

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0799

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 18, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 83457). Claimant filed a timely request for hearing. On June 20, 2018, ALJ Frank began a hearing, but continued the hearing to July 5, 2018, so that the Office of Administrative Hearings (OAH) could send the parties a new notice of hearing that contained notice of the drug and alcohol adjudication policy issues. On July 5, 2018, ALJ Frank conducted a hearing, and on July 13, 2018 issued Order No. 18-UI-113107, concluding that the Department's drug and alcohol adjudication policy applied to this case and that claimant did not commit a disqualifying act under that policy. On August 15, 2018, the employer filed a late application for review¹ with the Employment Appeals Board (EAB).

In its application for review, the employer asserted that its application for review was late because OAH mailed Order No. 18-UI-113107 to the employer, but not its representative. OAR 471-041-0070(2) provides that the 20-day period for filing an application for review may be extended a reasonable time upon a showing of good cause. Good cause exists where the applicant provides evidence that factors beyond its control prevented timely filing. OAR 471-041-0070(2)(a). A reasonable time is defined by OAR 471-041-0070(2)(b) as seven days after the factor that prevented the timely filing ceased to exist. OAH failed to update the employer's address to include the address of its representative as requested by the employer during the June 20, 2018 hearing and did not serve a copy of the hearing order on the employer's representative. Audio Record (June 20, 2018) at 5:15 to 5:48. This was a factor beyond the employer's control. EAB infers that the employer likely filed its application for review within a

¹ See OAR 471-041-0070(1) (February 18, 2012).

reasonable time, seven days after the employer forwarded Order No. 18-UI-113107 to its representative, and therefore allows the employer's late application for review.

The employer submitted written argument on the merits of Order No. 18-UI-113107 to EAB but failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) Pioneer Human Services employed claimant from September 5, 2017 to April 4, 2018 as a case manager for drug court.

(2) The employer has a written drug and alcohol policy that it provided to claimant at hire. The policy prohibits employees from using, possessing, distributing, selling or being under the influence of alcohol or drugs that are unlawful under federal or state law.

(3) The employer's drug and alcohol policy includes a voluntary disclosure provision that encourages employees to seek treatment for illegal drug use. The provision states that the employer will not initiate disciplinary action against an employee who voluntarily discloses use of illegal drugs and the need for services related to illegal drug use if the employee "obtains an assessment and appropriate treatment, and provides continual confirmation to Human Resources of compliance with the recommended treatment." Exhibit 1 at 8. Additionally, the employee must refrain from reporting to work under the influence of illegal drugs, and must not already be under a recommended treatment plan due to a prior voluntary disclosure of drug or alcohol use.

(4) On March 28, 2018, claimant told an employee assistance program (EAP) coordinator that he had used methamphetamines and requested assistance to obtain treatment. Claimant had not previously disclosed a violation of the employer's drug and alcohol policy. The employer had a list (self-disclosure checklist) stating the requirements of the self-disclosure program. Conditions included, in relevant part, that claimant provide a urinalysis drug screen "upon disclosure [of drug use]," contact a certified drug counselor within one day of the disclosure date, and receive a drug/alcohol assessment from a certified counselor within five (business) days of the disclosure date. Exhibit 1 at 12. Another condition was that claimant return any telephone call from the medical review officer (MRO) who administered the drug test by the end of the next business day.

(5) On March 28, 2018, after he disclosed his drug use to the EAP coordinator, claimant completed a urinalysis drug test and contacted a certified counselor to arrange for an assessment. On March 29, 2018, claimant told the EAP coordinator he was in the process of arranging his assessment and insurance approval for it, and that it would take "three to five days before they can get back to [him] and accept [his] insurance." Audio Record (July 5, 2018) at 20:55 to 21:13. The EAP coordinator sent claimant the self-disclosure checklist and other program forms and told claimant to complete, sign and date them and return the forms to the coordinator by March 30, 2018.

(6) On Friday, March 30, 2018, the MRO attempted to contact claimant regarding claimant's drug test results, but was unable to do so. Claimant signed the self-disclosure program forms on April 2, 2018, but did not return them to the EAP coordinator that day.

(7) The EAP coordinator left claimant telephone messages when he did not hear from claimant by April 3, 2018. The MRO told the coordinator that he had been unable to contact claimant by telephone because the telephone number claimant provided was incorrect. On April 4, 2018, the coordinator called claimant and spoke with him. He told claimant he was non-compliant with the self-disclosure program because he had not turned in the completed, signed self-disclosure program forms or spoken with the MRO within one business day after March 30. Claimant reported that he had an assessment scheduled for that day. The coordinator told claimant he would “take another look at [claimant’s] status” if claimant returned the self-disclosure forms “immediately,” and completed the assessment that day. Exhibit 1 at 4.

(8) Later on April 4, 2018, claimant contacted the MRO regarding his drug test results, returned the self-disclosure program forms to the EAP coordinator, and completed the assessment. Claimant told the EAP coordinator he had contacted the MRO and completed the assessment.

