

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0204

Late Request for Hearing Allowed
Reversed & Remanded

PROCEDURAL HISTORY: On August 7, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and was disqualified from receiving unemployment insurance benefits effective February 23, 2020 (decision # 125856). On August 27, 2020, decision # 125856 became final without claimant having filed a request for hearing. On November 13, 2020, the Department served notice of an administrative decision, based in part on decision # 125856, concluding that claimant received benefits to which he was not entitled and assessing an overpayment of \$906 in regular unemployment insurance (regular UI) benefits and \$3,600 in Federal Pandemic Unemployment Compensation (FPUC) benefits that claimant was required to repay to the Department via offset from future benefits (decision # 110648). On November 18, 2020, claimant filed a late request for hearing on decision # 125856 and a timely request for hearing on decision # 110648.

ALJ Kangas considered claimant's late request for hearing on decision # 125856, and on December 28, 2020 issued Order No. 20-UI-158238, dismissing claimant's request for hearing as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by January 11, 2021. On January 10, 2021, claimant filed a timely response to the appellant questionnaire. On January 19, 2021, the Office of Administrative Hearings (OAH) mailed a letter stating that Order No. 20-UI-158238 was vacated and that a new hearing would be scheduled to determine whether claimant had good cause to file the late request for hearing on decision # 125856 and, if so, the merits of that decision.

On January 14, 2022, ALJ Murdock conducted separate hearings on decisions # 125856 and 110648. The employer failed to appear at the hearing on decision # 125856. On January 18, 2022, ALJ Murdock issued Order No. 22-UI-184279, concluding that claimant had good cause to file the late request for hearing on decision # 125856 and affirming the merits of that decision; and Order No. 22-UI-184292, affirming decision # 110648. On February 6, 2022, claimant filed applications for review of Orders No. 22-UI-184279 and 22-UI-184292 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 22-UI-184279 and 22-UI-184292. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2022-EAB-0203 and 2022-EAB-0204).

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

The parties may offer new information, such as the information contained in claimant's written argument, into evidence at the remand hearing. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of Order No. 22-UI-184279 concluding that claimant had good cause to file the late request for hearing on decision # 125856 is **adopted**. The remainder of this decision addresses the merits of decisions # 125856 and 110648, regarding whether claimant voluntarily quit work with good cause and whether he received benefits to which he was not entitled.

FINDINGS OF FACT: (1) Volcano Veggies LLC (the employer) employed claimant as a harvester and delivery driver from approximately September 2019 until February 28, 2020. Claimant worked for the employer part-time and was paid approximately \$11.00 per hour. Claimant resided in Bend, Oregon while he worked for the employer.

(2) On January 16, 2020, claimant received an offer of work from another employer ("Saltwater"). The new job paid approximately \$4,000 per month for full-time work, and required that claimant complete a three-week training program with the National Marine Fisheries Service (NMFS) before he could begin working. The training program was scheduled to begin on March 9, 2020 in Seattle, Washington. While claimant's time in the training program would be unpaid, Saltwater offered claimant lodging in Seattle for the duration of the training.

(3) Claimant "was not able to make ends meet" with the pay from his part-time work from the employer. Order No. 22-UI-184279 Audio Record at 18:02. As the job offer from Saltwater both paid significantly more and was more closely related to the subject matter of his educational degree, claimant accepted the offer with Saltwater. In or around late January 2020, claimant notified the employer that he intended to resign effective February 28, 2020.

(4) Claimant last worked for the employer on February 28, 2020. Shortly thereafter, claimant travelled to Seattle, and began the NMFS training on March 9, 2020. After about three days, the training was postponed due to complications arising from the onset of the COVID-19 pandemic. The training resumed in May 2020. Claimant completed the training and started working for Saltwater thereafter.

(5) When claimant filed his initial claim for unemployment insurance benefits, the Department determined that his weekly benefit amount was \$151.

(6) Claimant claimed benefits for the weeks including April 5, 2020 through May 16, 2020 (week 15-20 through 20-20). These are the weeks at issue. The Department paid claimant benefits for all of the weeks at issue under its “Benefits While You Wait” program in effect at the time before determining if claimant’s work separation disqualified him from receiving benefits. Order No. 22-UI-184292 Audio Record at 10:04.

