

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0960

Reversed & Remanded

PROCEDURAL HISTORY: On August 22, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the claimant voluntarily left work without good cause (decision # 91400). Claimant filed a timely request for hearing. On September 19, 2018, ALJ Frank conducted a hearing, at which the employer failed to appear, and on September 27, 2018 issued Order No. 18-UI-117319, affirming the Department's decision. On October 2, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that contained information regarding her voluntary leaving that was not offered during the hearing and in that argument asserted that she did not offer the information at that time, in part, due to the apparent frustration the ALJ expressed toward her at the hearing. Written argument at 1. Generally, EAB does not consider new information on review unless the party offering it shows that factors or circumstances beyond its reasonable control prevented it from offering that information at the hearing. *See* OAR 471-041-0090 (October 29, 2006). However, our review of the record demonstrates that claimant met that threshold based on the ALJ's manner of questioning at hearing, and given that EAB has remanded this matter for further development of the record, claimant may offer this information during the hearing on remand. At that time, the assigned ALJ should consider whether that information is relevant and material to the issues on remand and not duplicative of other evidence, and should decide whether or not that evidence, whether by testimony or in writing, should be admitted into the record, assuming the parties have complied with evidentiary notice rules set forth in the notice of hearing.

CONCLUSIONS AND REASONS: Order No. 18-UI-117319 is reversed and this matter is remanded for the assignment of a new ALJ and further development of the record.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she (or he) proves, by a preponderance of the evidence, that she had good cause for leaving work when she did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause" is defined, in relevant part, as a reason of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable alternative but to leave work. OAR 471-030-0038(4) (January 11, 2018). The standard is objective. *McDowell v. Employment*

Department, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for the employer for an additional period of time.

Claimant was the city administrator and recorder for the employer, the City of Joseph, Oregon. The position was originally a job share, but in early 2018, one of the job sharers resigned and the city council asked claimant if she wanted the job full time. Claimant responded that she did but the parties were unable to agree on a salary. After that became apparent, claimant began to suspect that the city council, or rather specific members thereof, were attempting to find fault with her performance to justify her termination or layoff. On June 29, 2018, at a city council meeting attended by the public, one or more city council members attempted to publicly embarrass her by creating the appearance of poor performance after apparently going behind her back to rescind certain instructions she had previously given to a subordinate and arranging for items to be discussed at the meeting that were not on the agenda, leaving her unprepared. In conjunction with similar incidents of alleged impropriety, claimant resigned on June 29, 2018.

At the hearing on this matter, only claimant testified. Following the hearing, in Order No. 18-UI-117319, the ALJ concluded that claimant voluntarily left work without good cause, reasoning, after pointing out that claimant had the burden of proof, that she failed to offer sufficient evidence to establish that her circumstances constituted a “situation of gravity” such that a reasonable and prudent person in her circumstances would have concluded she had no reasonable alternative but to quit. Order No. 18-UI-117319 at 2. We disagree and conclude that the record was insufficiently developed to reasonably make that determination.

The record shows that the ALJ did not allow claimant a full and fair opportunity to present her case, and, to all appearances, became increasingly frustrated with claimant as the hearing progressed. For example, the ALJ repeatedly cut claimant off as she attempted to explain the circumstances that led her to resign and rarely let her finish a sentence before interrupting her. At the end of the hearing, the ALJ inquired if there was anything else she wanted to add to her testimony. Claimant responded that she did and began to speak, but the ALJ again interrupted claimant and did not allow her to finish her explanation. Audio Record ~ 18:30 to 20:15. At that point, after the ALJ again asked if there was any other testimony she wanted to offer, she responded, with obvious emotion and as an apparent result of the ALJ’s repeated interruptions of her attempts to offer testimony, “No, I’m not going to say anymore right now,” after which the ALJ remarked that he appreciated her patience with him and admitted he had been confused before closing the record. Audio Record ~ 20:15 to 20:45. We conclude the record was insufficiently developed, largely because of the ALJ’s repeated interruptions of claimant’s testimony and because the ALJ interacted with claimant in a manner that discouraged her from offering further testimony despite the record clearly suggesting that she had more to say.

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 voluntarily left work without good cause, Order No. 18-UI-117319 is reversed, and this matter remanded for further development of the record. Given the circumstances of the first hearing and the way in which claimant

and the ALJ interacted during it, it is recommended that a new ALJ be assigned to conduct the remand hearing as though it was a matter of first impression, and claimant should be prepared to discuss each of her reasons in a chronological and cogent fashion.

DECISION: Order No. 18-UI-117319 is set aside, and this matter remanded for further proceedings consistent with this order.¹

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

DATE of Service: November 8, 2018

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¹ **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-117319 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.