

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0921

Reversed & Remanded

PROCEDURAL HISTORY: On July 18, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause, and was disqualified from receiving unemployment insurance benefits effective June 23, 2019 (decision # 62253). Claimant filed a timely request for hearing. On September 3, 2019, ALJ Frank conducted a hearing, and on September 6, 2019 issued Order No. 19-UI-136218, affirming decision # 62253. On September 25, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's and the employer's timely filed written arguments to the extent they were relevant and material to this case, based upon the hearing record, and served upon the employer.

CONCLUSIONS AND REASONS: This matter is remanded for a new hearing.

Claimant notified the Department, Office of Administrative Hearings (OAH), and ALJ that he needed an interpreter for the hearing because he had a hearing impairment. *See* July 24th fax cover sheet; request for hearing; Audio recording at 11:20-13:00.

OAR 471-040-0008 provides as follows:

(2) If an individual with a disability is a party or witness in a contested case proceeding:

(a) The administrative law judge shall appoint a qualified interpreter and make available appropriate assistive communication devices whenever it is necessary to interpret the proceedings to, or to interpret the testimony of, the individual with a disability.

* * *

(6) A person requesting an interpreter for a person with a disability, or assistive communication device for an individual with a disability, must notify the administrative law judge as soon as possible, but no later than 14 calendar days before the proceeding, including the hearing or pre-hearing conference, for which the interpreter or device is requested.

(a) For good cause, the administrative law judge may waive the 14-day advance notice.

(b) The notice to the administrative law judge must include:

(A) The name of the person needing a qualified interpreter or assistive communication device;

(B) The person's status as a party or a witness in the proceeding; and

(C) If the request is in behalf of an individual with a disability, the nature and extent of the individual's physical hearing or speaking impairment, and the type of aural interpreter, or assistive communication device needed or preferred.

Despite claimant's requests for an interpreter and advance notice to the Department and OAH that he needed an interpreter for the hearing, there is no evidence in this record that the Department or OAH provided claimant with a certified or qualified interpreter, engaged with claimant to discover whether he had a disability as defined at OAR 471-040-0008, or discussed with claimant what kind of reasonable accommodation he might need in order to effectively participate in the hearing (for example, an in-person hearing, TTY service, etc.).

At the hearing, claimant was prepared with an individual in the room with him ready to represent him and assist him to overcome his hearing difficulties during the hearing. The ALJ did not allow the individual to represent claimant, and prohibited the individual from interpreting the hearing for claimant. The ALJ instead instructed claimant to tell the ALJ if he was unable to hear something during the hearing, and claimant agreed. However, it is axiomatic that an individual who cannot hear a statement being made cannot know to ask that the statement be repeated. Nor, assuming the individual was aware the statement was made, is asking for repetition a sufficient replacement for qualified interpretation, TTY service, or other accommodation. That is particularly true where, as here, there is evidence that neither party fully heard the hearing. *See* Audio recording at 17:30, 21:45, 28:15, 29:50, 31:30, 36:00.

Although the ALJ was likely correct when he denied claimant's request to have his representative/witness interpret the hearing for him, the failure to provide claimant with a different certified or qualified interpreter or to otherwise ensure claimant's ability to meaningfully participate in the hearing amounted to a probable violation of OAR 471-040-0008 and denial of due process. Likewise, there is no authority dictating that claimant not be allowed to have the representative of his choice, and no basis on this record for denying claimant's witness the opportunity to testify.

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 claimant was not afforded due process in the original proceedings, claimant is entitled to a new hearing with accommodation for his hearing impairment.

On remand, claimant should be allowed the opportunity to have a representative of his choosing, be provided with accommodation that would allow him to meaningfully participate in the hearing regardless of his hearing impairment, and given the opportunity to either have his witness testify or, in the alternative, be allowed to make an offer of proof by explaining what his witness would say if allowed to testify and explaining why she should be allowed to testify. Order No. 19-UI-136218 is therefore reversed, and this matter is remanded.

We note that the employer's primary witness also stated during the hearing that she had a hearing impairment. If any of the employer's witnesses require accommodation to fully and meaningfully participate in the remand hearing, the employer should contact OAH to request accommodation as well.

DECISION: Order No. 19-UI-136218 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 31, 2019

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-136218 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 desisyon.

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 Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación 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 ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

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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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