EO: 200
BYE: 201614

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

365
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0780

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 8, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for committing a disqualifying act (decision # 90608). Claimant filed a timely request for hearing. On June 8, 2015, ALJ Vincent conducted a hearing, and on June 12, 2015, ALJ Holmes-Swanson issued Hearing Decision 15-UI-40010, concluding claimant's discharge was not for a disqualifying act. On June 29, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

In Hearing Decision 15-UI-40010, the ALJ concluded that claimant's discharge was not for a disqualifying act because, under OAR 471-030-0125(7)(d), the terms of the last chance agreement under which claimant was discharged were not reasonable. In its written argument to EAB, the employer argued that the ALJ erred in reaching that conclusion because the Department did not have the statutory authority to adopt OAR 471-030-0125(7)(d), making that provision invalid, the last chance agreement under which claimant was discharged reasonable, and claimant's discharge, therefore, disqualifying. Specifically, the employer argued that ORS 657.176(13)(c) sets forth an exclusive list of factors that can be used to determine whether or not a last chance agreement is reasonable, and the Department exceeded its statutory authority by adopting rules that further defined whether or when a last chance agreement could be considered reasonable.

However, ORS 657.176(13)(c) states, in pertinent part, that a last chance agreement is a reasonable agreement, between an employer and employee, that permits an employee to return to work under certain conditions; nowhere in that provision does the legislature set forth the definition of "a reasonable agreement" or purport to define the term "reasonable." ORS 174.010 provides that, in analyzing the meaning of a statute, we may not "insert what has been omitted, or to omit what has been inserted." Therefore, we cannot conclude that the legislature defined what a reasonable last chance agreement was when enacting ORS 657.176(13). The legislature delegated to the Department under ORS 657.610(4) the authority to, among other things, "determine all questions of general policy" and "[a]dopt rules for" ORS chapter 657. We therefore conclude that the legislature delegated to the Department the authority

to develop policy and rules to define the term "reasonable" for purposes of ORS 657.176, and that Department did not exceed its statutory authority when it adopted OAR 471-030-0125.

Having so concluded, OAR 471-030-0125(6) states that, for purposes of ORS 657.176(13)(c), "no employer policy is reasonable if the employee is required to pay for the cost of the test," and OAR 471-030-0125(7), includes, for purposes last chance agreements, that "[a] term requiring an employee to pay for any of the cost of a drug or alcohol test is not a reasonable condition." We therefore agree with the ALJ that the last chance agreement claimant violated cannot be considered a "reasonable" agreement, and claimant's violation of it by testing positive for drugs cannot be considered a disqualifying act under the applicable laws and rules.

The employer also argued that the ALJ erred in Hearing Decision 15-UI-40010 because, after determining that claimant's discharge was not for a disqualifying act, he failed to analyze whether claimant's positive drug test also violated ORS 657.176(2)(a). However, to determine whether any misconduct occurred in a discharge case, we must also turn to OAR chapter 471 to determine the Department's rules and policies. OAR 471-030-0125(1) states, "For purposes of *any applicable provision of ORS 657.176*, this rule establishes policy for adjudicating cases involving the use, sale, possession or effects of drugs or alcohol in the workplace." (Emphasis added.) In other words, regardless whether we applied ORS 657.176(2)(a) or (h), the outcome of this matter would remain the same because the basis for claimant's discharge falls squarely within the provisions of OAR 471-030-0125, under which we have concluded that claimant, cannot be subject to disqualification from receipt of benefits.

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the hearing decision under review is **adopted**.

DECISION: Hearing Decision 15-UI-40010 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, *pro tempore*, not participating.

DATE of Service: <u>August 4, 2015</u>

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.

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