

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0045

Reversed & Remanded

PROCEDURAL HISTORY: On June 18, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant refused an offer of suitable work without good cause and was disqualified from receiving unemployment insurance benefits effective May 3, 2020 (decision # 132136). On June 19, 2020, the Department served notice of an administrative decision, based in part on decision # 132136, concluding that claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits, and assessing a \$3,808 overpayment of regular benefits, a \$3,000 overpayment of Federal Pandemic Unemployment Compensation (FPUC) benefits, a \$1,142.40 monetary penalty, and 28 penalty weeks. On July 8, 2020, decision # 132136 became final without claimant having filed a request for hearing. On July 9, 2020, the June 19, 2020 overpayment decision became final without claimant having filed a request for hearing.

On August 14, 2020, claimant filed late requests for hearing on both decision # 132136 and the June 19, 2020 overpayment decision. On August 31, 2020, the Office of Administrative Hearings (OAH) served notice of a consolidated hearing scheduled for September 9, 2020 at 1:30 p.m. to consider claimant's late requests for hearing and, if granted, the merits of decision # 132136 and the June 19, 2020 overpayment decision. On September 9, 2020, claimant failed to appear at the hearing, and ALJ Lohuis issued Order No. 20-UI-153756 dismissing claimant's request for hearing on decision # 132136, and Order No. 20-UI-153758 dismissing claimant's request for hearing on the June 19, 2020 overpayment decision, leaving both decisions undisturbed.

On September 14, 2020, claimant filed a timely request to reopen the hearing. On September 21, 2020, OAH served notice of a consolidated hearing scheduled for October 5, 2020 at 9:30 a.m. to consider claimant's request to reopen and late requests for hearing, and, if granted, the merits of decision # 132136 and the June 19, 2020 overpayment decision. On October 5, 2020, ALJ Scott conducted a consolidated hearing on both matters, interpreted in Burmese, and issued Order No. 20-UI-154828

dismissing claimant's late request for hearing on decision # 132136, and Order No. 20-UI-154831 dismissing claimant's late request for hearing on the June 19, 2020 overpayment decision, leaving both decisions undisturbed. On October 9, 2020, claimant filed an application for review of Orders No. 20-UI-154828 and 20-UI-154831 with the Employment Appeals Board (EAB). On November 16, 2020, EAB issued Appeals Board Decisions 2020-EAB-0659 and 2020-EAB-0660, reversing Orders No. 20-UI-154828 and 20-UI-154831, granting claimant's request to reopen and late requests for hearing, and remanding both matters to OAH for a hearing on the merits of decision # 132136 and the June 19, 2020 overpayment decision.

On December 29, 2020, ALJ Scott conducted a consolidated hearing on both decisions, interpreted in Burmese, and on January 5, 2021, issued Order No. 21-UI-158503, affirming decision # 132136 and Order No. 21-UI-158508, modifying the June 19, 2020 overpayment decision by concluding that claimant had been overpaid \$3,808 in regular benefits and \$3,000 in FPUC benefits, but that she had not made a willful misrepresentation or failed to report a material fact and was not subject to a monetary penalty or penalty weeks. On January 20, 2021, claimant filed an application for review of Orders No. 21-UI-158503 and 21-UI-158508.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 21-UI-158503 and 21-UI-158508. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2021-EAB-0045 and 2021-EAB-0046).

WRITTEN ARGUMENT: EAB considered claimant's written argument when reaching these decisions.

FINDINGS OF FACT: (1) Claimant's native language is Rohingya. Claimant is able to communicate to some extent in Burmese and in English, but not as well as in Rohingya.

(2) In earlier interactions with the Department, claimant requested and was granted interpretation services in Rohingya. Prior to the hearing, claimant was contacted by a representative of the Department and asked if a Burmese interpreter would be sufficient for the hearing. Claimant "thought it would be best to go along with their suggestion," and agreed. Claimant's Written Argument at 2.

(3) Claimant was not able to understand everything that was said to her at the hearing, and was concerned that the Burmese interpreter was not interpreting her responses accurately.

(4) At the hearing, the Burmese interpreter made several errors while interpreting from English to Burmese.

CONCLUSIONS AND REASONS: Orders No. 21-UI-158503 and 21-UI-158508 are set aside and these matters remanded for a new hearing in claimant's native language of Rohingya.

Oregon law requires that, "to secure the constitutional rights and other rights of persons who are unable to readily understand or communicate in the English language because of a non-English-speaking cultural background . . . , and who as a result cannot be fully protected in administrative proceedings . . . unless qualified interpreters are available to provide assistance," such persons "shall" be provided with an interpreter. See ORS 45.273, ORS 45.275(1)(a); OAR 471-040-0007 (March 5, 2006).

“A ‘qualified interpreter’ means a person who is not certified under ORS 45.291, but is readily able to communicate with the limited English proficient person and who can orally transfer the meaning of statements to and from English and the language spoken by the limited English proficient person. A qualified interpreter must be able to interpret in a manner that conserves the meaning, tone, level, style and register of the original statement, without additions or omissions. A qualified interpreter does not include any person who is unable to interpret the dialect, slang or specialized vocabulary used by the party or witness.” OAR 471-040-0007(2)(c).

In her written argument and supporting declarations, claimant identified several mistranslations of potentially-material facts in the hearing testimony. Claimant’s Written Argument at 5. Further, claimant argued that, because Burmese is not claimant’s native language, “the agency’s failure to provide an effective interpreter impacted claimant’s ability to meaningfully participate in [the] hearing . . . in violation of claimant’s right of due process of law.” Claimant’s Written Argument at 6. The record supports claimant’s argument here. That claimant was unable to readily understand the language in which she was asked to testify at hearing, and into which English testimony was translated for her, undermines the reliability of the resulting testimony and rendered claimant unable to communicate fully during the hearing. Additionally, the record shows that claimant was not provided with a “qualified interpreter” within the meaning of OAR 471-040-0070(2)(c) because the Burmese interpreter was not able to interpret claimant’s testimony, or the questions posed by the ALJ, in a manner that conserved their meaning, tone, level, style and register. For these reasons, a new hearing in claimant’s native language of Rohingya is required on all issues.

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 refused an offer of suitable work without good cause or made misrepresentations of material fact in order to obtain benefits, Orders No. 21-UI-158503 and 21-UI-158508 are reversed, and these matters are remanded.

DECISION: Orders No. 21-UI-158503 and 21-UI-158508 are set aside, and these matters remanded for further proceedings consistent with these orders.

S. Alba and D. P. Hettle.

DATE of Service: February 25, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Orders No. 21-UI-158503 or 21-UI-158508 or return these matters to EAB. Only a timely application for review of the subsequent order will cause these matters 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

ទោរទៅ – ចំពោះសំណើនេះ មិនមានការបញ្ជាក់ឱ្យបានច្បាស់លាស់អំពីការងាររបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

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 الاستئناف 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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