CONCLUSIONS AND REASONS: Order No. 22-UI-184279 is set aside and the matter remanded to determine whether claimant voluntarily quit work with good cause. Because whether claimant received benefits to which he was not entitled depends on whether claimant voluntarily quit work with good cause, Order No. 22-UI-184292 is also set aside, and the matter remanded.

Voluntary quit. A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless they prove, by a preponderance of the evidence, that they had good cause for leaving work when they did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). “Good cause . . . is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work.” OAR 471-030-0038(4) (December 23, 2018). “[T]he reason must be of such gravity that the individual has no reasonable alternative but to leave work.” OAR 471-030-0038(4). 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 their employer for an additional period of time.

A claimant who leaves work to accept an offer of other work “has left work with good cause only if the offer is definite and the work is to begin in the shortest length of time as can be deemed reasonable under the individual circumstances. Furthermore, the offered work must reasonably be expected to continue, and must pay [either] an amount equal to or in excess of the weekly benefit amount; or an amount greater than the work left.” OAR 471-030-0038(5)(a). In pertinent part, the Department does not consider a job offer to be definite “if [it] is contingent upon . . . [such things as] passing a drug test, background check, credit check, and/or an employer receiving a contract.” Oregon Employment Department, UI Benefit Manual §442 (Rev. 04/01/10).

Claimant voluntarily quit work in order to accept a position with Saltwater. Order No. 22-UI-184279 concluded that claimant “did not have a definite offer of other work when he left employment and he left work to attend school when not required to do so by law.”¹ Order No. 22-UI-184279 at 4. The record as developed does not support this conclusion.

As a preliminary matter, it is not clear from the record that claimant’s three-week training course could be accurately described as “school.” Even assuming that it was school, though, the record is clear that claimant did not quit in order to attend school. Rather, the record shows claimant quit work in order to accept an offer of other work with Saltwater, as it allowed him to earn significantly higher wages and was more closely related to the subject matter of his educational degree.

¹ Under OAR 471-030-0038(5)(b)(D), voluntarily leaving work to attend school, unless such attendance is required by law, is not good cause for leaving work.

However, further inquiry is needed to determine whether claimant satisfied the other requirements of OAR 471-030-0038(5)(a). On remand, inquiry should be made whether the employment relationship between claimant and Saltwater began before claimant completed the NMFS training and to determine whether the offered work was reasonably likely to continue, including whether the position was temporary in nature, or whether claimant had any reason to believe that he would be unable to complete the training course. The record should also be developed to determine whether the other work exceeded either claimant's weekly benefit amount or his rate of pay with the employer. To that end, the ALJ should inquire as to the cash value of the lodging provided to claimant, as well as any other noncash remuneration, including travel expenses or incidentals. Finally, in order to determine whether the work began in the shortest period of time as could be considered reasonable under the circumstances, the ALJ should develop the record to show why claimant left work on February 28, 2020 if the training was not scheduled to begin until March 9, 2020.

Overpayment. ORS 657.315(1) provides, in relevant part, that an individual who has been overpaid benefits because of an error not caused by the individual's false statement, misrepresentation of a material fact or failure to disclose a material fact, or because an initial decision to pay benefits is subsequently reversed by a decision finding the individual is not eligible for the benefits, is liable to have the amount deducted from any future benefits otherwise payable to the individual under this chapter for any week or weeks within five years following the week in which the decision establishing the erroneous payment became final.

Order No. 22-UI-184292 concluded that claimant was liable for overpaid regular and FPUC benefits because he received benefits to which he was not entitled because he was disqualified from receiving benefits for the weeks at issue as a result of his separation from the employer. Order No. 22-UI-184292 at 3. Because the record was insufficiently developed to determine whether claimant voluntarily quit with good cause, the record also contains insufficient evidence to determine whether claimant received benefits to which he was not entitled for the weeks at issue. Order No. 22-UI-184292 must therefore be reversed and remanded pending a determination on the administrative decision which created the overpayment.

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 voluntarily quit work with good cause, and whether claimant is liable for an overpayment of benefits, Orders No. 22-UI-184279 and 22-UI-184292 are reversed, and this matter is remanded.

DECISION: Order No. 22-UI-184279 and 22-UI-184292 are set aside, and these matters remanded for further proceedings consistent with this order.

D. Hettle and A. Steger-Bentz;
S. Alba, not participating.

DATE of Service: April 7, 2022

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 22-UI-184279 and 22-UI-184292 or return these matters to EAB. Only a timely application for review of the subsequent orders 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

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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