

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0292

Reversed & Remanded

PROCEDURAL HISTORY: On December 12, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant's discharge was not for committing a disqualifying act (decision # 84751). The employer filed a timely request for hearing. On January 28, 2015 and February 6, 2015, ALJ Holmes-Swanson conducted a hearing, on February 12, 2015 issued Hearing Decision 15-UI-33431, and on February 23, 2015 issued Amended Hearing Decision 15-UI-33943, both concluding that claimant voluntarily left work with good cause and committed a disqualifying act. On March 16, 2015, the Department filed an application for review of Hearing Decision 15-UI-33943 with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 15-UI-33943 must be set aside, and this matter remanded for additional evidence.

The ALJ concluded both that claimant was not disqualified from receiving unemployment insurance benefits because of his work separation, and that he was disqualified from benefits for committing a disqualifying act. Hearing Decision 15-UI-33943 at 3. However, ORS 657.176(2) provides that an individual may be disqualified from benefits because of a work separation, *or* for committing a disqualifying act under ORS 657.176(9) or (10). *Compare* ORS 657.176(2)(a), (c); ORS 657.176(2)(h) (emphasis added). The ALJ's conclusions that claimant was and was not disqualified because of his work separation in this case are irreconcilably inconsistent, and reached in error.

In this case, claimant was discharged because of a positive breathalyzer test for alcohol that violated the employer's drug and alcohol policy.¹ The applicable law and rule that apply in this matter are, therefore, ORS 657.176(9) and OAR 471-030-0125.

There is little factual dispute in this case. The employer had a policy providing for drug and alcohol testing on the basis of the employer's reasonable suspicion that the individual was under the influence of drugs or alcohol, the employer's staff evaluated claimant's behavior at the time of the test by using criteria from an objective checklist to record information about his behavior, two or more individuals made consistent reports that claimant had glassy eyes, was uncoordinated and smelled of alcohol during the period immediately before claimant was required to undergo testing, and claimant's breathalyzer test had a positive result for alcohol, in violation of the employer's zero tolerance policy. The preponderance of the evidence therefore shows that claimant failed a reasonable suspicion test for alcohol that was required under the employer's reasonable written policy.²

An individual who fails a reasonable suspicion alcohol test that was required under the employer's reasonable written policy is generally considered to have committed a disqualifying act.³ However, individuals with documentation of their participation in certain types of treatment programs on the date of separation or within 10 days after are excused from disqualification if certain requirements are met. ORS 657.176(9)(b)(A). OAR 471-030-0125(2)(i) provides:

For purposes of ORS 657.176(9)(b)(A):

(A) "Recognized drug or alcohol rehabilitation program" means a program authorized and licensed under the provisions of OAR chapter 415, or authorized and licensed under similar provisions in another state.

(B) "Documentation of participation in the program" means a signed statement by an authorized representative of the recognized program that the individual is/was engaged in a course of treatment.

The record shows that claimant's work separation in this case occurred on November 5, 2014. The record further shows that claimant entered an alcohol treatment program on or about October 30, 2014. 01/28/15 Hearing Transcript at 17. The ALJ concluded that claimant may not be excused from disqualification in this case because there is no documentation in the record concerning claimant's participation in treatment. Hearing Decision 15-UI-33943 at 8. However, the record fails to show that anyone ever asked claimant to provide that documentation, or notified him that he should or must provide it to avoid disqualification.

¹ Although the evidence shows that claimant was allowed to submit a letter of resignation to the employer to be permitted to characterize his work separation as a voluntary leaving instead of a discharge, claimant could not actually have continued to work for the employer for any additional period of time at the time he submitted his resignation. But for the employer's decision to end claimant's employment, claimant was, ostensibly, willing to continue working for the employer for an additional period of time. Under OAR 471-030-0038(2)(a) and (b), claimant's work separation was, therefore, a discharge, regardless how the parties chose to characterize it.

² Breathalyzer tests are not required to undergo confirmatory testing, and claimant was not required to pay for the cost of the test. Therefore, claimant is not exempt from disqualification under OAR 471-030-0125(6) and OAR 471-030-0125(10)(b).

³ See Under OAR 657.176(2)(h), ORS 657.176(9)(a)(F), OAR 471-030-0125(2)(e), OAR 471-030-0125(3), OAR 471-030-0125(4), OAR 471-030-0125(6) and OAR 471-030-0125(10)(b).

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 the ALJ failed to develop the record necessary for a determination of whether claimant's positive breathalyzer test for alcohol was a disqualifying act considering his participation in treatment, Hearing Decision 15-UI-33943 must be reversed as unsupported by a complete record, and this matter remanded.⁴

DECISION: Hearing Decision 15-UI-33943 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: March 30, 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. 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

⁴ The purpose of this remand is to provide the parties with the opportunity to submit documentary evidence and testimony about claimant's participation in an alcohol treatment program. Because the applicable law and rule require documentation of the participation, any party with documentation must be prepared to submit it to the Office of Administrative Hearings (OAH) prior to any scheduled proceedings and in accordance with OAH's rules and procedures for submission of evidence. The documentation, if it exists, must include a signed statement by an authorized representative of the alcohol treatment program claimant attended that documents the dates of claimant's participation, and information showing whether the program claimant attended was state-licensed.