

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0956

Order No. 19-UI-137058 ~ Reversed & Remanded
Order No. 19-UI-137059 ~ Reversed & Remanded

PROCEDURAL HISTORY: On August 2, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 154134). On August 5, 2019, the Department served notice of another administrative decision assessing a \$3,773 overpayment, \$565.95 monetary penalty, and 25 penalty weeks (decision # 195870). On August 13, 2019, claimant filed a timely request for hearing on decisions # 154134 and # 195870. On August 29 and September 17, 2019, ALJ Frank conducted consolidated hearings on decisions # 154134 and # 195870, and on September 25, 2019, issued Order No. 19-UI-137058, affirming decision # 154134, and Order No. 19-UI-137059, assessing a \$3,773 overpayment that claimant was required to repay, but concluding that claimant was not liable for misrepresentation penalties. On October 3, 2019, claimant filed an application for review of both orders with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (May 13, 2019), EAB consolidated its review of Orders No. 19-UI-137058 and 19-UI-137059. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2019-EAB-0956 and 2019-EAB-0957).

EAB did not consider claimant's written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

CONCLUSIONS AND REASONS: Orders No. 19-UI-137058 and 19-UI-137059 are remanded for a new hearing.

Claimant referred to having "lost his hearing" and "his hearing loss" in the documents he provided the Office of Administrative Hearings (OAH). *See* Exhibit 1, Claimant's August 28, 2019 Letter to ALJ Frank. At the hearing on August 29, 2019, claimant told the ALJ that he was "hard of hearing" and asked him to speak in a "slow and clear" manner or claimant would not understand him. Audio Record at 1:19 to 1:47. The ALJ told claimant to tell him if claimant needed him to repeat something, but claimant stated that it "made [him] nervous" because he did not want to "make [the ALJ] mad" by

asking him to “repeat and repeat.” Audio Record at 1:47 to 2:03. The audio record shows the proceedings were not “slow and clear.” The August 28 hearing was continued to September 17, 2019.

During the September 17, 2019 hearing, claimant told the ALJ again that he had a hearing impairment. The ALJ had claimant turn off his speakerphone because it caused an echo during the hearing. Claimant explained that he was using a speakerphone because he had a representative with him to assist him if he did not hear during the hearing. The ALJ told claimant that whoever was assisting him with understanding the hearing had to remain silent during the hearing. Claimant stated that he had to allow his ears to “adjust” to the change in the sound when the speakerphone was turned off. Audio Record at 5:00 to 16:03. The record shows that claimant may not have been able to hear the ALJ and the testimony, or to discern who was speaking.

OAR 471-040-0008 (March 5, 2006) provides as follows, in relevant part:

(1) For purposes of [OAR 471-040-0008]:

(a) An “assistive communication device” means any equipment designed to facilitate communication by an individual with a disability;

(b) An “individual with a disability” means a person who cannot readily understand the proceedings because of deafness or a physical hearing impairment * * *;

(c) A “qualified interpreter” for an individual with a disability means a person readily able to communicate with the individual with a disability, interpret the proceedings and accurately repeat and interpret the statements of the individual with a disability.

(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.

It was apparent at both hearings that claimant was an "individual with a disability" and that he could not readily understand the proceedings because of deafness or a physical hearing impairment. Despite claimant's repeated references to his hearing impairment and his assertion that he had a representative present with him to interpret the proceedings to him when he was unable to understand due to his hearing impairment, there is no evidence in this record that 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 assisting 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, or whether they understood the statement. Nor is asking for repetition a sufficient replacement for qualified interpretation, TTY service, or other accommodation.

Although the record does not show if claimant's representative was qualified to interpret or assist claimant with the hearing, the failure to provide claimant with accommodations to ensure claimant's ability to meaningfully participate in the hearing amounted to a probable violation of OAR 471-040-0008 and a denial of due process. Likewise, there is no authority dictating that claimant not be allowed to have the representative of his choice.

On remand, claimant should be allowed the opportunity to have a representative of his choosing, and be provided with accommodation(s) that would allow him to meaningfully participate in the hearing regardless of his hearing impairment. On remand, it is necessary to determine the nature of the work separation, and if it was a quit, whether claimant had good cause to quit due to mistreatment from his supervisor. It is necessary to determine if the mistreatment was due to claimant's impairment.

Based on the hearing record, Order No. 19-UI-137059 correctly concluded that claimant was not liable for misrepresentation penalties. However, Order No. 19-UI-137059 must be remanded to ensure that it is consistent with the outcome for Order No. 19-UI-137058, regarding the underlying decision that caused the overpayment. Also on remand, it is necessary to discern if the Department accommodated claimant's hearing impairment during its investigation about the work separation, and if not, if claimant's hearing impairment was a factor in causing the overpayment. Orders No. 19-UI-137058 and 19-UI-137059 are therefore reversed, and this matter is remanded.

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 further development of the record is necessary for a determination of whether claimant quit work with

good cause and whether claimant is liable for an overpayment, Orders No. 19-UI-137058 and 19-UI-137059 are reversed, and this matter is remanded.

DECISION: Orders No. 19-UI-137058 and 19-UI-137059 are set aside and remanded for further proceedings consistent with this order.

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

DATE of Service: November 8, 2019

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Orders No. 19-UI-137058 or 19-UI-137059 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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

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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