EO: 200
BYE: 201739

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0184

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 17, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 153334). The employer filed a timely request for hearing. On February 2, 2017 ALJ Frank conducted a hearing, and on February 10, 2017 issued Hearing Decision 17-UI-76691, affirming the Department's decision. On February 13, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Clackamas County employed claimant as a deputy assigned to its jail from sometime before August 2016 until October 6, 2016.

(2) The employer expected claimant to comply with all of its policies. In particular, the employer expected claimant to ensure that all inmates under his supervision were accounted for and in their assigned cells after nightly lockdown occurred. The employer also expected claimant to provide honest information in response the employer's inquiries about his work performance. Claimant understood the employer's expectations as a matter of common sense and based on common workplace practices.

(3) When the jail was not locked down, inmates were allowed to leave their assigned cells and visit other inmates' cells. Before August 27, 2016, there was no established time for nightly lockdown in the jail. It varied depending on events that had occurred in the jail that day and could be as late as 2:00 or 3:00 a.m. It was not uncommon for jail deputies to allow inmates to visit the cells of other inmates after lockdown was in effect.

(4) On the night of August 27, 2016, claimant was working in the female section of the jail when an inmate asked him if she could leave her assigned cell to visit some other inmates because she was being transported to prison on the following day. Claimant allowed her to do so, with the result that there were three inmates in one cell rather that only the two assigned. Sometime later, the inmates in that cell placed bedsheets over their clothes and began behaving playfully. During that night, claimant asked the

inmates what they were doing and was told they were having a "toga party." Transcript at 25. Also during that night, another deputy contacted claimant to ask about the bedsheets the inmates were wearing. Claimant told the deputy, "Don't worry about it. I'll take care of it." Transcript at 29. Claimant made a head-count report that night and did not report any unusual activity on the cell block. Sometime during that night, an inmate came up to claimant complaining of pain. Claimant called the nurse and the nurse told him to give the inmate an aspirin from the emergency kit. Claimant did so. Claimant's shift ended on August 28, 2016 at 2:00 a.m.

(5) After August 28, 2016, the employer learned of the "toga party" and began an investigation into claimant's behavior that evening. As a result of the investigation, the employer concluded claimant was dishonest when he did not tell the deputy who contacted him or the deputy to whom he made the head-count about the toga party, was dishonest when he denied during the investigation that the inmates were not wearing any clothing under the bedsheets they had put on and had not followed protocols when he allowed the inmates to leave their cells and visit with each other during lockdown.

(6) On October 6, 2016, the employer discharged claimant.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. 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. The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer's witness at hearing contended that the employer discharged claimant for various violations of the employer's standards arising from claimant's behavior during the shift beginning on August 27, 2016. With respect to claimant's alleged noncompliance with the employer's lockdown policy by allowing some inmates to mingle after lockdown, the employer's witness agreed with claimant that the time for lockdown varied depending on the events of a particular day, and did not dispute claimant's testimony that it was common practice for deputies to allow visiting to occur among inmates after lockdown and that, for this reason, claimant did not think he was required to put an end to the interactions among a few inmates that took place after lockdown. Transcript at 9, 23, 24. Based on claimant's unrebutted testimony, if claimant did allow a small number of inmates to be outside their assigned cells after lockdown on August 27, 2016, that behavior was not a willful or wantonly negligent violation of the employer's standards as claimant understood them. With respect to the employer's allegations that claimant was untruthful on August 27, 2016 and during the employer's investigation, the employer's witness was generally unable to specify what those lies were when questioned by the ALJ. Transcript at 9-12. In addition, claimant denied he was untruthful or dishonest with the employer in connection with any of the events that occurred during his shift on August 27-28, 2016. Transcript at 27, 29. While the employer's witness specifically contended that claimant was dishonest when he denied in the investigation that he knew the inmates were naked under the sheets they were using as togas on August 27, 2016 and the evidence was "overwhelming" that the inmates were not dressed under the togas, the witness presented no evidence that corroborated these assertions or that rebutted or

tended to rebut claimant's denial. As well, that claimant might have failed to report that "unusual activity" in the form of the toga party was occurring on the cell block was not necessarily dishonest, as the employer contended, since claimant had given permission for the inmates to mingle, knew about the "toga party," did not take any steps to stop it, and presumably did not think that under the circumstances the "toga party" was an abnormal or remarkable enough occurrence to merit reporting it. Further, the employer did not provide even rough estimates of the time of day during claimant's shift that his alleged violations of the employer's policies occurred, and did not dispute claimant's contention that he was not on duty and the "majority of the stuff [the employer's accusations] transpired after I left [the shift]." Transcript at 26. On balance, the employer did not meet its burden to show that claimant willfully or with wanton negligence violated the employer's standards during his shift beginning on August 27, 2016.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-76691 is affirmed.

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

DATE of Service: <u>March 16, 2017</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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