

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1032-R

Request for Reconsideration Granted
Appeals Board Decision 2016-EAB-1032 Adhered To

PROCEDURAL HISTORY: On March 28, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision (decision # 101208) concluding that claimant did not actively seek work from February 14 through March 12, 2016 (weeks 7-16 through 10-16). Claimant filed a timely request for hearing. On April 21, 2016, ALJ S. Lee conducted a hearing, and on April 28, 2016, issued Hearing Decision 16-UI-58464, reversing decision # 101208. On May 2, 2016, ALJ S. Lee issued Amended Hearing Decision 16-UI-58620, affirming the Department's decision. On May 16, 2016, claimant filed an application for review of Amended Hearing Decision 16-UI-58620 with the Employment Appeals Board (EAB). On May 18, 2016, EAB issued Appeals Board Decision 2016-EAB-0561, affirming Amended Hearing Decision 16-UI-58620. On June 2, 2016, claimant submitted a written argument to EAB. To address the issue raised in claimant's argument, EAB exercised its discretion under ORS 657.275(3) and reconsidered Appeals Board Decision 2016-EAB-0561. On June 7, 2016, EAB issued Appeals Board Decision 2016-EAB-0561-R, reversing Hearing Decision 16-UI-58620, and remanding the matter to the ALJ for further development of the record. On August 15, 2016, ALJ S. Lee conducted a hearing, and on August 23, 2016, issued Hearing Decision 16-UI-66159, affirming decision # 101208. On September 2, 2016, claimant filed an application for review with EAB. On September 16, 2016, EAB issued Appeals Board Decision 2016-EAB-1032, affirming Hearing Decision 16-UI-66159. On October 4, 2016, claimant filed a request for reconsideration of Appeals Board Decision 2016-EAB-1032. We grant claimant's request for reconsideration to address some of the issues raised in his request.

In Appeals Board Decision 2016-EAB-1032, we found that claimant failed to actively seek work during the weeks at issue (weeks 7-16 through 10-16) and concluded that he was therefore ineligible to receive benefits for those weeks under ORS 657.155(1)(c), which requires that individuals must actively seek work during each week for which unemployment benefits are claimed. Claimant did not dispute the finding that he performed no work search activities during the weeks at issue, but asserted that he was not required to look for work because he had been temporarily laid off by his regular employer.¹

¹ Under OAR 471-030-0036(5)(b) (February 23, 2014), individuals who are on a temporary layoff of four weeks or less and who have been given a date to return to work within four calendar weeks of the layoff date are excused from conducting an active work search.

Because claimant worked one day a week for his customary employer during each of the weeks at issue, however, we found that his work hours had been reduced and that he had not been laid off. We therefore concluded that he was not exempt from the requirement to actively search for work. Appeals Board Decision 2016-EAB-1032 at 2. We also rejected claimant's contention that he was a "partially employed individual" who may not be required to engage in work search activities under OAR 471-030-0060(4) (December 25, 2005).² OAR 471-030-0060(1) defines a "partially unemployed individual" as one who has been working full time for an employer "and remains attached to their usual and regular employer," who begins working for the employer some but less than the individual's customary full time hours due to lack of full time work, who earns less than the weekly benefit amount, and who expects to return to full time work for the employer. We noted that Department records showed that claimant had worked less than full time for his regular employer during the fourth quarter of 2016, the quarter in which the employer reduced his hours, and that he had worked full time during only one quarter out of the six quarters prior to fourth quarter of 2016. Appeals Board Decision 2016-EAB-1032. Because claimant had not been working full time for the employer prior to the date his hours were reduced, we concluded he did not fulfill the requirements to qualify as a "partially unemployed individual."

In his request for reconsideration, claimant asserted that he understood, based on the Department materials he received and reviewed when he filed his claim, that he had been temporarily laid off by his employer. Claimant contended that "[i]f it is the intention of the unemployment department that an unemployed claimant is not eligible for unemployment benefits if they work for the employer which they are separated from (laid off or partially unemployed) why is this not made clear in the documents?" Reconsideration Request at 8. While we agree that the Department's "Claimant Handbook," UI Pub 350 (5/15), to which claimant referred and upon which he based his arguments, does not define the difference between a reduction in work hours and a layoff, the handbook contains the following advisement for part time workers:

If you are working part-time and earn less than your *weekly benefit amount*, you may be eligible to receive benefits. You must also continue to seek, and be willing to accept permanent, temporary, full-time, and part-time work during each week you continue to claim. "Claimant Handbook" at 13.³

This section put claimant on notice that he needed to search for work during any weeks he was working part time for the employer and claiming benefits. If claimant was uncertain whether he was a laid off worker or part time worker, he could and should have sought clarification from a Department representative.

Also in his request for reconsideration, claimant took issue with EAB's conclusion that he was not a "partially employed individual." In Appeals Board Decision 2016-EAB-1032, EAB noted that the Department representative who testified at the hearing on remand was unable to explain how the

² OAR 471-030-0060(4) (December 25, 2005) appears to exempt "partially unemployed individuals" from the requirement to search for work for a four week period.

³ We take official notice of the "Claimant Handbook," a document contained in Department records. OAR 471-0041-0090(3) (October 29, 2006). Any party that objects to our taking notice of this fact must submit its objections to this office in writing, setting forth the basis of the objection, within 10 days of the date on which this decision is mailed. Unless such an objection is received, the noticed document will remain part of the record.

Department interpreted OAR 471-030-0060, and whether it applied to claimant's circumstances. EAB expressed its expectation that at future hearings in which the applicability of OAR 471-030-0060 was at issue, "the Department will provide a witness who is knowledgeable about the Department's interpretation and application of this rule." Appeals Board Decision 2016-EAB-1032 at n.2. In his request for reconsideration, claimant responded as follows with this statement:

Why 'in the future'? If the EAB is going to disqualify me from my benefits using OAR 471-030-0060 I believe that the departments [sic] interpretation of OAR 471-030-0060 is crucial. I believe this alone is a reason to grant me a new trial. Reconsideration Request at 7.

EAB certainly expects that any future hearings at which the rules concerning "partially employed individuals" are at issue will include testimony from knowledgeable Department witnesses regarding ambiguities in these rules. Such testimony is not needed in regard to those provisions of the rule that are clear and require no interpretation, however. One of the explicit requirements to qualify as a "partially unemployed individual" under OAR 471-030-0060(1) is that the individual must have been working full time for an employer prior to the date on which the employer reduced that individual's work hours. As discussed above, the record shows that claimant was not working full time prior to the date on which his hours were reduced, a finding that claimant does not challenge in his request for reconsideration. Claimant was therefore not a "partially employed individual" and not subject to any exemption from work search requirements the rules may provide to such individuals.

For the above reasons, EAB did not err concluding that claimant was required to actively search for work during the weeks at issue, and is disqualified from receiving unemployment benefits because he did not do so. Because we find no error of material fact or law in EAB Decision 2016-EAB-1032 that would require correction, we adhere to that decision on reconsideration. *See* ORS 657.290(3) (reconsideration by EAB may include making a new decision "to the extent necessary and appropriate for the correction of a previous error of material fact or law").

DECISION: Reconsideration is granted. Appeals Board Decision 2016-EAB-1032 is adhered to on reconsideration.

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

DATE of Service: October 7, 2016

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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