

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1281**

*Affirmed*  
*Eligible in Part; Ineligible in Part*

**PROCEDURAL HISTORY:** On August 25, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work during the weeks of February 26, 2017 through July 1, 2017 (decision # 160651). Claimant filed a timely request for hearing. On October 11, 2017, ALJ Amesbury conducted a hearing, and on October 17, 2017 issued Hearing Decision 17-UI-94750, modifying the Department's decision by concluding claimant was available for work during the week of February 26, 2017 through March 4, 2017 and not available for work during the weeks of March 5, 2017 through July 1, 2017. On November 2, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) As of 2016, claimant had been previously employed in executive capacities by organizations that served the needs of the deaf and hard of hearing community in Oregon. Claimant was actively involved in that community and at times advocated on its behalf before governmental agencies and legislative bodies. Sometime around 2016, claimant was president of the Oregon Association of the Deaf. In approximately summer and fall 2016, claimant worked with a team at the Department of Public Safety, Standards and Training (DPSST) to develop means by which the deaf and hard of hearing could readily communicate to law enforcement that they needed special assistance in communicating with them.

(2) Sometime around mid-December 2016, claimant's employer let him go. On December 13, 2016, claimant filed an initial claim for unemployment benefits. Claimant claimed and was paid benefits for the weeks of February 26, 2017 through July 1, 2017 (weeks 09-17 through 26-17), the weeks at issue.

(3) During the weeks at issue, claimant sought work as a program director and an Uber or Lyft driver. Sometime before January 28, 2017, claimant became aware that DPSST was hiring individuals to role play in scenarios intended to raise the cultural awareness of law enforcement trainees and officers, including awareness of the needs of the deaf and the hard of hearing communities. Claimant knew that

the role playing position that DPSST had advertised paid \$9.75 per hour. Transcript at 32. On January 28, 2017, claimant contacted DPSST seeking to apply for a role playing position. Exhibit 4 at 2. Soon thereafter, DPSST sent an application to claimant, which claimant completed and submitted. The application that claimant was sent and completed was for a paid position with DPSST, not a volunteer position.

(4) On February 24, 2017, DPSST sent claimant an email offering him a role playing position. The email stated that if claimant decided to accept the position, he should complete the attached hiring forms and bring them with him when he met with the employer's human resources representative, as well as bringing proof of citizenship, other documents needed to complete the federally required Form I-9 employment eligibility verification, his social security card, and a voided check to set up direct deposit for his paychecks.

(5) On March 1, 2017, claimant arranged to meet with DPSST's human resources representative on March 2, 2017. On March 2, 2017, DPSST's human resources representative informed claimant that after the hiring paperwork was completed, its scheduler would give him email instructions that would enable DPSST him to schedule him for work. Exhibit 1 at 6.

(6) Later on March 2, 2017, claimant went to the DPSST workplace and completed the hiring process. Claimant brought with him a document that he had signed on March 1, 2017 which set out the terms and conditions of his employment and stated that his rate of pay would be \$9.75 per hour and he would work full time as a role player. Exhibit 1 at 23. Claimant completed and signed a federal Form W-4 in which he stated that, for income tax purposes, he was claiming one tax allowance, and he received an Oregon Bureau of Labor and Industries form that summarized certain legally required employment protections. Exhibit 1 at 25, 26. Claimant also brought with him and gave the employer a voided check from his checking account so that his paychecks would be directly deposited in that account. That day, claimant also met with DPSST's scheduler, who explained to him that as a prerequisite to obtaining work assignments, he needed to access DPSST's online calendar indicating the days each week he was available to work and he would be contacted if there was work for him on those days. The scheduler gave claimant instructions on how to access the online calendar. Because of the number of trainees attending classes at DPSST, a role player who was available would have several complete or half days of work each week. Claimant was credited with two hours of work time for completing the hiring process on March 2, 2017.

(7) On approximately March 6 and 8, 2017, DPSST's scheduler sent claimant emails explaining to him again how to access and enter his work availability in DPSST's online calendar. Exhibit 2 at 1.

(8) By March 20, 2017, claimant had not accessed DPSST's online calendar even once to indicate his availability for work and as a result he had not been assigned to any work. On March 20, 2017, the DPSST's scheduler sent claimant an email to which she had attached a timecard for claimant, told claimant that he was owed two hours of pay for the time he spent on March 2, 2017 completing the hiring process and asked him to sign the timecard and send it back to her so he could be paid. Exhibit 1 at 21. Claimant signed the timecard, scanned it and emailed it back to DPSST.

(9) By April 26, 2017, claimant still had not accessed DPSST's online calendar to indicate his availability for work and, thus, still had not been assigned any work. Since the Oregon legislative

session had convened, which was on February 1, 2017,<sup>1</sup> claimant had been focused on lobbying legislators and legislative committees on behalf of the deaf and hard of hearing community and had been visiting the capitol three to four times per week to do so. Exhibit 3 at 1. On April 26, 2017, DPSST's scheduler sent claimant an email asking when he thought he would start his role playing job for the DPSST and asking him to indicate his availability on calendars she had attached to the email. Exhibit 1 at 9. Claimant did not respond to the scheduler's email until June 13, 2017. On that date, claimant replied to the scheduler, "I am sorry for not getting in touch with you as I've been busy lobbying with our legislator[s] on multiple bills so I didn't really have time to be a part of DPSST." Exhibit 1 at 9. Claimant also stated the he would have time to devote to DPSST after the legislative session closed on July 10, 2017. *Id.* Claimant did not indicate any availability on the calendars attached to the April 26, 2017 email.

