

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1126-R

Request for Reconsideration Dismissed
Employment Appeals Board Decision 2017-EAB-1126 Remains Undisturbed

PROCEDURAL HISTORY: On June 9, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant committed a disqualifying act (decision # 142856). Claimant filed a timely request for hearing. On August 31, 2017, ALJ M. Davis conducted a hearing, and on September 8, 2017 issued Hearing Decision 17-UI-92166, affirming the Department's decision. On September 16 2017, claimant filed an application for review with the Employment Appeals Board (EAB). On October 19, 2017, EAB issued EAB Decision 2017-EAB-1126, affirming Hearing Decision 17-UI-92166. On October 30, 2017, claimant filed a request for reconsideration of EAB Decision 2017-EAB-1126 accompanied by new written materials not previously submitted into evidence.

CONCLUSIONS AND REASONS. Claimant's request for reconsideration is dismissed. Employment Appeals Board Decision 2017-EAB-1126 remains undisturbed.

ORS 657.290(3) allows EAB to reconsider any previous decision that it has issued for purposes of correcting material errors of fact or law. *See also* OAR 471-041-0145(1) (October 29, 2006). OAR 471-041-0145(2) provides that a request for reconsideration is subject to dismissal unless it "includes a statement that a copy has been provided to the other parties" to the proceeding. Claimant's October 30, 2017 request for reconsideration did not contain such a statement or any similar statement. For this reason, claimant's request for reconsideration is dismissed.

Even if we had allowed claimant's request for reconsideration of EAB Decision 2017-EAB-1126, we would not have considered the new information that claimant submitted along with her request. While OAR 471-041-0090(2) (October 29, 2006) allows EAB to consider information not offered for admission into evidence during the hearing under certain circumstances, claimant did not explain why she did not present this information at hearing or otherwise show that factors or circumstances beyond her reasonable control prevented her from doing so as required by OAR 471-041-0090(2). Absent such a showing, EAB would not have considered this new information, which therefore could not have been used to show that there were any errors of fact or law in Appeals Board Decision 2017-EAB-1126.

And even if we had allowed claimant's request for reconsideration and considered her new information, the outcome of EAB Decision 2017-EAB-1126 would have remained the same. In EAB Decision 017-EAB-1126, we found, as fact, that claimant began participating in an inpatient drug and alcohol treatment program within 10 days after she was discharged for violating the employer's drug and alcohol policy. *Appeals Board Decision, 2017-EAB-1126* at 2. Despite this finding, we concluded that claimant did not fall within the exception from constituting a disqualifying act set forth in ORS 657.176(9)(b)(A) for drug and alcohol policy violations committed by an individual who has entered such a treatment program within ten days after the date of discharge because claimant did not provide, as further required by ORS 657.176(9)(b)(A) and OAR 471-030-0125(2)(i)(B) (March 12, 2006), documentation of such participation in the form of a *signed statement from a representative of the treatment program*. *Appeals Board Decision 2017-EAB-1126* at 3.

While the new written materials that claimant furnished were her discharge papers from the drug and alcohol treatment program at Cedar Hills Hospital, her participation in the program was not questioned in Appeals Board Decision 2017-EAB-1126. The fatal deficiency in the evidence that claimant presented during the hearing and the basis for EAB's conclusion that claimant engaged in a disqualifying act despite her entry into a drug treatment program within ten days of her discharge was her failure to present the signed statement from a representative of the treatment program required by OAR 471-030-0125(2)(i)(B). OAR 471-030-0125(2)(i)(B) does not allow for any exceptions to the requirement of a representative's signed statement before its provisions are applicable and an otherwise disqualifying act may not be considered to have been a disqualifying act. Because the new documents and information that claimant submitted on October 30, 2017 did not include such a signed statement by an authorized representative of the treatment program in which claimant participated, those new documents did not cure the deficiency in claimant's proof and did allow claimant's act to fall within the exception created by ORS 657.176(9)(b)(A), or allow EAB to consider her violation of the employer's drug and alcohol policy to have been a non-disqualifying act. Accordingly, the new documents that claimant submitted did not demonstrate that Appeals Board Decision 2017-EAB-1126 contained any errors of material fact or law, and EAB would have adhered to Appeals Board Decision 2017-EAB-1126 on reconsideration even had EAB considered claimant's new documents.

DECISION: The request for reconsideration filed on October 30, 2017 is dismissed. Employment Appeals Board Decision 2017-EAB-1126 remains undisturbed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: November 7, 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. 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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