

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0316

Reversed & Remanded

PROCEDURAL HISTORY AND FINDINGS OF FACT: On January 19, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer, but not for misconduct, and was not disqualified from receiving benefits based on the work separation (decision # 101005). The employer¹ filed a timely request for hearing. On March 6, 2024, ALJ Smith conducted a hearing, and on March 8, 2024, issued Order No. 24-UI-249766, affirming decision # 101005. On March 27, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT AND EVIDENTIARY MATTER: The employer filed a written argument with their application for review on March 27, 2024, and claimant faxed and emailed a written argument to EAB on April 5, 2024. Under OAR 471-041-0090(1), EAB has considered the employer's written argument as necessary to complete the record regarding a notice issue inherent to the order under review and underlying administrative decision. The argument has been marked as EAB Exhibit 1, and a copy provided to the parties with this decision. Any party that objects to our admitting EAB Exhibit 1 must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the exhibit will remain in the record.

Claimant's written 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 her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB did not consider claimant's new information, and considered her argument only to the extent it was based on information received into evidence at the hearing.

The parties may offer new information, such as the content of claimant's written argument or the documents included with either party's argument, into evidence at the remand hearing. At that time, it

¹ For purposes of this decision, "the employer" refers to Compass Group USA. However, as explained below, the actual employer of record appears to be a different entity who has not yet been made a party to these proceedings.

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.

CONCLUSIONS AND REASONS: Order No. 24-UI-249766 is set aside and this matter remanded for another hearing and order.

ORS 657.265 states:

When a claimant files an initial claim or an additional claim, the Employment Department promptly shall give written notice of the claim filing to the claimant's most recent employing unit or agent of the employing unit. If the claimant did not receive or will not receive remuneration from qualifying employment, as described in ORS 657.176, in an amount greater than or equal to four times the claimant's weekly benefit amount from the claimant's most recent employing unit, the Employment Department shall notify the claimant's next previous employing unit or units or agents of the employing unit or units until the Employment Department has notified all of the claimant's former employing units, or the agents of the employing units, that, in the aggregate, have paid or will pay the claimant remuneration from qualifying employment, as described in ORS 657.176, in an amount that is equal to or exceeds four times the claimant's weekly benefit amount.

ORS 657.267 states:

(1) An authorized representative shall promptly examine each claim for waiting week credit or for benefits and, on the basis of the facts available, make a decision to allow or deny the claim. Information furnished by the claimant, the employer or the employer's agents on forms provided by the Employment Department pursuant to the authorized representative's examination must be accompanied by a signed statement that such information is true and correct to the best of the individual's knowledge. Notice of the decision need not be given to the claimant if the claim is allowed but, if the claim is denied, written notice must be given to the claimant. If the claim is denied, the written notice must include a statement of the reasons for denial, and if the claim is denied under any provision of ORS 657.176, the notice must also set forth the specific material facts obtained from the employer and the employer's agents that are used by the authorized representative to support the reasons of the denial. The written notice must state the reasons for the decision.

(2) If the claim is denied under any provision of ORS 657.176, written notice of the decision must be given to the employing unit, or to the agent of the employing unit, that, in the opinion of the Director of the Employment Department, is most directly involved with the facts and circumstances relating to the disqualification.

(3) Notice of a decision that was wholly or partially based on information filed with the director in writing within 10 days after the notice provided for in ORS 657.265 must be given to any employing unit or agent of the employing unit that filed the information.

* * *

OAR 471-030-0039(2) (January 11, 2018) states, “Written notice of administrative decisions shall be provided as required in ORS 657.267 and 657.268 and shall be personally delivered or mailed to the parties or their authorized agents at their last address of record.”

OAR 471-040-0015 (August 1, 2004) states:

(1) To afford all parties a reasonable opportunity for a fair hearing, notice of hearing setting forth the time, date, place, and issue(s) in general shall be personally delivered or mailed at least five days in advance of the hearing to parties or their authorized agents at their last known address as shown by the record of the Director.

(2) The following parties shall be notified of a hearing when a request for hearing has been filed as provided by ORS 657.265 or 657.355:

(a) The Director;

(b) The claimant;

(c) The employing unit entitled to notice of the determination or decision under ORS 657.265; and any employing unit that could be expected to have information relating to the issue(s) of the hearing.

(3) In all other cases for which ORS Chapter 657 provides for hearing, parties who shall be notified of a hearing are:

(a) The Director; and

(b) The employer or employing unit which has filed a request or application for hearing.