(10) Between April 26, 2017 and July 1, 2017, claimant still did not access DPSST's online calendar to indicate that he was available to work and, as a result, still was not assigned any work. Because of his volunteer lobbying and advocacy activities on behalf of the deaf and hard of hearing community during the weeks at issue, claimant did have the time to work for the employer.

**CONCLUSIONS AND REASONS:** Claimant was available for work during week 09-17 and is eligible to receive benefits for that week. Claimant was not available for work during weeks 10-17 through 26-17 and is not eligible to receive benefits for those weeks.

To be eligible to receive benefits, unemployed individuals must be able to work, available for work, and actively seek work during each week claimed. ORS 657.155(1)(c). An individual must meet certain minimum requirements to be considered "available for work" for purposes of ORS 657.155(1)(c). OAR 471-030-0036(3) (February 23, 2014). Among those requirements are that the individual be willing to work and capable of reporting to full time, part time and temporary work opportunities throughout the labor market, and refrain from imposing conditions that limit the individual's opportunities to return to work at the earliest possible time. *Id.* Where, as here, a claimant was paid benefits during the weeks at issue, the Department has the burden to show the claimant was not available and not eligible to receive the benefits he was paid. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

At the outset, during week 09-17, claimant submitted an application for work in a role playing position at DPSST and attended two hours of work, for which he was paid by DPSST, completed hiring paperwork and received instruction in DPSST's scheduling processes. By these actions, claimant laid the groundwork for performing future work for DPSST. No evidence was presented that any other activities undertaken by claimant substantially limited his efforts to obtain work during week 09-17. The Department therefore did not meet its burden to show that claimant was not available for work in week 09-17.

With respect to weeks 10-17 through 26-17, claimant contended he thought his prospective work for DPSST was volunteer work and that he therefore innocently gave priority to his lobbying efforts on behalf of the deaf and hard or hearing community to the exclusion of working for DPSST. However, claimant's contentions as to his understanding about the nature of his work for DPSST is substantially undercut by the hiring documents he signed which indicated the role playing position he had accepted

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<sup>1</sup> See <https://www.oregonlegislature.gov/calendarLegislative%20SessionDispForm.aspx?ID=5>.

was a paid position, by the tax forms he completed which were applicable only if he would receive taxable income for his work from DPSST, by the direct deposit arrangements he made for his pay from DPSST at the time he was hired, and by the fact that he signed a time card and received pay for the two hours he spent on March 2, 2017 when he completed the hiring process at the workplace. On these facts, it is not plausible that claimant thought his work for DPSST was unpaid, volunteer work.

Claimant also contended that he did not list that he was available for any work with DPSST during weeks 10-17 through 26-17 because the March 6 and March 8, 2017 emails instructing him to do so were addressed in such a way they appeared to be part of a general mailing to DPSST instructors, appeared to him to be intended only for DPSST instructors and not for role players like him, and he therefore did not read those emails. However, it is not likely that so early in his employment claimant would ignore emails received from a new employer without even a cursory review of their substance. Claimant's contention is also seriously undercut by the fact that the April 26, 2017 email he received from the employer's scheduler inquiring about his signing up for role playing on the employer's online was addressed in the same way as the earlier emails that he supposedly thought were intended only for instructors, but claimant read that later email and responded to it on June 13, 2017. Exhibit 1 at 9. Had claimant truly ignored the March 6 and 8, 2017 emails as not intended for him, he likely also would have ignored and not responded to the April 26, 2017 email. As well, that claimant did not indicate any availability in response to the April 26, 2017 email, but stated that he was unavailable until the legislative session closed on July 10, 2017, strongly suggests that, rather than a lack of knowledge about the employer's scheduling process, claimant's preoccupation with the legislative session was the cause of his failure to list any availability on the employer's online calendar. Furthermore, if claimant were truly available to work for DPSST while the legislative session was ongoing, it is unlikely that he would not have contacted the employer sometime during the four months between week 10-17 and week 26-17 inquiring about why he was never scheduled for work.

Finally, in unguarded parts of his testimony at hearing, when claimant addressed his lobbying efforts independent of his availability, he emphasized that during the legislative session he needed to be free of other commitments or entanglements, presumably like work, and needed to have an open schedule that made it possible for him to attend "last minute legislative meeting \*\*\* so that I could go and speak on behalf of my community." Transcript at 46. Given claimant's failure to list any availability for work during the legislative session from week 10-17 through 26-17 or ask the employer why he was not scheduled for work, the degree and depth of his commitment to his legislative lobbying efforts on behalf of the deaf and hard of hearing community, and his perceived need to be available at all times and without prior notice for those lobbying activities, it appears most likely that by limiting his work with DPSST in a way that would not interfere with those lobbying activities, claimant imposed a condition that substantially limited his opportunities to work for DPSST, and thus limited his opportunities to return to work at the earliest possible time during weeks 10-17 through 26-17. Accordingly, claimant was not available for work during those weeks and is not eligible to receive benefits for them.

Claimant was available for work during week 09-17 and is eligible to receive benefits during that week. Claimant was not available for work during week 10-17 through 26-17 and is not eligible to receive benefits during those weeks.

**DECISION:** Hearing Decision 17-UI-94750 is affirmed.

J. S. Cromwell and D. P. Hettle.

**DATE of Service: December 8, 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](http://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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