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

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EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1314-R

Request for Reconsideration Allowed
Appeals Board Decision 2017-EAB-1314 Adhered to on Reconsideration
No Disqualification

PROCEDURAL HISTORY AND FINDINGS OF FACT: On June 13, 2017, the Oregon Employment Department (the Department) served notice of administrative decision # 82453, which found that claimant was fired by Home Care Workers on May 15, 2017 because she lost the "license, certification or other authority necessary for the job" by failing "to provide your fingerprints after receiving a request via mail from the State," and concluded claimant was "fired for misconduct connected with work." Claimant filed a timely request for hearing. On July 12, 2017, ALJ Monroe conducted a hearing, and on July 14, 2017 issued Hearing Decision 17-UI-88076, concluding claimant's discharge was not for misconduct. Hearing Decision 17-UI-88076 included findings that claimant was discharged by Home Care Workers on May 18, 2017 when that entity "terminated claimant's provider number because she had not completed the fingerprinting process necessary to ensuring [*sic*] that she had successfully passed the background check." Based upon those findings, Hearing Decision 17-UI-88076 reasoned that claimant made substantial efforts to comply with the fingerprinting and background check requirement, submitted fingerprints twice, and received conflicting information from the employer about what she was required to do, making claimant's loss of license – which caused Home Care Workers to terminate her provider number and discharge her from caring for its clients – *not* attributable to claimant as willful or wantonly negligent misconduct. On August 3, 2017, Hearing Decision 17-UI-88076 became final without any party to the proceedings having filed an application for review with the Employment Appeals Board (EAB).

On August 8, 2017, the Department served notice of administrative decision # 91630, which, like decision # 82453, found that claimant was fired by Home Care Workers on May 15, 2017 because she lost the "license, certification or other authority necessary for the job" by failing to "provide your fingerprints when requested by the State of Oregon . . .," and concluded that claimant was "fired for misconduct connected with work." Claimant filed a timely request for hearing. On October 25, 2017, ALJ S. Hall conducted a hearing and issued Hearing Decision 17-UI-95370, concluding that claimant's discharge by Home Care Workers *was* for misconduct. Like Hearing Decision 17-UI-88076, Hearing Decision 17-UI-95370 found as fact that claimant's discharge was based upon the May 18th termination of her provider certification for failing to "submit the fingerprints necessary to complete the background

check." Based upon those findings, Hearing Decision 17-UI-95370 reasoned that claimant's failure to comply with the fingerprinting and background check requirement "was wantonly negligent." On November 14, 2017, claimant filed a timely application for review of Hearing Decision 17-UI-95370 with EAB. On December 13, 2017, EAB issued Appeals Board Decision 2017-EAB-1314, vacating Hearing Decision 17-UI-95370 and finding claimant not disqualified from receiving benefits. On January 2, 2018, the Department filed a request for reconsideration of Appeals Board Decision 2017-EAB-1314 with EAB.

EAB considered the Department's written argument when reaching this decision.

CONCLUSIONS AND REASONS: The Department's request for reconsideration is allowed. On reconsideration, we adhere to Appeals Board Decision 2017-EAB-1314.

EAB may in its discretion reconsider its previous decisions on its own motion or upon request by any party. *See* ORS 657.290(3), OAR 471-041-0145(1) (October 29, 2006). The request is subject to dismissal unless it includes a statement that it was provided to the other parties and is filed on or before the 20th day after the decision sought to be reconsidered is mailed. OAR 471-041-0145(2). In this case, the Department, a party to this case, filed a request for reconsideration within the 20-day period allowed under the rule, and the request included a statement that it was provided to the other parties. The Department's request for reconsideration is, therefore, allowed.

The Department's request is predicated on its argument that EAB erred in finding that the work separation adjudicated in decision # 91630 was "an adjudication of the same separation determined on July 14, 2017 in Hearing Decision 17-UI-88076" because claimant worked for "two separate consumers," each of whom had a distinct "ability to hire, fire, and direct the individuals [*sic*] work," and that Home Care Workers acted as those consumers' agent, not as claimant's direct employer. The Department indicated that it "has a clear policy regarding the employment relationship of individuals being paid by Home Care Workers, which was released in written form on August 2, 2007," and attached to the Department's request for reconsideration.