* * *

At issue in this matter is claimant’s separation from work which, per decision # 101005 and confirmed by claimant at hearing, took place on November 9, 2023. Transcript at 11. The employer from whom claimant separated on November 9, 2023, is “Levy,” a subsidiary of Compass Group USA. Compass Group USA is the employer named in this decision. Transcript at 10. However, the record shows that claimant successively worked for, and separated from, *two* subsidiaries of Compass Group USA. Claimant first worked for Bon Appetit, separating on October 24, 2023. Shortly thereafter, claimant began working for “Levy,” and separated from them on November 9, 2023. As the employer noted in their written argument, however:

The separating employer for this claimant was actually Levy [n]ot Compass, Levy has their “own” account number and never received a claim and all claims and correspondence... were

addressed to Compass and therefore they were prepared to testify regarding the separation [from Bon Appetit].

EAB Exhibit 1 at 1. In other words, the correct employer for the separation which was addressed in decision # 101005 and the order under review may not have been properly noticed of the separation, and therefore may not have been afforded an opportunity to participate in the proceedings regarding claimant's separation from their employment. Under ORS 657.265, the Department was required to notify claimant's most recent employing unit or agent of the employing unit of the claim. It should be noted that the requirement to notify said employer "of the claim" is not synonymous with the requirement to notify that employer of the administrative decision itself. However, if the correct employer ("Levy") did not receive notice of the claim, they would not have been afforded the opportunity to provide information to the Department that could be used as a basis for adjudicating the outcome on this work separation and, likewise, could have entitled them to appeal the subsequent administrative decision under ORS 657.267(3) and OAR 471-030-0039(2).

Furthermore, OAR 471-040-0015 requires the Office of Administrative Hearings (OAH) to notify the "employing unit entitled to notice of the determination or decision under ORS 657.265" of the hearing scheduled on that decision. It is therefore necessary to determine whether the correct employer has been properly notified of the claim as required by ORS 657.265, whether they have taken the steps necessary to entitle them to notice of the subsequent administrative decision, and whether OAH properly notified the correct employer of the scheduled hearing on that decision.

On remand, the ALJ should inquire as to whether the correct employer was properly noticed of the November 9, 2023, separation, such that they were afforded an opportunity to participate in the proceedings. The Department is urged to produce a representative to testify on this point. If the record on remand shows that the correct employer was not noticed of the separation, the matter should be remanded to the Department for proper notice of the separation and, if necessary, amendment of the underlying administrative decision. EAB recognizes that returning this matter to the Department to re-notice the correct employer and re-adjudicate the work separation may not represent the most efficient use of administrative resources. Therefore, if the correct employer has not already been noticed, the Department and OAH are encouraged to identify and locate the correct employer in this matter² and, to the extent that the proper parties are both willing to so stipulate, proceed to a rehearing on the merits of the November 9, 2023, work separation.³

If the record on remand shows that the correct employer already was noticed of the November 9, 2023, separation, the ALJ should proceed with a re-hearing on the merits of that separation, allowing the employer to produce witnesses and submit documentary evidence relating to that separation. At hearing, the employer produced a witness who was only able to testify on claimant's separation from Bon Appetit, not at issue in this matter. Given that claimant had two work separations from two separate

² It is not clear from the record what "Levy's" full business name is, or how best to contact them. However, the Department is presumed to possess resources sufficient to accomplish this task.

³ The October 24, 2023, separation from Bon Appetit may also present a disqualification issue necessary to adjudicate, if not already adjudicated. That separation is outside the scope of this appeal, however, and is not addressed here.

subsidiaries of the same company within a short period of time,⁴ and that decision # 101005 did not identify which subsidiary was at issue in that decision, the employer's failure to produce witnesses who could testify about claimant's separation from "Levy" was understandable. As such, the employer was not given a reasonable opportunity for a full and fair hearing on the November 9, 2023, separation, and a full and fair inquiry, as required under ORS 657.270, was not conducted.

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 so that notice may be given to the correct employer, Order No. 24-UI-249766 is reversed, and this matter is remanded.

DECISION: Order No. 24-UI-249766 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: May 10, 2024

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 24-UI-249766 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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⁴ Although both Bon Appetit and "Levy" are subsidiaries of the same parent company, they may, for purposes of unemployment insurance benefits, to be considered distinct, separate employers. Likewise, claimant's separations from those employers were apparently distinct, and thus appear to require separate adjudications.



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 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 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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