

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0618**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On April 18, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 140111). The employer filed a timely request for hearing. On May 4, 2016, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for May 16, 2016. On May 16, 2016, ALJ Menegat conducted a hearing, at which claimant failed to appear, and on May 18, 2016 issued Hearing Decision 16-UI-59791, concluding the employer discharged claimant for misconduct. On May 24, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. In her written argument, claimant stated that she applied for review with EAB because she did not receive notice of a hearing. Claimant's statement is construed as a request to have EAB consider additional evidence under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information if the party presenting the information shows that it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. The record shows that OAH sent the notice of the May 16, 2016 hearing to claimant's address of record at that time. Claimant offers no additional details, such as problems she may have experienced with mail delivery or processing, to support her claim that she did not receive notice of the hearing. Without supporting details, we have no basis for concluding that claimant's failure to receive notice of hearing was a circumstance beyond her reasonable control. Moreover, under OAR 137-003-0520(10) (January 31, 2012), documents sent through the U.S. Postal Service are presumed to have been received by the addressee, subject to evidence to the contrary. Claimant's bare assertion that she did not receive the hearing notice is insufficient to rebut the presumption of delivery. Claimant's request to present new evidence directly to EAB is, therefore, denied. However, this denial does not bar claimant from appearing at the hearing on remand and presenting additional information to the ALJ at that time.

Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider claimant's argument when reaching this decision.

**CONCLUSIONS AND REASONS:** Hearing Decision 16-UI-59791 is reversed, and this matter remanded to OAH for additional information.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) (August 3, 2011) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. The willful or wantonly negligent failure to maintain a license, certification or other similar authority necessary to perform the occupation involved is misconduct "so long as such failure is reasonably attributable to the individual." OAR 471-030-0038(3)(c).

Claimant had been a loan servicing manager for the employer since 2008. During 2015, the employer discovered claimant drew a series of insufficient-funds checks on her accounts with the employer's credit union. Although the activities resulted in client having to pay fees, they did not result in a financial loss to the employer. The employer gave claimant a warning and asked her to close her accounts and move her financial business to another institution. Claimant did so. Sometime later, the National Credit Union Administration (NCUA) board of examiners reviewed the employer's financial dealings, including claimant's activities before she closed her accounts, and sent a report about the activities to the employer's insurer. The insurer provided the bond required for claimant to hold her position as a loan servicing agent. The insurer informed the employer that it would no longer provide a bond covering claimant's work performance, and the employer discharged claimant for that reason.

In Hearing Decision 16-UI-59791, the ALJ concluded claimant engaged in misconduct because claimant's "irregular" financial activities were such that the employer's insurer would no longer support the bond necessary to claimant's occupation under OAR 471-030-0039(3)(c).<sup>1</sup> The ALJ reasoned that claimant's activities were activities that claimant "knew would cause bond revocation if ever discovered by the insurance or bonding company," and were willful or at least wantonly negligent.<sup>2</sup>

We agree that it is necessary to determine if claimant's activities were misconduct by applying OAR 471-030-0038(3)(c) because a bond was necessary to the performance of the occupation of loan servicing manager. However, the ALJ failed to ask at hearing, and the record does not otherwise show, information about the circumstances that resulted in the insufficient-funds checks so EAB can determine if claimant's failure to maintain her eligibility to be bonded was reasonably attributable to her. Specifically, whether claimant knew or should have known her financial activities would cause bond revocation and thereby can determine whether her actions were willful or wantonly negligent.

---

<sup>1</sup> Hearing Decision 16-UI-59791 at 3.

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

On remand, the ALJ must ask the parties what the insurer's bonding standards were, how claimant knew about those standards, and if claimant knew that insufficient-funds checks could affect her bonding status and render her uninsurable. If claimant appears at the hearing on remand, the ALJ must ask claimant if she knowingly issued the insufficient-funds checks, and if yes, why she did so. If claimant did not knowingly issue the insufficient-funds checks, the ALJ must ask how and why it occurred that claimant drew checks on an account with insufficient funds to cover them. The ALJ must ask claimant if and how claimant maintained records to account for activity on her accounts and to inform her of the balance of funds in those accounts. The ALJ must ask the parties how many accounts claimant had at the employer's credit union, who were the authorized signatories on the accounts, the number and general amounts of the overdrafts and NSF checks, and if and when claimant became aware of the insufficient-funds checks. The ALJ must ask the parties if claimant had an authorized overdraft limit or overdraft protection on her accounts. Without a full inquiry into the facts that led to the insufficient-funds checks, the record is insufficient to determine if claimant's failure to maintain her eligibility to be bonded was attributable to her as willful or wantonly negligent conduct.

ORS 657.270(3) requires that the ALJ give all parties a reasonable opportunity for a fair hearing. That obligation requires that the ALJ 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. ORS 657.270(3); *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 the employer discharged claimant for misconduct, Hearing Decision 16-UI-59791 is reversed, and this matter is remanded for further development of the record.

**DECISION:** Hearing Decision 16-UI-59791 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service:** June 24, 2016

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-59791 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.

**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.

**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.