

FILED: November 13, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

WAI PO LEUNG,
Petitioner,

v.

EMPLOYMENT DEPARTMENT,
Respondent.

Employment Appeals Board
12AB1262

A151956

Argued and submitted on January 03, 2014.

John D. Burgess argued the cause and filed the brief for petitioner.

Karla H. Ferrall, Assistant Attorney General, argued the cause for respondent. With her on the brief were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

Before Armstrong, Presiding Judge, and Nakamoto, Judge, and Egan, Judge.

NAKAMOTO, J.

Reversed and remanded.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Petitioner

- No costs allowed.
 Costs allowed, payable by
 Costs allowed, to abide the outcome on remand, payable by
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1 NAKAMOTO, J.

2 Claimant seeks judicial review of a final order of the Employment Appeals
3 Board (EAB). The EAB affirmed the administrative law judge's (ALJ) denial of
4 claimant's late request for a hearing concerning his right to extended unemployment
5 insurance benefits that he had already received. Claimant, who is a native Cantonese
6 speaker, contends that the Employment Department (department) failed to follow its
7 policy on assisting claimants with limited English language proficiency. He contends
8 that those circumstances met the "good cause" standard for late hearing requests in OAR
9 471-040-0010(1). We reverse and remand.

10 I. FACTS AND PROCEDURAL HISTORY

11 Agency findings of fact, unless challenged, are assumed to be correct on
12 review. *Meltebeke v. Bureau of Labor and Industries*, 322 Or 132, 134, 903 P2d 351
13 (1995). The unchallenged findings of the EAB in this case are as follows: Claimant's
14 native language was Cantonese. Although he had lived and worked in the United States
15 for approximately thirty years, he spoke broken English. He could "listen pretty good" in
16 English, but reading English was a "problem." He sometimes had his wife assist him
17 with English communications.

18 Claimant filed an initial claim for unemployment insurance benefits in
19 February 2009. When payment on his claim for regular benefits was exhausted, he filed
20 for, and was paid, extended benefits. However, the department later determined that he
21 was not entitled to those extended benefits. In March 2011, claimant received a written

1 decision from the department to that effect, in English.

2 Within the time period allowed for a hearing request, claimant took the
3 2011 decision to a local office of the department, where a department employee
4 explained to him that he could request a hearing on the decision. Claimant therefore
5 understood that he had been denied extended benefits and that he could request a hearing
6 on the denial, but he did not comprehend the full legal effect of the decision, namely, that
7 he would have to repay the extended benefits that he had received. Claimant filled out a
8 hearing request form but never filed it.

9 Ten months later, in 2012, claimant received a notice from the department
10 stating that he had to repay the extended unemployment insurance benefits that he had
11 received. Once he received the repayment notice, claimant filed a late request for a
12 hearing on the department's March 2011 decision that he was ineligible for the extended
13 benefits.

14 The administrative record reveals the following procedural history.
15 Claimant appeared at two hearings regarding whether he had good cause for the lateness
16 of his 2012 hearing request; the second hearing was scheduled so that claimant could
17 have an interpreter. Claimant represented himself at both hearings. He did not introduce
18 a copy of the department's "limited English proficient" (LEP) policies as an exhibit. A
19 representative of the department appeared and testified, but no party presented testimony
20 from the department's employee in its Albany office who had spoken with claimant about
21 the March 2011 decision. The ALJ determined that claimant had not shown good cause

1 to extend the time he had to request a hearing to challenge the department's March 2011
2 decision that he was ineligible for the extended benefits.

3 Claimant appealed the ALJ's decision to the EAB. Before the EAB,
4 claimant focused on the terms of OAR 471-040-0010(2), specifically, whether the
5 department had failed to follow its policies regarding claimants who are LEP by failing
6 "to communicate orally or in writing in a language that could be understood" by him
7 "upon gaining knowledge" that he "needed or was entitled to such assistance." The EAB
8 affirmed, although it concluded that claimant had limited English proficiency.¹ The term
9 "limited English proficient person" is defined, for purposes of the department's contested
10 case proceedings, as "a person who, by reason of place of birth, national origin, or
11 culture, speaks a language other than English and does not speak English at all or with
12 adequate ability to communicate effectively in the proceedings." OAR 471-040-
13 0007(2)(a).

