

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0236**

*Reversed*  
*No Penalty Assessed*

**PROCEDURAL HISTORY:** On January 26, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant made a willful misrepresentation to obtain benefits and assessed four penalty weeks. Claimant filed a timely request for hearing. On February 23, 2015, ALJ Wiperman conducted a hearing, and on February 27, 2015 issued Hearing Decision 15-UI-34321, affirming the Department's decision. On March 5, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) On January 2, 2014, claimant filed an initial claim for unemployment benefits. Claimant's claim was determined valid with a weekly benefit amount of \$126.

(2) Sometime after January 2, 2014, claimant worked as a school bus driver during the school year. When school year 2013-2014 ended and claimant's work as a bus driver was over, claimant contacted the owner of Stark Excavation, LLC for summer work as a laborer. Claimant intended to leave this job with the employer and return to his work driving a bus when school year 2014-2015 commenced.

(3) In July 2014, claimant spoke several times with the employer's owner about when his work would start. On approximately July 23, 2014, the owner called claimant and asked him to report to a job site for work on Thursday, July 24, 2014. At that time, the owner told claimant that he was not guaranteed any hours or pay and that the owner was going to "give [him] a try." Audio at 16:08. On July 24, 2014, claimant reported to the job site as instructed and worked that day and the day of Friday, July 25, 2014. Claimant did not know whether the owner was going to schedule him for any additional work, and thought that the owner might not do so because he believed that the employer was not receiving much compensation from the job.

(4) On Monday, July 28, 2014, the owner telephoned claimant and told him, "Hey, I don't think it's gonna work out." Audio at ~21:36. The owner also told claimant that other employees had thought that

he was not sufficiently experienced to perform laborer work for the employer. The owner told claimant that he might not be "cut out" for the work. Audio at ~21:43. The owner did not tell claimant that he was discharged or "fired" or that the work separation was caused by poor work performance. Audio at ~18:28. Claimant thought that the owner was letting him go because of financial constraints. Audio at ~17:18, ~17:35, ~18:13.

(5) On August 4, 2014, claimant restarted his claim for unemployment benefits. When claimant filed to restart his claim, he stated that the employer had laid him off due to a lack of work. Claimant subsequently claimed, but the Department did not pay to him, benefits for the week of July 27, 2014 and continuing thereafter.

**CONCLUSIONS AND REASONS:** Claimant did not make a willful misrepresentation to obtain benefits for the weeks starting on July 27, 2014 and continuing thereafter.

ORS 657.215 states that an individual is disqualified from receiving future benefits for a period of up to 52 weeks if the individual willfully made a false statement or misrepresentation to obtain benefits. In Hearing Decision 15-UI-34321, the ALJ concluded that claimant was subject a penalty disqualification because he "misrepresented the nature of his [July 28, 2014] work separation" to the Department when he stated that he had not been discharged. Hearing Decision 15-UI-34321 at 2. We disagree.

In the hearing decision, the ALJ focused on whether claimant had incorrectly characterized the nature of the work separation to the Department, and not, as ORS 657.215 requires for the assessment of a penalty disqualification, whether *willfully* or *intentionally* made a *knowing* misrepresentation for the purpose of securing benefits. The employer's witness and claimant agreed that the employer never told claimant that he was discharged or "fired" or used like language to clearly indicate that the work separation was based on a discharge. Audio at ~18:31, ~ 21:28. Based on claimant's un rebutted testimony, his belief that he was principally let go as a result of the employer's financial constraints was not implausible, particularly when the employer's witness used ambiguous language to inform him that he should not report for work in the future. Audio at ~17:18. In addition, there was no evidence in the record that claimant was aware or reasonably aware that the manner in which he reported the work separation might make him ineligible to receive benefits. The only evidence on this issue was claimant's answer to the Department's questionnaire, in which he stated the contrary: that he was not aware that the reason for the separation might affect his eligibility for benefits. Exhibit 1 at 6. Without evidence establishing both that claimant intentionally misrepresented the nature of his work separation and that he did so in order to obtain benefits, this record is insufficient to support a penalty disqualification under ORS 657.215. The ALJ erred in concluding that claimant was subject to a penalty disqualification.

Claimant did not make a willful misrepresentation to obtain benefits. Claimant is not subject to a penalty disqualification from future benefits otherwise payable to him.

**DECISION:** Hearing Decision 15-UI-34321 is set aside, as outlined above.

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

**DATE of Service:** April 22, 2015

**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 Court of Appeals website at [courts.oregon.gov](http://courts.oregon.gov). Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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