

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0383**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 26, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not commit a disqualifying act (decision # 100346). The employer filed a timely request for hearing. On March 14, 2017, ALJ Murdock conducted a hearing, and on March 16, 2017 issued Hearing Decision 17-UI-79051, affirming the Department's decision. On March 31, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented the employer from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), EAB considered only information received into evidence at the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) PeaceHealth employed claimant as a registered nurse (RN) from June 3, 2011 until December 13, 2016.

(2) The employer had a written policy governing the effects of drugs and alcohol in the workplace. Among other things, that policy prohibited nurses from reporting for work or performing work while having any detectable levels of alcohol, drugs or controlled substances in their systems. That policy allowed the employer to administer drug or alcohol tests upon reasonable suspicion. Exhibit 1 at 7-17.

(3) On June 13, 2016, claimant submitted to a reasonable suspicion drug test and tested positive for controlled substances. On October 20, 2016, claimant and the employer entered into a last chance agreement which allowed claimant to return to work. In that agreement, claimant agreed to participate in and comply with the terms of an EAP-approved treatment program, to cooperate in any drug tests required by a licensing board or by the employer's testing program, and to abstain from the use of any non-medically prescribed controlled substances or any chemicals that might adversely affect job performance. Exhibit 1 at 6. The agreement concluded, "I understand that any positive result on a drug

or alcohol test may subject me to immediate discharge or other disciplinary action.” *Id.* Shortly after signing the last chance agreement, claimant returned to work.

(4) After claimant returned to work, the Oregon State Board of Nursing (OSBN) required that as a condition of maintaining her RN license, claimant submit to random drug tests. OSBN’s drug testing was performed by Reliant Behavioral Health. On December 2, 2016, Reliant administered a random five panel hair follicle and expanded opiates drug test to claimant. Immediately after, Reliant administered a urinalysis test to claimant, as its testing protocol required, to confirm the accuracy of the five panel hair follicle test. The five panel hair follicle test administered to claimant was positive for the presence of cocaine and methamphetamines. The urinalysis test administered to claimant was negative for the presence of any controlled substances, including cocaine and methamphetamines.

(5) On October 13, 2016 the employer discharged claimant for violating the terms of the last chance agreement by testing positive for controlled substances on the five panel hair follicle test.

**CONCLUSIONS AND REASONS:** The employer discharged claimant but not for committing a disqualifying act.

ORS 657.176(2)(h) provides that an individual is disqualified from benefits if the individual committed a disqualifying act under ORS 657.176(9) or (10). ORS 657.176(9)(a)(G) states that it is a disqualifying act if an individual violates the terms of a last chance agreement with the employer. ORS 657.176(13)(c) states that a last chance agreement must be “reasonable.” OAR 471-030-0125(7)(b) (March 12, 2006) states that a last chance agreement is “reasonable” only if it “contains only reasonable terms.”

For purposes of this decision, it is assumed the employer’s requirement that claimant enter into a last chance agreement as a condition of continuing to work was a valid and lawful exercise of the employer’s authority under its drug and alcohol policy. The issue we consider is whether it was appropriate for the employer to discharge claimant for violating the last chance agreement when the results of the two drug tests that were administered to her on December 2, 2016 were discrepant, one detecting the presence of prohibited substances and one not detecting them. While a second confirmatory test might not have been not required for a five panel hair follicle test under a strict reading of OAR 471-030-0125(10)(b), the fact remains that such a test was performed and it *did not* confirm the results of the five panel hair follicle test that detected prohibited substances in claimant’s system. Given these contradictory test results, it cannot be concluded more likely than not - or concluded reliably - that on December 2, 2016, claimant had prohibited substances in her system and, for that reason, violated the last chance agreement. While the language of the last chance agreement could be construed to create an absolute prohibition against any positive drug test results, even if those results were shown to be not reliable, such a tortured reading would incorporate an unreasonable term or condition in the agreement and render the agreement unenforceable. OAR 471-030-0125(7)(b). For this reason, as well, the positive result on claimant’s five panel hair follicle test did not violate a reasonable last chance agreement since it was contradicted by the result of the urinalysis test that was contemporaneously administered to claimant.

The employer did not discharge claimant for committing a disqualifying act. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 17-UI-79051 is affirmed.

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

**DATE of Service:** April 19, 2017

**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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