(9) The EAP coordinator reported claimant’s status to the employer and the employer discharged claimant because he failed to comply with the self-disclosure program portion of the employer’s drug and alcohol policy by failing to return the self-disclosure forms to the EAP coordinator by March 30, failing to contact the MRO by April 2, 2018, and failing to complete his assessment by April 3, 2018.

CONCLUSION AND REASONS: We agree with the ALJ and conclude claimant did not commit a disqualifying act under the Department’s drug and alcohol adjudication policy and is not disqualified from receiving unemployment compensation benefits.

ORS 657.176(2)(h) provides that an individual is disqualified from unemployment insurance benefits if the employer discharged claimant for committing a disqualifying act. ORS 657.176(9)(a)(A) defines a disqualifying act to include an individual’s failure to comply with the terms and conditions of the employer’s reasonable written policy governing the use or effects of drugs in the work place. An individual is also considered to have committed a disqualifying act if the individual admits a violation of a reasonable written employer policy governing the effects of drugs in the workplace. OAR 471-030-0125(9)(a) (January 11, 2018).

The employer’s drug and alcohol policy was reasonable within the meaning of ORS 657.176(9) and OAR 471-030-0125(3) because it governed the use and effects of drugs in the workplace and was provided to claimant in writing. The record does not show, and claimant did not allege, that the employer failed to follow its policy. *See* OAR 471-030-0125(3). It is undisputed that claimant’s voluntary disclosure of illegal drug use was not itself an admission that constituted a disqualifying act because the employer’s drug policy provided that the employer would not discipline an employee the first time he disclosed a violation of the employer’s drug policy and requested assistance to obtain treatment.

The next issue is whether claimant’s conduct after he disclosed his drug use violated the employer’s drug policy. After an employee discloses his drug use to the employer, the employer’s policy requires that the employee obtain an assessment and appropriate treatment, provide “continual confirmation” to the employer of compliance with such treatment, and refrain from reporting to work under the influence of unlawful drugs. The record shows claimant obtained an assessment on April 4, 2018. Claimant had not yet received a treatment recommendation based on that assessment. There was no evidence that

claimant had reported to work under the influence of drugs or alcohol. Thus, the employer failed to show that claimant violated the drug policy it provided to claimant in writing at hire.

The employer asserted that claimant violated items on the self-disclosure checklist, which it sent to claimant the day he disclosed his drug use to the employer. More specifically, the employer asserted that claimant failed to return the self-disclosure forms to the EAP coordinator by March 30, failed to contact the MRO within one business day of when the MRO tried to contact claimant about his drug test results, and failed to complete his assessment by April 3, 2018, within five (business) days of the disclosure date of March 28, 2018. Because the record fails to show that claimant knew or should have known the MRO had an incorrect telephone number for him, or that the error was attributable to claimant, we conclude that claimant did not violate the checklist requirement by failing to contact the MRO within one day of March 30. Claimant contacted the MRO on April 4, within one day of when the EAP coordinator told him the MRO was attempting to contact him. The record also does not show that claimant failed to complete his assessment “within five (business) days of the disclosure date.” Claimant completed his assessment on April 4, 2018. According to the plain language of the self-disclosure checklist, April 4 was the fifth business day after claimant disclosed his drug use on March 28. Claimant did, however, fail to return the required forms to the EAP coordinator by March 30. Although this requirement was not included on the self-disclosure checklist, claimant understood the expectation because the coordinator told claimant to return the forms by March 30.

Because the employer discharged claimant for allegedly violating its drug policy, and the written drug policy given to claimant at hire did not provide deadlines for claimant to comply with the self-disclosure program, claimant’s failure to return the self-disclosure checklist by March 30 (as well as his other alleged failures to meet deadlines) did not violate the employer’s drug policy. The employer implicitly asserts that claimant’s violation of the self-disclosure checklist should be treated like a last chance agreement. It is a disqualifying act to violate the terms of a last chance agreement with the employer. ORS 657.176(9)(a)(G). However, a “reasonable last chance agreement” is defined as, among other things, a documented agreement, signed by the employee, under which the employer allows the employee to return to work only under certain stated conditions to which the employee has agreed. ORS 657.176(13)(c)(A); OAR 471-030-0125(7). Unlike a last chance agreement, the self-disclosure checklist was not a documented agreement, signed by claimant, that claimant would be allowed to return to work only under the conditions of the agreement and that the employer would discharge him if he failed to comply. Claimant did not sign and return the checklist until after he began the program and allegedly violated its requirements, and the checklist did not state claimant would be summarily discharged if he failed to follow the checklist. We therefore conclude that the checklist was not a last chance agreement within the meaning of ORS 657.176(13)(c)(A) and OAR 471-030-0125(7).

In sum, claimant did not violate the employer’s written drug policy. Because the self-disclosure checklist was not a last chance agreement, even had the record shown that claimant failed to meet the deadlines established by that checklist, claimant’s failure to do so would not be a disqualifying act under the Department’s drug adjudication policy. The employer discharged claimant, but not for committing a disqualifying act. Claimant is not disqualified from receiving unemployment insurance benefits based on his work separation from the employer.

DECISION: Order No. 18-UI-113107 is affirmed.

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

DATE of Service: September 19, 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. 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.