

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0240**

*Affirmed*  
*Ineligible December 31, 2017 to February 3, 2018*

**PROCEDURAL HISTORY:** On January 12, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work and did not actively seek work from December 31, 2017 to January 6, 2018 (decision # 92340). Claimant filed a timely request for hearing. On March 1, 2018, ALJ Griffin conducted a hearing, and on March 2, 2018 issued Hearing Decision 18-UI-104323, concluding claimant was not available for work from December 31, 2017 to February 3, 2018. On March 7, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB received claimant's written argument. Although claimant argued that she was in fact available for work during the weeks at issue "because I sought and was available to work a flexible part-time schedule identical to my part-time work schedule at my previous job, a schedule that I maintained for over 11 years prior to the closure of my employer's offices in Oregon," and that she "prefer[s] to work flexible hours that do not exceed 4-5 hours per day to accommodate my caregiving responsibilities," claimant's description of her availability to work is not consistent with how the Employment Department has defined that term. For example, although claimants are generally required to be "[w]illing to work full time, part time, and accept temporary work opportunities, during all of the usual hours and days of the week customary for the work being sought" and "[n]ot imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time," the Employment Department has recognized that a parent or other individual with responsibility for caring for children under the age of 18 who require additional care, "who is not willing to or capable of working a particular shift because of a lack of child care" may, under certain circumstances, still be deemed "available for work" so long as the unwillingness is confined to "a particular shift," the work is customarily performed during other shift(s), and the individual is willing to work during the other shift(s). *See generally* OAR 471-030-0036(3) and (4). In this case, however, claimant is not willing to work full time at all, nor are her schedule restrictions confined to just one of two or more available shifts, as would be required by the administrative rule as a condition of eligibility. She is available to work only a partial shift each day (4-5 hours) in a field which, with some variation based upon workload or deadlines, usually involves only one customary shift. We therefore agree with the ALJ that claimant

was not “available for work” during the weeks at issue, as that term is defined by the Employment Department.

As to claimant’s challenges to the validity or constitutionality of the Department’s administrative rule defining availability, the Oregon Legislature has delegated the authority to define terms such as “available for work” to the Employment Department. *See McPherson v. Employment Div.*, 285 Or. 541, 591 P.2d 1381 (1979) (ORS chapter 657 contains two types of terms, those primarily for the courts to interpret and define, and those the agency is primarily responsible to interpret and define); *Oliver v. Employment Div.*, 40 Or. App. 487, 595 P.2d 1252 (1979) (the term “available for work,” like the term “good cause” in *McPherson*, calls “for completing a value judgment that the legislature itself has only indicated” and the authority to define the term therefore lies with the Department). EAB does not have the authority to articulate or change policy through interpretation of the Department’s rules; EAB is a reviewing body that *applies* the Department’s rules, not a policy-making one that *interprets* them. *See McPherson*, 285 Or. At 546-547, 591 P.2d 1381; *Johnson v. Employment Dept.*, 187 Or. App. 441, 446-447, 67 P.3d 984 (2003) (*Johnson I*). The Department has defined “available for work” in conformity with federal regulations setting forth requirements for state workforce agencies under the Federal Unemployment Tax Act. *See e.g.* 26 U.S.C 23 § 3304; 20 CFR § 604. The Department appears to have lawfully adopted OAR 471-030-0036 pursuant to its legislatively delegated authority, it appears that the interpretation conforms with state and federal law, and we are, therefore, bound to apply it. EAB considered the remainder of claimant’s argument when reaching this decision to the extent it was relevant and based upon the hearing record.

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the hearing decision under review is **adopted**.

**DECISION:** Hearing Decision 18-UI-104323 is affirmed.

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

**DATE of Service:** April 10, 2018

**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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