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

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0449-R

Appeals Board Decision 2018-EAB-0449 Adhered to on Reconsideration
Order No. 18-UI-107128 Reversed
Ineligible Weeks 5-18 to 7-18

PROCEDURAL HISTORY: On March 14, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not eligible for benefits because she did not actively seek work from January 28, 2018 to February 17, 2018 (decision # 90528). Claimant filed a timely request for hearing. On April 9, 2018, ALJ Scott conducted a hearing, and on April 11, 2018 issued Order No. 18-UI-107128, concluding that although claimant did not actively seek work from January 28, 2018 to February 17, 2018, the Department was estopped from denying claimant benefits. On May 1, 2018, the Department filed an application for review with the Employment Appeals Board (EAB). On June 1, 2018, EAB issued Appeals Board Decision 2018-EAB-0449, reversing Order No. 18-UI-107128, concluding claimant was not eligible for benefits from January 28, 2018 to February 17, 2018, and the Department was not estopped from denying claimant benefits. On June 5, 2018, claimant filed a timely request for reconsideration. This decision is issued pursuant to EAB's authority under ORS 657.290(3).

FINDINGS OF FACT: The Findings of Fact in Appeals Board Decision 2018-EAB-0449 are adopted.

CONCLUSIONS AND REASONING: Claimant's request for reconsideration is allowed pursuant to OAR 417-041-0145 (October 29, 2006). Claimant did not actively seek work during the weeks at issue and the Department is not estopped from denying claimant benefits for that reason. Appeals Board Decision 2018-EAB-0449, so finding, is adopted and incorporated by reference as clarified herein.[1] We write to address claimant's arguments on reconsideration.

[1] We have included a convenience copy of Appeals Board Decision 2018-EAB-0449 with the copies of this decision that were mailed to the parties.

Claimant argued that EAB erred in Appeals Board Decision 2018-EAB-0449 by stating, "There is no dispute in this case that claimant did not conduct an 'active work search' by conducting five work seeking activities each week that included at least two direct contacts with employers. The only issue in this case is whether the Department should be estopped from denying claimant benefits based upon her failure to actively seek work." Claimant wrote, "Claimant did not concede that she failed to "actively seek work," and in addition to the estoppel argument, Claimant challenged the application of the "five work seeking activities rule in her case." Although nothing in EAB's decision stated that claimant had in fact had conceded any fact or issue, we agree that EAB poorly phrased the referenced passage, and should more accurately have written that the record shows that claimant did not conduct five work seeking activities each week that included at least two direct contacts with employers, and her only work seeking activities involved contact with the employer that had hired her and preparation for a new job that was scheduled to begin after the weeks at issue.

Claimant also argued that claimant "was actively seeking work in that she was preparing to start a new job," and "[a]ny interpretation of OAR 471-030-0036(5)(a) that results in a contrary finding would be an abrogation of the statute."[2] However, ORS 657.155(1)(c) sets forth the requirement that unemployment insurance claimants actively seek work as a condition of being eligible for benefits, but does not define the term. The Oregon Legislature has delegated the authority to define terms such as "actively seeking 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) (in a situation involving a term similar to "actively seek work," the Court found that the term "available for work" 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 exercised its delegated authority and defined "actively seek 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. § 3304; 20 CFR § 604; 42 U.S.C. § 503(a)(12) (providing that, "The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of each State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provisions for * * * [a] requirement that, as a condition of eligibility for regular compensation for any week, a claimant must be . . . actively seeking work"). 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. It does not appear that the Department's 2014 amendment of OAR 471-030-0036 to include what the Court of Appeals has elsewhere described as a "quantitative description of what the department views as adequate work-seeking activities" would require an abrogation of its earlier "general statement" of what an ordinary and reasonable person would do to actively seek work; those two provisions appear to be

[2] We agree with claimant that the February 23, 2014 version of OAR 471-030-0036 applies in this case, and have consistently applied that version of the rule throughout these proceedings.

harmonious and easily reconciled to give meaning to the whole. *See Stone v. Employment Dept.*, 274 Or. App. 555, 560, 361 P.3d 638, 641 (2015) (wherein the Court of Appeals described the 2014 addition of the five work seeking activity requirement as a "quantitative description").

