

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1155

Reversed & Remanded

PROCEDURAL HISTORY: On October 3, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 140834). The employer filed a timely request for hearing. On November 16, 2018, ALJ Shoemake conducted a hearing, and on November 26, 2018, issued Order No. 18-UI-120224, affirming the Department's decision. On December 17, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted two written arguments to EAB. EAB did not consider the employer's first written argument, submitted with its application for review on December 17, 2018, because the employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). EAB considered the employer's written argument submitted on January 10, 2019 when reaching this decision.

FINDING OF FACT: Daniel Robert Lang employed claimant from January 2 to August 14, 2018, last as a paralegal.

CONCLUSIONS AND REASONS: Order No. 18-UI-120224 is reversed, and this matter remanded to the Office of Administrative Hearings for another hearing and Order on whether claimant should be disqualified from receiving benefits based on her work separation from the employer.

The employer offered documents at hearing that the ALJ marked as Exhibit 1 but did not admit because, although the employer sent claimant the documents before the hearing, claimant did not receive them and the ALJ reasoned that the employer could provide the same evidence in sworn testimony.¹ In Order No. 18-UI-120224, the ALJ found that the employer discharged claimant, in part, because she allegedly falsified the employer's master calendar. One of the documents offered by the employer was the portion of the master calendar that claimant allegedly falsified. ORS 657.270 requires the ALJ to give all parties

¹ See Order No. 18-UI-120224 at 1, Audio Record at 5:56 to 8:54.

a fair hearing, and inquire fully into the facts necessary for consideration of the issues properly before the ALJ.

We disagree that sworn testimony was sufficient for the parties to provide the information necessary regarding the allegation that claimant falsified the calendar. 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 a legible copy of the calendar and the employer's other documents, the ALJ's failure to continue the hearing to allow the evidence to be submitted was error. For this reason, the employer's documents that the ALJ marked as Exhibit 1 at hearing are hereby entered into evidence as EAB Exhibit 1. EAB shall serve copies of EAB Exhibit 1 to the parties with this decision. However, because the calendar copies for July and August 2018 that are part of EAB Exhibit 1 are only minimally legible, the employer should submit new copies to the Office of Administrative Hearings (OAH) for the hearing on remand and confirm with OAH before the hearing that the copies are legible, and should send legible copies to the other parties before the hearing.² At the hearing on remand, the employer should be given the opportunity to testify further about EAB Exhibit 1, and claimant the opportunity to respond.

In addition to any evidence the parties may provide regarding the source of the handwriting on the calendar, the ALJ should ask the parties questions regarding the calendar, such as who customarily wrote entries on the calendar, where it was kept, how often the parties referred to it in general and during August 2018, and how it was used and what types of notations were included on the calendar. The ALJ should also ask if the parties used other records for attendance purposes. As for the employer's "time off request form,"³ the ALJ should ask how and when claimant had used that form in the past, and discuss occasions when the parties apparently had not used that form, including for July 23, August 13 and any other dates when the employer approved claimant's time off work without using the time off request form.

In Order No. 18-UI-120224, the ALJ also found that the employer discharged claimant, in part, because she refused to work on August 13, 2018, and concluded that claimant "testified that she was given that day off and that she wrote the time off on the calendar at the [employer's] request."⁴ Based on those findings of fact,⁵ the ALJ concluded that claimant's failure to report to work on August 13 was, at most, an isolated instance of poor judgment.⁶ First, as the employer asserted in its written argument, the ALJ's finding of fact that claimant wrote on the employer's calendar is inconsistent with the record. As the employer asserted in its written argument, claimant denied at hearing having written on the employer's calendar.

The record shows that on August 11, the parties had a disagreement about August 13, and claimant did not report to work on August 13. However, the information in the record is insufficient for EAB to

² See EAB Exhibit 1 at 2-3.

³ EAB Exhibit 1 at 4-6.

⁴ Order No. 18-UI-120224 at 3.

⁵ See Order No. 18-UI-120224 at 1.

⁶ Order No. 18-UI-120224 at 3.

determine if actually refused to report for work on August 13, and whether her failure to report to work on August 13 was a willful or wantonly negligent violation of a known employer expectation. The ALJ should ask the parties to recount all conversations they had regarding August 13, including the conversation when claimant allegedly asked for that day off from work and August 11, when the employer and claimant discussed when claimant would prepare materials for a client's hearing on August 14. Questions should elicit information to show why the employer believed claimant was scheduled to work that day, and why claimant believed the employer did not expect her to work that day. The ALJ should inquire as to how the employer's act of suspending claimant on August 11 affected the parties' understanding of when claimant would return to work. The questions should include who was present during the conversations, what was stated, and when the conversations occurred.

The ALJ should also inquire regarding the employer's assertion that occasions when claimant failed to meet with him in the morning and evening to review assignments were prior instances of misconduct. The ALJ should inquire further with the parties about the employer's expectation in that regard, what claimant knew or should have known about that expectation, evidence of any verbal or written warnings claimant received if she failed to meet with the employer, and any other questions the ALJ deems necessary to complete the record.

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-120224 is reversed, and this matter is remanded for development of the record.

DECISION: Order No. 18-UI-120224 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: January 16, 2019

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-120224 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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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyong ito.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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