14 The EAB concluded that claimant had failed to demonstrate the
15 department's violation of its policy for providing services to persons who are LEP:

16 "Claimant failed to show the Department had, much less failed to follow, an
17 LEP policy requiring its representatives to explain to claimant he would
18 'not be able to challenge any future attempt to collect' unless he appealed its
19 decision, or knew claimant 'needed or was entitled' to translation,
20 interpretive, or other LEP services it failed to provide."

21 The EAB found that claimant "did not assert or show he asked the Department in March
22 2011 'to communicate orally or in writing' in Cantonese." Rather, the EAB observed,

¹ We reject the department's argument on review that no evidence in the record establishes that claimant was an LEP person.

1 challenge a determination regarding unemployment insurance benefits "may be extended,
2 upon a showing of good cause therefor." The department's rule that governs whether a
3 claimant can show "good cause" for extension of the period for requesting a hearing
4 provides:

5 "(1) 'Good cause' exists when an action, delay, or failure to act arises
6 from an excusable mistake or from factors beyond an applicant's reasonable
7 control.

8 "* * * * *

9 "(b) Good cause does not include:

10 "* * * * *

11 "(B) Not understanding the implications of a decision or notice when
12 it is received.

13 "(2) Notwithstanding section (1) of this rule, good cause for failing
14 to file a timely request for hearing shall exist when the appellant provides
15 satisfactory evidence that the Employment Department failed to follow its
16 own policies with respect to providing service to a limited English
17 proficient person, including the failure to communicate orally or in writing
18 in a language that could be understood by the limited English proficient
19 person upon gaining knowledge that the person needed or was entitled to
20 such assistance."

21 OAR 471-040-0010. Under the plain meaning of the text of OAR 471-040-0010(2), a
22 claimant has the burden to prove the facts necessary to meet the requirements for the
23 "good cause" exception based on the department's failure to follow its own LEP policies.
24 However, the EAB explained in its decision in this case that OAR 471-040-0010(2) "does
25 not require a causal connection between the Department's failure to follow its LEP
26 policies and the missed filing deadline."

27 On review, the department acknowledges that it does have an LEP policy

1 and has appended its applicable policy to its brief. Under a section entitled "Staff
2 Responsibilities," the policy provides that departmental staff will be trained and should
3 try to determine whether a customer needs language assistance:

4 **"Training**

5 "New staff will complete an online Universal Access training within the
6 first 30 days of their employment. Instructional information offered is to
7 acquaint new employees to the federal LEP Policy Guidelines, ADA laws
8 and accessing contracted language services provided to staff. Certification
9 will be issued upon completion of the online training.

10 **"Customer Interaction**

11 "Employment Department staff should make every attempt to determine
12 whether a customer is in need of interpretive services. Staff should contact
13 a qualified bilingual staff member if available to assist. If qualified staff
14 are not available, use the 'Language Line Identification Cards' to determine
15 the language spoken. The Language Line can then be used for interpretive
16 services."

17 (Boldface in original.) Under a section entitled "Management Responsibilities," the
18 department's LEP policy in part provides:

19 **"Written Communication**

20 "All written communication mailed to LEP customers regarding agency
21 services and programs such as Business & Employment Services, Child
22 Care, Office of Human Resources, Tax, Workforce & Economic Research,
23 and Unemployment Insurance--including benefits information,
24 adjudication, or hearings decisions--will include a multi-language service
25 insert offering language services at no cost to the LEP customer."

26 (Boldface in original.)

27 The parties' specific dispute concerns whether claimant met the proof
28 requirements in OAR 471-040-0010(2). Claimant argues that the EAB's decision was not
29 supported by substantial evidence. He contends that the evidence instead established that

1 the department knew that he needed language assistance, asserting that the department (1)
2 knew that he did not understand the decision and asked the department's office in Albany
3 for help in understanding it and (2) knew that he was not a native or skilled English
4 speaker when he spoke in limited, broken English with a department employee about the
5 March 2011 decision (as evidenced by the ALJ having rescheduled the hearing so that he
6 could have an interpreter). Nevertheless, he asserts that, despite his LEP status and his
7 limited English skills when he orally communicates, the department indisputably failed to
8 determine whether he needed interpretive services and failed to communicate with him in
9 Cantonese. Claimant argues that he left the department's office in Albany understanding
10 that "he was not going to receive any more benefits, but for reasons which were obscure
11 to him."²

12 The department first responds that claimant's challenge fails because he did
13 not prove in the first place that the department had an LEP policy.³ We reject that
14 argument because the department's own rule concerning good cause, OAR 471-040-
15 0010(2), indicates that the department has an LEP policy, which it acknowledges, as

² At his hearing before the ALJ, claimant testified that "I do not quite fully understand how the system work from the beginning to the end and I thought that because my benefit had ended, so I thought that I should not continue to file to the government and the time of the offices."