Claimant also argued that EAB erred because it failed to specifically accept or reject claimant's written arguments in Appeals Board Decision 2018-EAB-0449. We disagree that EAB erred. EAB noted in the decision that claimant's arguments were considered by the board in the course of reaching that decision; there is no requirement in statute or rule that EAB specifically accept or reject a party's arguments, and arguments that are considered and not specifically addressed or accepted are, implicitly, rejected. Even if we had specifically accepted or rejected claimant's written arguments, however, the outcome of this decision would have remained the same.[3] Claimant had argued that the decision to deny her benefits in this case "contradicts clear meaning and intent behind ORS 657.155(1)(c) and OAR 471-030-0036(5)(a)." However, claimant did not provide authority for that assertion beyond what appears to have been the opinion that "[n]o reasonable interpretation of ORS 657.155(1)(c) would exclude Claimant from eligibility under these facts." Claimant argued that the "ordinary and reasonable person" standard set forth in the rule should control the outcome of the case, but by doing so, in effect, claimant would ignore the rest of the rule in which the Department "quantitatively" defined that what "an ordinary and reasonable person would do to return to work at the earliest opportunity," with exceptions that do not apply in this case, is "conduct at least five work seeking activities per week." In other words, the rule, read in its entirety, establishes the requirement that an individual do what an ordinary and reasonable person would do, and clarifies the Department's position that an ordinary and reasonable person seeking to return to work at the earliest opportunity would conduct at least five work seeking activities each week. We also note, however, that to any extent the Department's subjective intent in quantitatively clarifying what an ordinary and reasonable person would do to return to work might, as claimant alleges, be to "eliminate" the "ordinary and reasonable person test," it appears that doing so would be within the Department's delegated authority.

In reaching this decision and rejecting claimant's arguments, we considered that ORS 657.155(1)(c) modifies the term "actively seeking" with "and unable to obtain suitable work," and the Department has not defined in rule what it means to be "unable to obtain suitable work" in that context.[4] Claimant arguably could be said to be *not* "unable to obtain suitable work," generally speaking, and exempt from the related requirement that she "actively seek" work, because she had received and accepted an offer of work. However, it is legally significant that the work was not set to begin until after a few weeks had passed. A fundamental tenet of the unemployment insurance program, reflected in the text of ORS 657.155, is that an individual must be eligible for benefits – and therefor actively seeking work – during each distinct week claimed, and OAR 471-030-0036(5) reflects that requirement by stating that individuals must conduct at least five work seeking activities "per week." Therefore, although claimant had an offer of work set to begin after the weeks at issue, and was *not* "unable to obtain suitable work"

[3] Any arguments not specifically addressed in this decision are rejected.

[4] ORS 657.155(1) states, in pertinent part:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the Director of the Employment Department finds that:
> * * *
> (c) The individual is able to work, is available for work, and is actively seeking and unable to obtain suitable work.

once that work began, she did *not* have an offer to perform that work during the three weeks at issue, and therefore *was* "unable to obtain suitable work" during those weeks.

To any extent claimant's argument is that the Department nevertheless should exclude her situation from the actively seeking work requirement because requiring individuals who have accepted offers of work to continue seeking work until the new job begins is unethical or unfair, the fact remains that the Department has not excluded claimant's situation from its rule. Had the Department meant to carve out an exemption from the active work search requirement for individuals scheduled to begin a new job one or more weeks hence, the Department has the authority to do so, and has in fact excluded other situations from the active work search requirement, including individuals temporarily laid off work under limited circumstances and certain members of closed unions, but has not elected to exclude claimant's situation.

Claimant's situation is not unique. Many claimants receive and accept offers of work under circumstances where the jobs are not set to begin until one or several weeks have passed; it is an unfortunate fact, however, that many times the offer of new work is rescinded or the anticipated job does not come to fruition or does not begin when anticipated, and, perhaps for such reasons, the Department has concluded that holding out for a prospective job offer might not be what an ordinary and reasonable person would do to return to work at the "earliest opportunity." Given that the Department has exempted some situations, but chosen not to exempt individuals in claimant's situation from the requirement that they actively seek work, and has chosen to characterize such individuals as "unable to obtain suitable work," we infer that the application of the ORS 657.155(1)(c) and OAR 471-030-0036(5) work-seeking requirement to individuals in claimant's situation – and concomitant lack of an exception for such individuals – was a policy adopted by the Department with intent, and reflects the reality that not all prospective jobs that are offered and accepted materialize as planned. It is not EAB's role to articulate or change the Department's policy through interpretation of the Department's rules.

The U.S. government has set forth the requirement that states require claimants to actively seek work as a condition of eligibility for unemployment insurance program funding. 42 U.S.C. § 503(a)(12). The Oregon legislature provides that unemployed individuals are only eligible for benefits "with respect to any week" if the individual is "actively seeking and unable to obtain suitable work." ORS 657.155(1)(c). The legislature delegated to the Department the authority to define what it means to be "actively seeking and unable to obtain suitable work" in "any week," and the Department has done so through OAR 471-030-0036(5), which sets forth the "ordinary and reasonable person" standard and explains that, in the Department's view, an ordinary and reasonable person seeking to return to work at the earliest opportunity conducts at least five work seeking activities every week. Claimant did not satisfy that requirement, and therefore is ineligible for benefits during the week at issue.

DECISION: On reconsideration, Appeals Board Decision 2018-EAB-0449 is adhered to as clarified herein. Order No. 18-UI-107128 is set aside, as outlined above.

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

DATE of Service: <u>July 9, 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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