

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1295

Reversed & Remanded

PROCEDURAL HISTORY: On September 7, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 155236). Claimant filed a timely request for hearing. On October 26, 2016, ALJ Frank conducted a hearing, and on November 3, 2016, issued Hearing Decision 16-UI-70526, affirming the administrative decision. On November 16, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Shangri La employed claimant as a housing resource specialist from November 5, 2015 until August 18, 2016. A requirement of claimant's position was that she maintain a criminal record that was acceptable to the Oregon Department of Human Resources (DHS).

(2) On June 19, 2016, claimant was arrested for Driving Under the Influence of Intoxicants (DUII). Claimant subsequently entered into a diversion program, which required that she participate in an alcohol education program. Claimant also installed a mandatory ignition interlock device on her car. The device required claimant to blow into a mouthpiece before starting her car, and prevented the car from starting if her blood alcohol level was over the legal limit. Exhibit 1.

(3) On July 20, 2016, the employer learned about claimant's arrest. The employer suspended claimant, pending submission of her criminal history to DHS.

(4) On August 16, 2016, DHS notified the employer that claimant's criminal history was not approved. On August 18, 2016, the employer discharged claimant for her inability to pass the DHS criminal background check.

CONCLUSION AND REASONS: Hearing Decision 16-UI-70526 is reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for additional proceedings.

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 necessary to the performance of the occupation involved is misconduct, "so long as such failure is reasonably attributable to the individual." OAR 471-030-0038(3)(c).

In Hearing Decision 16-UI-70526, the ALJ concluded that the employer discharged claimant for "failure to maintain a license, certification or other similar authority necessary to the performance of the occupation involved." Hearing Decision 16-UI-70526 at 2. The ALJ found that claimant understood that her employment was dependent on "authority to work" granted by DHS, and that the revocation of her "authority to work" that led to her discharge resulted from a DUII charge "to which she had pleaded guilty and had been convicted." The ALJ concluded that claimant's discharge was based on factors "reasonably attributable" to her actions and therefore constituted misconduct. *Id.* at 3.

The record fails to support the ALJ's conclusion that claimant engaged in misconduct by failing to maintain a license or certification necessary to her occupation under OAR 471-030-003(c). The evidence shows that the requirement that claimant have and maintain a criminal background acceptable to DHS was a condition of her employment in the *position* of housing resource specialist. Exhibit 1, 8/17/16 Letter from the employer to claimant. There is no evidence in the record to demonstrate that a DHS approved criminal background was necessary to the performance of the general *occupation* of housing specialist.

Because the employer discharged claimant for her inability to maintain a criminal record acceptable to DHS due to her arrest for DUII, it is necessary to determine if the behavior that resulted in claimant's arrest constituted a willful or wantonly negligent violation of the employer's standards under the general definition of misconduct in OAR 471-030-0038(3)(a). The record developed at the hearing is insufficient to make such a determination. Claimant asserted that at the time she was arrested for DUII, she "had been imbibing at an outside beer garden while listening to friends' bands at Waldport's Beachcomber Days but had stopped hours before, apparently there was still some in my system." Claimant also refers to her "poor judgment" in choosing to drive home on the night she was arrested. Exhibit 1, Claimant's Hearing Request to DHS. On remand, the ALJ must ask claimant how much alcohol she had consumed on the day she was arrested, how much time elapsed between the time she consumed alcohol and the time she decided to drive home, how and why she decided to drive after consuming alcohol, and whether she was aware of the consequences that might result from her decision to drive. The ALJ must ask any other questions necessary to determine claimant's state of mind on the date she was arrested for DUII. A full inquiry into the facts that resulted in claimant's arrest is needed to determine if claimant's behavior was a willful or wantonly negligent disregard of the employer's interest.

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-70526 is reversed, and this matter is remanded for further development of the record.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-70526 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.

DECISION: Hearing Decision 16-UI-70526 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: December 12, 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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