³ Given that a claimant need not prove causation, we reject the department's argument that claimant was required to prove that the LEP policy required the kind of information in his native Cantonese language that the EAB ruled would have prompted him to decide to request a hearing, namely, an explanation of the legal consequences of the March 2011 ineligibility decision.

1 noted earlier.

2 Rather, whether claimant established good cause for his late hearing request
3 turns on whether the department followed its LEP policies to provide language assistance
4 "upon gaining knowledge" that he "needed or was entitled to such assistance," as
5 provided in OAR 471-040-0010(2). That is because the only possible findings on this
6 record are that (1) claimant is an LEP person, as the EAB determined, and (2) the
7 department failed "to communicate orally or in writing" with claimant in his native
8 Cantonese.

9 On that key issue, the parties differ regarding what "knowledge" claimant
10 was required to prove under the department's "good cause" rule and, accordingly, whether
11 claimant met his burden of proof given the evidence in the record. In determining the
12 meaning of an administrative rule, we "determine the meaning of the words used, giving
13 effect to the intent of the enacting body." *Abu-Adas v. Employment Dept.*, 325 Or 480,
14 485, 940 P2d 1219 (1997). We normally do so by considering "the text of the rule and its
15 context, including other portions of the rule and related laws, and the rule's adoption
16 history." *Brand Energy Services, LLC v. OR-OSHA*, 261 Or App 210, 214, 323 P3d 356
17 (2014). In this case, although the parties both contend that we should interpret the rule
18 simply by considering the text of OAR 471-040-0010(2), we consider the text of the rule
19 in context, specifically, in context with the department's LEP policy and federal law
20 requiring the department to provide access to LEP persons.

21 The department contends that OAR 471-040-0010(2) should be understood

1 to require a claimant to prove that the department knew both (1) that the claimant was a
2 limited English language person and (2) that the claimant was "in need of interpretive
3 services in a particular language." To prove the latter, the department asserts that
4 claimant had to, but failed to, prove that he "expressed a language preference or asked the
5 department to communicate with him in Chinese." In light of the rule's text and context,
6 we decline to accept the interpretation of the knowledge requirement that the department
7 advances.

8 The text of the rule itself does not support the department's interpretation.
9 By its terms, OAR 471-040-0010(2) requires a claimant to prove that the department
10 "failed to follow its own policies with respect to providing service to a limited English
11 proficient person." The department's rule also provides that a sufficient showing includes
12 proof of the department's "failure to communicate orally or in writing in a language that
13 could be understood by the limited English proficient person upon gaining knowledge
14 that the person needed or was entitled to such assistance." The rule does not state that a
15 claimant must prove that the department knew that the claimant was an LEP person.
16 Rather, under the plain meaning of the text, a claimant who is an LEP person can prove a
17 failure to follow the LEP policy by proving that the department gained "knowledge" that
18 the claimant "needed or was entitled to" oral or written language assistance. In other
19 words, whether the claimant is an LEP person is separate from whether the department
20 gained knowledge that the claimant "needed or was entitled" to assistance. Thus, the
21 department's proffered interpretation appears to be inconsistent with the wording of the

1 rule itself.

2 As for the department's position that a claimant must prove that he or she
3 expressed a language preference or asked the department to communicate in a particular
4 language, we again disagree that the department posits a plausible interpretation. The
5 department's interpretation does not comport with the text of the rule, which does not
6 require proof of any request on the part of the claimant or customer. Instead, the rule
7 indicates that it is department policy to provide language assistance "upon gaining
8 knowledge" that the claimant or customer needs or is entitled to such assistance.

