

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0719**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On April 28, 2017 the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant committed a disqualifying act (decision # 110809). Claimant filed a timely request for hearing. On May 30, 2017, ALJ Frank conducted a hearing, and on June 2, 2017 issued Hearing Decision 17-UI-84771, affirming the Department's decision. On June 12, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

**CONCLUSIONS AND REASONS:** Hearing Decision 17-UI-84771 is reversed and this matter is remanded for further development of the record.

OAR 657.176(2)(h) provides that an individual is disqualified from benefits if the individual committed a disqualifying act. An individual is considered to have committed a disqualifying act if the individual violates the terms of a reasonable written policy that governs the effects of drugs or alcohol in the workplace or is under the influence of intoxicants while performing services for the employer. ORS 657.176(9)(a)(A); ORS 657.176(9)(a)(D) states. An individual is considered "under the influence of intoxicants if, at the time a test is administered in accordance with an employer's reasonable written policy, the individual has any detectible level of drugs or alcohol present in the individual's system unless the employer's policy specifies a particular level and an individual "tests positive" when the amount of drugs or alcohol present in the individual's system exceeds the amount prescribed in the employer's reasonable policy or, if no particular cut off level is prescribed, the individual has any

detectible level of drugs or alcohol present in the individual's system. OAR 471-030-0125(2)(c) (March 12, 2006); OAR 471-030-0125(2)(e). In the case of a positive blood or urine test for drugs or alcohol, in order to determine whether an individual fails the test, is under the influence or tests positive for drugs or alcohol, the initial test result must be confirmed by a test conducted in a federal or state licensed clinical laboratory. OAR 471-030-0125(1)(a).

The employer discharged claimant for committing a disqualifying act after she tested positive for alcohol on a urine test that the employer required her to take since she had, among other things, a strong odor of alcohol emanating from her person during a work shift. In Hearing Decision 17-UI-84771, the ALJ concluded that, by this test result, claimant had committed a disqualifying act solely on the basis that the test result was positive. Hearing Decision 17-UI-84771. Assuming without deciding that employer's policy was reasonable and that the employer had a reasonable basis for requiring claimant to submit to the urine test, the ALJ did not inquire of either party whether MedTox, the clinical laboratory that initially evaluated claimant's urine sample and performed the confirmatory test, was a federal or state licensed clinical laboratory and the basis for that conclusion. Without such evidence, it cannot be determined whether claimant's positive test result was valid and disqualified her from benefits. As well, although the employer's witness testified at hearing that the employer's policy had a "zero tolerance" drug and alcohol policy and that having any detectible level of alcohol in claimant's system would violate the policy, the documents the employer submitted indicated that the employer's policy prohibited a blood alcohol content of 0.004% or greater while on duty. Audio at ~16:12; Exhibit 1 at 6. On remand the ALJ should ask the employer's witness which level is the correct one and to explain the cause of this discrepancy.

During the hearing, the ALJ assumed that claimant was discharged due to having committed a disqualifying act and conducted no inquiry about the nature of the work separation. In certain documents it submitted, however, the employer took the position that claimant resigned from work and the separation was a voluntary leaving. Exhibit 1 at 7, 8. On remand, the ALJ should make a sufficient inquiry into the facts surrounding the work separation to allow EAB to determine whether the separation is properly characterized as a discharge or a voluntary leaving, including why the employer told claimant's union representative that it considered claimant to have voluntarily left work, the facts supporting this conclusion and whether, for purposes of this proceeding, the employer considers the separation to have been a voluntary leaving or a discharge and why. The ALJ should also inquire of claimant how she views the work separation and why.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation 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(3); *see accord 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 claimant committed a disqualifying act and the nature of the work separation, Hearing Decision 17-UI-84771 is reversed, and this matter remanded for further development of the record.<sup>1</sup>

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<sup>1</sup> **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-85771 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-84771 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service: July 18, 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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