

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0716**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On February 27, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant committed a disqualifying act by violating the employer's written drug and alcohol policy (decision # 115109). Claimant filed a timely request for hearing. On June 1, 2017, ALJ Murdock conducted a hearing, and on June 6, 2017, issued Hearing Decision 17-UI-84999 affirming the Department's decision. On June 12, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

**CONCLUSIONS AND REASONS:** Hearing Decision 17-UI-84999 must be reversed, and this matter remanded for additional proceedings consistent with this order.

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for a disqualifying act. ORS 657.176(9)(a)(G) specifies that an individual is considered to have committed a disqualifying act if the individual violates the terms of a last chance agreement with the employer. For purposes of ORS 657.176(9), a last chance agreement means a reasonable agreement between an employer and an employee who has violated the employer's reasonable written policy. ORS 657.176(13)(c). For purposes of ORS 657.176(9)(a), an employer must follow its own drug policy in order for its policy to be reasonable. OAR 471-030-0125(3)(b) (March 12, 2006). For an employer's policy to be reasonable with respect to drug testing, the employer must either have probable cause for requiring the drug test, or the policy must provide for random, blanket or periodic testing. OAR 471-030-0125(3)(d).

The evidence in this case shows that the employer had a written drug policy, the relevant terms of which are unknown. The evidence also shows that claimant was a medical marijuana user since his date of hire, a fact known to the employer and its former executive director, and that the employer did not enforce its drug policy against claimant for that reason. At some point thereafter, the employer's new executive director decided to enforce the employer's drug policy amongst all employees, including claimant, and administered a company-wide drug test on November 5, 2016, as a result of which claimant tested positive for marijuana. Claimant and the employer then entered a last chance agreement, the full terms of which are also unknown. Claimant's doctor prescribed him a synthetic form of THC, a fact also known to the employer, which claimant used in lieu of marijuana. On January 16, 2017,

claimant submitted to a scheduled drug test required by the last chance agreement and failed the test, after which the employer discharged him for violating the last chance agreement.

In Hearing Decision 17-UI-84999, the ALJ implicitly found, without making specific findings or drawing conclusions, that the employer's written drug policy under which claimant initially tested positive for marijuana in November 2016 was "reasonable," and that the "last chance agreement" between claimant and the employer was consistent with the definition of a last chance agreement set forth in ORS 657.176(13). The ALJ then found and concluded that claimant violated the terms of that last chance agreement by testing positive for marijuana on January 16, 2017, which violation constituted a disqualifying act under ORS 657.176(9).<sup>1</sup> However, the record, as it stands, does not support the ALJ's conclusion.

The employer did not offer, and the ALJ did not elicit, sufficient information showing that the employer followed its written policy by conducting what appears to have been a blanket test of employees for drugs as it apparently did in November 2016. The record therefore fails to show whether or not the employer's drug and alcohol policy was "reasonable" with respect to that test, and, consequently, whether the agreement between claimant and the employer was a "last chance agreement" as that term is defined at ORS 657.176(13). On remand, the employer should submit a copy of the relevant portions of its policy into evidence. Regardless whether the policy is placed into evidence, the ALJ should clarify with the employer whether the employer's November 2016 test of claimant was pursuant to a probable cause, blanket, random or periodic test, ask the employer what its policy allowed with respect to conducting that sort of drug testing, and ask any other questions necessary to determine whether or not the employer followed its written policy with respect to subjecting claimant to drug testing in November 2016.

The employer did not offer, and the ALJ did not elicit, sufficient information about claimant's January 2017 drug test results and whether they violated the last chance agreement.<sup>2</sup> Without evidence of the specific terms of the last chance agreement, and details about the drug test results, we cannot conclude whether claimant violated the last chance agreement. On remand, the employer should submit into evidence a copy of the last chance agreement, and a copy of claimant's January 2017 drug test results. Regardless whether those documents are placed into evidence, the ALJ should ask the employer and claimant to explain the terms of the last chance agreement, and ascertain whether the terms were reasonable and whether the last chance agreement prohibited claimant from testing positive for marijuana or THC or drew a distinction between those test results. The ALJ should inquire about whether the January 2017 drug test results showed that claimant tested positive for marijuana or THC, whether and to what extent claimant and the employer discussed his prescription for synthetic THC, whether the employer authorized claimant to use that substance, whether the synthetic THC would yield a positive drug test, and any other information necessary to establish whether the last chance agreement was reasonable and whether claimant's test results violated it.

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<sup>1</sup> Hearing Decision 17-UI-84999 at 2, 4.

<sup>2</sup> The employer did not provide a clear explanation as to whether it chose to test claimant based on his known history or marijuana use, and then decided to test other employees, or whether it decided to conduct blanket or for cause testing. Audio Record ~ 5:00 to 6:00; 7:30 to 8:30. The employer also failed to clearly explain how it decided which employees to test. *Id.* Finally, the employer failed to show the terms of the claimant's last chance agreement that were violated in January 2017.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That 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(5), *cf.* ORS 183.417(8). *See accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). The ALJ did not conduct a full inquiry into all issues under ORS 657.176 as implemented in OAR 471-030-0125, and absent that inquiry we cannot conclude whether the employer's policy was reasonable for purposes of ORS 657.176(9)(a) or that the employer discharged claimant for committing a disqualifying act.

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-84999 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 17-UI-84999 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service: July 21, 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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