9 The ordinary meaning of the transitive verb "gain" is "to get or attain to
10 possession" or to "cause to be obtained or given." *Webster's Third New Int'l Dictionary*
11 928 (unabridged ed 2002). Thus, to "gain" something, such as knowledge, suggests, at
12 least in some usages, some activity on the part of the actor to get or attain that thing. The
13 ordinary meaning of "knowledge" includes "the fact or condition of being cognizant,
14 conscious, or aware of something," such as knowledge "of what she had had to endure"
15 or the knowledge "that it was really important." *Webster's* at 1252. Although the
16 department could "gain knowledge" of a customer's need for language assistance by way
17 of a customer's request that the department communicate in a particular foreign language,
18 the department's rule is not couched in such specific, limited terms and suggests instead
19 that the department may get the knowledge or cause such knowledge to be obtained in
20 other ways, such as by engaging in communication with the customer and observing
21 limited English proficiency.

1 Context supports our analysis of the text of OAR 471-040-0010(2). The
2 department's proffered interpretation contradicts the terms of its LEP policy, which is
3 referenced in the rule and therefore provides context for understanding the rule. The LEP
4 policy states that "[d]epartment staff should make every attempt to determine whether a
5 customer is in need of interpretive services." The LEP policy thus does not require
6 customers to ask for an interpreter, nor does it require department employees to
7 determine whether a customer is an LEP person. The policy simply requires the
8 department's employees to determine whether the customer needs interpretive services.

9 The department's LEP policy also requires a multi-language insert "offering
10 language services at no cost." That written-communication provision does not depend on
11 customer or claimant request. That part of the LEP policy is further evidence that the
12 department does not require customers or claimants to request specific language
13 assistance in order for the department to fail to follow its LEP policy.⁴

14 Moreover, states have an obligation to provide meaningful access to their
15 unemployment insurance programs for individuals with limited English proficiency. *See*
16 Section 601 of Title VI of the Civil Rights Act of 1964, codified at 42 USC § 2000d ("No
17 person in the United States shall, on the ground of race, color, or national origin, be
18 excluded from participation in, be denied the benefits of, or be subjected to
19 discrimination under any program or activity receiving Federal financial assistance.");

⁴ The March 2011 decision that claimant sought to challenge late had no such multi-language insert, as the administrative record reveals.

1 *Lau v. Nichols*, 414 US 563, 568-69, 94 S Ct 786, 39 LEd 2d 1 (1974) (holding that
2 prohibited national origin discrimination under Title VI includes failing to provide LEP
3 individuals with meaningful access to recipient programs). A "program or activity" or
4 "program" in 42 USC section 2000d refers to "all of the operations of," among other
5 things, "a department, agency, special purpose district, or other instrumentality of a State"
6 or "the entity of such State * * * government that distributes such assistance and each
7 such department or agency (and each other State * * * government entity) to which the
8 assistance is extended, in the case of assistance to a State * * * government." 42 USC §
9 2000d-4a(1). The unemployment compensation program is a longstanding federal-state
10 program; Oregon enacted its unemployment compensation law in 1935. *Puget Sound B.*
11 *& D. Co. v. S. U. C. C.*, 168 Or 614, 620, 126 P2d 37 (1942).

12 The department, therefore, has an obligation to provide LEP individuals
13 with access to its unemployment compensation program. The department recognizes that
14 obligation, as evidenced by the department's LEP policy. The department's LEP policy
15 states that federal laws, including Title VI and Executive Order 13166, 65 Fed Reg 50121
16 (Aug 11, 2000), were applied to the policy.

17 We thus do not view the department's LEP policy provision regarding
18 "Customer Interaction" and its wording that "[d]epartment staff should make every
19 attempt to determine whether a customer is in need of interpretive services" and "should
20 contact a qualified bilingual staff member if available to assist" as merely precatory.
21 Rather, we consider the department's rule that good cause for a late hearing request will

1 exist when an LEP person has not been given language assistance in violation of the
2 department's LEP policies in the context of the department's obligation under federal law
3 to provide persons with limited English proficiency meaningful access to the
4 unemployment insurance program. In that light, and given the LEP policy itself and
5 ordinary meanings of the words "gain" and "knowledge" used within the rule, we
6 conclude that the phrase "gaining knowledge that the person needed or was entitled to
7 such [language] assistance" in OAR 471-040-0010(2) refers to the department's
8 knowledge or awareness, obtained by any means, that the person needed or was entitled
9 to oral or written language assistance. We remand for reconsideration under the correct
10 understanding of OAR 471-040-0010(2).

11 Reversed and remanded.