As a preliminary matter, the Department did not include a copy of the August 2, 2007 policy with its request. However, EAB has access to certain Department records; we have identified the policy and admitted it into the record as necessary to complete the record, marked as EAB Exhibit 1.[1] The policy sets forth the varying responsibilities of Home Care Workers and its clients, including that the clients are responsible to "interview, hire and train the provider," although providers must be in and maintain compliance with the Home Care Workers program, and that the clients "also have firing rights." The policy goes on to say, "For these reasons, and despite the fact HCW has agreed to be the employer of record for the clients they serve, **the "real" employer in these cases is the client for whom the care provider is working**." (Emphasis in original.) The policy also states that Department employees are to send notices and decisions involving Home Care Workers to "HCW for" the client.

[1] Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. Unless such objection is received and sustained, the noticed fact will remain in the record at EAB Exhibit 1.

We cannot agree that we find the policy "clear" in the context of this case. The policy does not set forth, and we cannot determine, what it means to be a "real" employer versus the "employer of record," or how that distinction fits into the statutory structure governing the Department's identification of and notice to parties. More relevant to this case, despite the terms of its policy, the administrative decisions in both decision # 91630 and decision # 82453 named "Home Care Workers" as the employer and made "findings" about claimant stating, "You were employed by Home Care Workers . . ." The records developed in these cases also demonstrate that, notwithstanding the unusual relationship between Home Care Workers and caregivers, the clients in these cases continued to employ claimant for weeks after she lost her Home Care Workers certification, the clients did not choose to discharge her, and she was released from jobs with two clients by the Home Care Workers program, *not* the clients. Therefore, while there is no dispute that claimant served two different clients while with Home Care Workers, there is a significant amount of evidence suggesting that claimant was, nevertheless, employed by and discharged by Home Care Workers. For that reason, we cannot conclude that we erred in so finding.

Even if we concluded otherwise, the outcome of this decision would remain the same, because the "party" in these matters that is precluded from relitigating the same set of facts is the Department, not Home Care Workers. Regardless of how many consumers claimant might have served through Home Care Workers, Home Care Workers determined in May 2017 that claimant should be separated from service to all her clients based upon claimant's single act of failing to maintain a certification necessary for employment with Home Care Workers program clients. It was determined at a hearing to which the Department was a party (albeit non-participating) that claimant's May 15th loss of Home Care Workers certification was not the result of misconduct on her part. The Department is, and should be, bound by that determination. In other words, because it was determined on July 14, 2017 that claimant's loss of certification was not disqualifying misconduct, and that decision became final without the Department having appealed it to EAB, the Department cannot, a month later, institute a different proceeding against the same claimant alleging that the same May 15th loss of certification was disqualifying misconduct. Claimant's single loss of certification cannot be both qualifying and disqualifying, regardless how many clients or employers she served, be it one or several. The Department, as a party to the cases against this claimant, is precluded from bringing the same cause of action against claimant twice, and precluded from relitigating the same issue twice.

Finally, even if we had agreed with the Department's arguments in favor of reconsideration, the ultimate outcome in this matter – that is, claimant's qualification for benefits – would remain the same, albeit on a different theory. There is no factual dispute that claimant was required to maintain certification with Home Care Workers as a condition of employment as a caregiver, nor is there any dispute that claimant lost her certification because she failed to complete a fingerprinting process to renew her certification. However, in order for claimant's loss of certification to be considered disqualifying, it must have been attributable to her own willful or wantonly negligent conduct.[2] The record developed during the hearing

[2] 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. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. OAR 471-030-0038(3)(c) provides, "The willful or

in this case shows that claimant submitted paperwork to be recertified on two separate occasions months prior to the date her certification lapsed, her paperwork was lost once by the agency, she was not advised of all the requirements in advance, and she was not advised that her paperwork could expire. Although it appears that she made significant efforts to renew her certification, those efforts were further stymied by the fact that her hours of work and mandatory training sessions conflicted with the hours of the office she needed to contact in order to renew her certification, affecting her ability to readily contact that office. In other words, although claimant failed to maintain a necessary certification, and that failure was attributable to claimant, given her repeated efforts and inability to complete her recertification process despite those efforts, the failure was not willful, nor was it wantonly negligent. Claimant's discharge for failing to maintain certification through Home Care Workers was, therefore, not misconduct, and any discharge based upon that failure would not disqualify her from receiving unemployment insurance benefits.

For all those reasons, alternatively, we adhere to our previous decision on reconsideration, and conclude that claimant may not be disqualified from receiving benefits because of the work separation at issue in this case.

DECISION: The Department's request for reconsideration is allowed. On reconsideration, we adhere to Appeals Board Decision 2017-EAB-1314.

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

DATE of Service: <u>January 17, 2018</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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wantonly negligent failure to maintain a license, certification or other similar authority necessary to the performance of the occupation involved is misconduct, so long as such failure is reasonably attributable to the individual."