

**EMPLOYMENT APPEALS BOARD DECISION**

**2014-EAB-0845**

*Reversed  
Disqualification*

**PROCEDURAL HISTORY:** On March 20, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant is disqualified from receiving benefits (decision # 103056). Claimant filed a timely request for hearing. On April 21, 2014, ALJ Wipperman conducted a hearing, and on April 25, 2014 issued Hearing Decision 14-UI-16196, reversing the Department's decision. On May 15, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB reviewed the entire hearing record. The employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

On *de novo* review and pursuant to ORS 657.275(2), the ALJ's findings of fact in hearing decision Hearing Decision 14-UI-16196 are **adopted**.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude that claimant is disqualified from receiving benefits.

ORS 657.176(2)(h) states that an individual shall be disqualified from the receipt of benefits if the individual has committed a disqualifying act described in ORS 657.176(9). ORS 657.176(9)(a)(G) provides that an individual is considered to have committed a disqualifying act when the individual violates the terms of a last chance agreement with the employer. ORS 657.176(13)(c) provides that "last chance agreement" means a reasonable agreement between an employer and an employee who has violated the employer's reasonable written policy that permits the employee to return to work under conditions that may require the employee abstain from unlawful drug use and attend and comply with the requirements of a rehabilitation or education program acceptable to the employer.

For purposes of ORS 657.176(13)(c), a last chance agreement is a document signed by the employee for the condition of continued employment and is reasonable if it is written and contains only reasonable conditions, including, but not limited to, agreeing to remain drug free, participating in a rehabilitation program, employee assistance program or other similar program, and submitting to random or periodic drug testing to demonstrate the employee remains drug free. OAR 471-030-0125(7) (March 12, 2006). A written employer policy is reasonable if it prohibits the effects of drugs or alcohol in the workplace, is followed by the employer, has been published and communicated to the individual or provided to the individual in writing, and the policy provides for random or periodic testing. OAR 471-030-0125(3).

A "random" test for drugs means a test for drugs given to a sample drawn from a population in which each member of the population has an equal chance to be selected for testing. OAR 471-030-0125(5)(a). A "periodic" test for drugs means a drug test administered at various intervals. OAR 471-030-0125(5)(b). An individual "tests positive" for an unlawful drug when the test is administered in accordance with the provisions of an employer's reasonable written policy, and at the time of the test the amount of drugs determined to be present in the individual's system equals or exceeds the amount prescribed by such policy or agreement. OAR 471-030-0125(2)(e). In the case of a positive urine test for drugs, in order to determine whether an individual tests positive, an initial test must be confirmed by a test conducted in a federal or state licensed clinical laboratory. OAR 471-030-0125(10)(a).

In the present case, it is undisputed that claimant was placed on a reasonable last chance agreement (LCA), as defined under ORS 657.176(13)(c) and OAR 471-030-0125(7), after violating the employer's reasonable drug policy, as defined under OAR 471-030-0125(3), by testing positive for an unlawful drug, as defined under OAR 471-030-0125(2)(e) and OAR 471-030-0125(10)(a). The employer discharged claimant for violating the LCA by refusing to take a drug test. In Hearing Decision 14-UI-16196, the ALJ concluded that claimant did not violate the LCA, and therefore is not disqualified from receiving benefits, because the LCA required him to submit to periodic drug tests and, at hearing, the employer acknowledged that the drug test claimant refused to take was conducted as part of its random testing program.<sup>1</sup> However, the employer's witness testified that claimant's drug test was conducted at the same time as a random drug test of other employees, and not that claimant's drug test was a random drug test. Transcript at 7, 11, 13-14. As found by the ALJ, claimant was asked to take the drug test "under the LCA," and not because he was part of a sample drawn from a population in which each member of the population had an equal chance to be selected for testing.<sup>2</sup> Claimant's drug test was one of several administered at various intervals under the LCA,<sup>3</sup> and therefore a periodic drug test, and not a random drug test.

Thus, in refusing to take the drug test, claimant violated the LCA. Claimant therefore committed a disqualifying act under ORS 657.176(9)(a)(G), and is disqualified from receiving benefits under ORS 657.176(2)(h).

**DECISION:** Hearing Decision 14-UI-16196 is set aside, as outlined above.

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<sup>1</sup> Hearing Decision 14-UI-16196 at 4.

<sup>2</sup> *Id.* at 2.

<sup>3</sup> Transcript at 15.

Susan Rossiter and Tony Corcoran;  
J. S. Cromwell, not participating.

**DATE of Service: June 25, 2014**

**NOTE:** You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the website at [court.oregon.gov](http://court.oregon.gov). Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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