

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0891

Reversed & Remanded

PROCEDURAL HISTORY: On July 25, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 74635). The employer filed a timely request for hearing. On August 6, 2018, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for August 20, 2018. On August 20, 2018, ALJ Murdock convened a hearing, at which time claimant appeared at the hearing and the employer failed to appear. The ALJ ruled on the record that the employer's request for hearing was dismissed. Audio recording, August 20, 2018 hearing at ~9:25. On August 21, 2018, OAH mailed notice of a new hearing scheduled for September 5, 2018.¹ On September 5, 2018, ALJ M. Davis conducted a hearing, and on September 6, 2018 issued Order No. 18-UI-116173, affirming the Department's decision. On September 12, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that they provided a copy of their argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

CONCLUSIONS AND REASONS: Order No. 18-UI-116173 is reversed, and this matter remanded.

In the evidentiary ruling section of Order No. 18-UI-116173, the ALJ wrote "No exhibits were offered or admitted into evidence." *See* Order No. 18-UI-116173 at 1. However, the record shows that the employer attempted to play an audio recording into the record and, when the audio was unclear, offered to send the audio to the ALJ in a different, more audible format, and the ALJ denied the request. September 5, 2018 hearing, Audio recording at ~ 33:30-41:15. ORS 657.270 requires the ALJ to give all parties a fair hearing, and inquire fully into the facts necessary for consideration of the issues properly before the ALJ. OAR 471-040-0026(1) provides that the ALJ may order, on her own initiative, that a hearing be continued. Where, as here, a continuance appears to have been necessary for the admission of

¹ The record does not contain any explanation establishing why the hearing request ALJ Murdock dismissed was rescheduled for a hearing. We presume that it has something to do with the "Bridge Report" document in the record that shows that two participants called into the hearing bridge for the August 20th hearing, one of which presumably was the employer, but there is no contextual information establishing what happened or why the matter was rescheduled.

potentially dispositive evidence and development of a full record, the ALJ's failure to continue the hearing to allow the evidence to be submitted was error.² The employer's audio recording is hereby entered into evidence as EAB Exhibit 1. Due process of law requires that the employer be given the opportunity to testify further about the exhibit and establish its veracity and probative value, and that claimant be given the opportunity to respond.

In addition to development of the record regarding the employer's audio recording, the ALJ should also inquire further with the parties about the employer's food policy, what claimant understood about the old policy, the date the policy changed, under what circumstances the employer required employees to put receipts for food purchase in their cubby, when if ever claimant first knew about the new policy, whether and what kinds of food claimant paid for during his employment, whether his behavior changed at any point, what claimant understood the employer's food policy to be at the time of the final incident, what dates claimant first opened the crackers and cottage cheese, how much the crackers claimant consumed in the final incident cost, how much the cottage cheese claimant consumed in the final incident cost, and any other questions the ALJ deems necessary to complete the record, including questioning claimant about the discrepancies between what he testified to at the hearing and what he was recorded telling the employer in EAB Exhibit 1.

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 claimant's discharge was for misconduct, Order No. 18-UI-116173 is reversed, and this matter is remanded for development of the record.

DECISION: Order No. 18-UI-116173 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: October 17, 2018

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-116173 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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² The ALJ rejected the employer's offered exhibit because the employer had time to submit a physical recording to OAH prior to the hearing. However, the employer had the recording and was prepared to play it at the hearing, and would likely have had little reason to know or suspect that the audio recording would not be audible during the hearing such that sending physical copies of the recording were necessary. The employer's failure to submit the physical recording to OAH prior to the hearing under the circumstances is not sufficient justification to exclude potentially probative evidence from the hearing.