

**OREGON EMPLOYMENT DEPARTMENT
875 UNION ST NE
SALEM, OR 97311**

**EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0887**

Reversed & Remanded

PROCEDURAL HISTORY: On July 27, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 74317). Claimant filed a timely request for hearing. On August 20, 2018, ALJ Scott conducted a hearing, and on August 22, 2018 issued Order 18-UI-115344, reversing the Department's decision. On September 11, 2018, the Department filed an application for review with the Employment Appeals Board (EAB).

EAB considered the parties' written arguments when reaching this decision, to the extent they were based upon the hearing record.

The Department's argument included new information that it did not present at the hearing. The Department implicitly argued that the new information should be considered because, although the Department did not participate during the hearing, "it is not the normal business practice of the agency to participate in separation hearings" and "[t]his was not one of the issues identified on the notice."

OAR 471-041-0090 provides that in order for EAB to consider a party's new information, the party must show that factors or circumstances beyond its reasonable control prevented it from offering the information during the hearing. Although it might not be the Department's normal practice to participate at some types of hearings, the Office of Administrative Hearings (OAH) provided the Department with electronic notification of the scheduled hearing, and the Department has chosen to make it a policy not to attend these sorts of hearings. The Department did not show that it was "prevented" from attending the hearing if it so chose, much less that it was prevented by factors or circumstances that were outside the Department's reasonable control.

The Department is correct that the existence of an employment relationship was not specifically listed on the notice of hearing. However, decision # 74317, issued by the Department, found, among other things, that claimant was “employed by” JC Penney Co., Inc., and was or should have been aware that claimant might dispute that finding when he requested a hearing. Indeed, the foundation of every work separation case is a Department finding that an employment relationship existed at one time, and the existence of an employment relationship is therefore potentially at issue in every work separation case.

The ALJ’s failure to continue the hearing to recruit the testimony of a Department witness was not reversible error. The ALJ may continue a hearing on his or her own initiative, but it appears to be a matter of ALJ discretion. OAR 471-040-0026(1). Although the ALJ has a legal obligation to conduct “a full and fair inquiry” and give “all parties a reasonable opportunity for a fair hearing” (ORS 657.270(3)), and is required to “determine the order of the presentation of evidence” and “examine any witnesses” (OAR 471-040-0025(3)), barring legally defective notice, nothing in the laws and rules requires the ALJ to call parties who have failed to appear or chosen not to appear at a hearing or offer such parties the opportunity to appear at a continued hearing.¹

Thus, the Department was provided with notice of the hearing, and was not prevented from attending. The Department therefore did not establish that factors or circumstances beyond its reasonable control prevented it from appearing and participating in the hearing. EAB therefore did not consider the Department’s new information when reaching this decision. Because of the outcome of this decision, the Department may, however, choose to appear at the remand hearing to offer evidence within the scope of the remand.

CONCLUSIONS AND REASONS: Order No. 18-UI-115344 is reversed and this matter is remanded for further proceedings.

In decision # 74317, the Department found that claimant was “employed” by JC Penney Co., Inc. until he quit work on April 27, 2018. At the hearing, claimant disputed that an employment relationship between claimant and JC Penney existed. The ALJ found as fact that claimant worked for Sears until April 18, 2018, and although he applied for a job with JC Penney and spoke with human resources, he rejected the job offer and “did not perform any services.” Order No. 18-UI-115344 at 1. The ALJ concluded that no employment relationship existed because “although he [claimant] pursued a possible job opportunity with employer, the employment relationship was never formed.” Order No. 18-UI-115344 at 2. The record does not support the ALJ’s conclusion, and this matter must therefore be reversed and remanded.

Claimant testified near the beginning of the hearing that he did not work for JC Penney, he worked for Sears. Audio recording at ~ 8:30. The ALJ commented that she did not know whether Sears bought out JC Penney, or if they were the same company now, then proceeded to develop the hearing record about claimant’s work separation from Sears. Audio recording at ~ 8:05-17:00. Thus, the majority of the hearing record in this case – all but two minutes forty-five seconds of testimony – does not pertain to claimant’s relationship with JC Penney, which is the only issue over which the ALJ and EAB have jurisdiction.

¹ ORS 657.270 and OAR 471-040-0040 allow parties who fail to appear at a hearing to request reopening, which may be allowed only if the party establishes “good cause” for the failure to appear. “Good cause” is when the failure to appear “arises from an excusable mistake or from factors beyond an applicant’s reasonable control.” OAR 471-040-0040(2).

Claimant ultimately did acknowledge that he had applied for work with JC Penney but rejected an offer of employment with that company without working or being paid. Audio recording at ~17:00-18:15. The record the ALJ then developed about claimant's interactions with JC Penney is not adequate. Although the ALJ asked claimant if he ever "perform[ed] services" for JC Penney, the ALJ accepted claimant's vague assurances that he did not work for JC Penney and did not ask claimant specific questions about his interactions, like if he attended any training sessions, observations, or orientations, or if he spent time reviewing JC Penney policies, or engaged in other activities that might be paid activities.

Claimant testified he spoke with JC Penney's human resources department, the store manager, and another manager. The ALJ did not ask claimant for specifics about who he spoke to, when they spoke, and what they discussed. When the ALJ asked claimant, "you were never scheduled to work for them?" claimant responded, "no, I never worked for them." Audio recording at ~ 19:10. The ALJ did not ask claimant to respond to her question, which was whether claimant was ever *scheduled* to work for JC Penney, not whether he actually worked a shift there.

Claimant also testified that he provided JC Penney with an I-9 form and other employment authorization paperwork. Audio recording at ~18:40-19:10. The I-9 "Employment Eligibility Verification" form is, by law, required to be completed "no later than the first day of employment, but not before accepting a job." See <https://www.uscis.gov/sites/default/files/files/form/i-9.pdf>. Therefore in order for claimant to have submitted such a document to JC Penney, he must have already accepted the job even if he might not have begun working. That means that some manner of relationship had to exist between claimant and JC Penney, and the ALJ was legally obligated to develop the record as to whether that relationship was "employment" within the meaning of ORS chapter 657. On remand, the ALJ must inquire with claimant about when he submitted the I-9 form and other employment authorization paperwork, and what the status of his relationship with JC Penney was at the time he did so. If, ultimately, it is determined on remand that there was an employment relationship between JC Penney and claimant, then the circumstances of the separation and whether the separation was disqualifying are, again, at issue and a record as to the separation must be developed.

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). Because the ALJ failed to develop the record necessary for a determination of whether an employment relationship existed, and, if so, whether the separation was disqualifying, Order No. 18-UI-115344 is reversed, and this matter is remanded for development of the record.

DECISION: Order No. 18-UI-115344 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: October 18, 2018

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-115344 or return this matter to EAB. Only a timely application for review of the subsequent Order will cause this matter to return to EAB.

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