

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0749**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On April 20, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for committing a disqualifying act (decision # 155725). Claimant filed a timely request for hearing. On June 1, 2016 ALJ Frank conducted a hearing, and on June 3, 2016 issued Hearing Decision 16-UI-61025, reversing the Department's decision. On June 23, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

**CONCLUSIONS AND REASONS:** Hearing Decision 16-UI-61025 is reversed, and this matter is remanded to the Office of Administrative Hearings (OAH) for further development of the record.

The employer in this case discharged claimant for allegedly violating its drug and alcohol policy by testing positive for marijuana. In Hearing Decision 16-UI-61025, the ALJ concluded that the employer did not demonstrate that claimant committed a disqualifying act. The ALJ reasoned that since the employer referred to the drug test it had administered to claimant as a "pre-employment" drug test", claimant's positive result on it was not disqualifying since it was not among the types of tests allowed under the Department's drug and alcohol adjudication policy, which are probable cause, random or blanket tests. Hearing Decision 16-UI-61025 at 4. We disagree.

Whatever the employer called the drug test that was administered to claimant, claimant was required to submit to it after the employer made him an offer of employment and hired him, subject to passing that test. Audio at ~9:00, ~14:50; Exhibit 1 at 3. All people to whom the employer made offers of employment were required to submit to and pass such drug tests or their employment would be revoked. Audio at ~9:46; Exhibit 1 at 3. Claimant worked for the employer for the three days between when he took the drug test and when the employer was informed of the test results, suggesting that his status was that of an "employee" when he submitted to the test. Audio at ~11:27. On these facts, while claimant's tenure might have been uncertain, he should be considered an employee at the time he took the drug test. As such, the drug test that claimant took met all requirements to constitute a permissible "blanket" drug test since it was "applied uniformly to a specified group or class of employees." OAR 471-030-

0125(5)(c) (March 12, 2006). The Department also recognizes that drug tests given to all newly hired employees as part of the hiring process are properly considered “blanket” tests, even if the employees were hired subject to passing the tests. Oregon Employment Department, Unemployment Insurance Benefits Manual (revised April 2, 2013), Ch. 460 §8. The ALJ therefore erred in concluding that claimant was not disqualified from benefits based on the timing and type of drug test that was administered to him.

In light of the conclusion that the drug test given to claimant was allowable, the ALJ did not sufficiently develop the evidence to permit us to determine whether claimant was or was not disqualified from benefits under other provisions of the Department’s drug and alcohol policy. First, the ALJ should have inquired into the reasonableness of the employer’s drug and alcohol policy, including whether a copy of that policy was provided or communicated and published to claimant before he submitted to the drug test, and whether the employer followed its own policy. OAR 471-030-0125(3)(b) and (c). The ALJ also should have inquired into whether claimant’s positive drug test result was confirmed by a second test, as suggested by a notation on the testing report, and whether Legacy Metro Lab or any other laboratory that performed the confirmatory testing was a federal or state licensed clinical laboratory. Exhibit 1 at 9; OAR 471-030-0125(10)(a). The ALJ should also inquire into the basis for any witness’s belief about the licensure of the lab that performed the confirmatory testing.

In the event the ALJ concludes the employer’s drug and alcohol policy was reasonable for purposes of OAR 471-020-0125(3), claimant violated that policy by his drug testing result and that result was confirmed by an appropriately licensed laboratory, the ALJ should develop the evidence sufficient to determine whether claimant’s participation in Kaiser Permanente’s Department of Addiction Medicine, Outpatient Treatment Services program meant that he should not be considered to have committed a disqualifying act under the Department’s drug and alcohol adjudication program. *See* ORS 657.176(9)(b). The ALJ should sufficiently inquire into claimant’s appearance for treatment in the Kaiser program on March 9, 2016 and his attendance at an orientation for the program sometime before March 18, 2016 to allow us to determine whether those actions constituted “participation” in drug rehabilitation program within 10 days of the date of the separation within the meaning of ORS 657.176(9)(b)(A). The ALJ should also develop the evidence sufficient to allow a determination of whether the Kaiser program was a “recognized drug rehabilitation program,” including whether it is authorized and licensed under the provisions of OAR Chapter 415, or authorized and licensed under similar provisions in a state other than Oregon. ORS 657.176(9)(b)(A); OAR 471-030-0125(2)(i). The ALJ should further inquire into all types of accreditation or licensing for that program, and the basis for any witness’s belief about the accreditation, licensing or authorization for the program. Finally, since ORS 657.176(9)(b)(A) requires that “documentation of participation in the program” must be provided to the Department, the ALJ should ask claimant if he supplied a copy of the progress report that became hearing Exhibit 2, or a like signed document meeting the requirements of OAR 471-030-0125(9)(2)(i)(B), to the Department and when he did so.

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 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 was disqualified from

benefits as a consequence of committing a disqualifying act, Hearing Decision 16-UI-61025 is reversed, and this matter remanded for further development of the record.

**DECISION:** Hearing Decision 16-UI-61025 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service:** August 5, 2016

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-61025 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.

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