

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0895

Reversed
Benefits Not Retroactively Payable

PROCEDURAL HISTORY: On July 18, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant had failed to respond to a questionnaire the Department sent him, and that benefits therefore were not payable from July 8, 2018 to July 14, 2018 and until claimant ended the denial by providing the required information. Claimant filed a timely request for hearing. On August 23, 2018, ALJ Amesbury conducted a hearing, and on August 24, 2018 issued Order No. 18-UI-115522, reversing the Department's decision and finding that benefits were payable to claimant for the period beginning July 8, 2018. On September 13, 2018, the Oregon Employment Department filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) On June 3, 2018, claimant filed an initial claim for unemployment insurance benefits. He filed weekly claims for benefits through the week ending June 23, 2018 (week 25-18) in which he reported that he had earnings.

(2) When claimant claimed the week ending June 30, 2018 (week 26-18), claimant did not report any earnings. On July 3, 2018, the Department mailed a questionnaire to claimant instructing him to provide information about that claim by July 8, 2018 or his benefits would be denied. Claimant did not submit a timely response. Effective July 8, 2018 (week 28-18), the Department denied claimant benefits.

(3) On approximately July 15, 2018, claimant realized that benefits were denied, and contacted the Department to inquire. The Department instructed claimant to respond to the questionnaire. On July 16, 2018, claimant did so. The Department ended claimant's ineligibly period and began paying him benefits effective the week of July 15, 2018 (week 29-18).

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude that benefits are not payable to claimant for the week of July 8, 2018 to July 14, 2018 (week 28-18).

ORS 657.155(1)(a) provides, “An unemployed individual shall be eligible to receive benefits with respect to any week only if the * * * individual has registered for work at and thereafter has continued to report at an employment office in accordance with such rules and the director [of the Employment Department] may prescribe.” The Department may also require individuals to provide information about their qualifications to participate in reemployment service assistance (ORS 657.156), submit job qualification information (ORS 657.159), submit information about work separations (ORS 657.176), and to make claims and certifications about employment and wages in accordance with the Department’s regulations (ORS 657.260).

The Department’s duly adopted administrative rule, as set forth in OAR 471-030-0025(1), describes a claimant’s responsibilities when claiming benefits, which include furnishing information to the Department that “may include, but is not limited to, information pertaining to prior work history, separations from work, current work activity and earnings, licenses or permits held, self-employment, entitlement to pay and allowances of various kinds, work seeking activity, working restrictions, and working ability.” OAR 471-030-0025(2) also requires that claimants “furnish such information required for processing their claim within the time frame” designated by the Department; according to OAR 471-030-0025(2)(a), the pertinent time frame is “five (5) calendar days . . . from the date the letter [requesting the information] was mailed.”

This matter is before EAB to determine whether or not benefits should be payable to claimant for the week of July 8, 2018 to July 14, 2018 (week 28-18), a week in which claimant was instructed to provide the Department with information necessary to his claim and failed to do so. In Order No. 18-UI-115522, the ALJ concluded that benefits were payable because the policy under which the Department sought to deny him benefits for that week was invalid. The ALJ erred.

The ALJ’s Order found as fact that prior to May 14, 2018, the Department “employed a policy” through which individuals denied benefits for a certain period of time for failing to provide the Department with information, upon providing the information, would be retroactively paid benefits for the weeks previously denied. Order No. 18-UI-115522 at 2. The ALJ found as fact that after May 14, 2018, the Department “adopted a new policy” ending the retroactive payment of benefits, so that “benefits that would have been paid to a claimant as a result of retroactive treatment of late-provided information are instead denied under the new policy.” *Id.* The ALJ found as fact that the Department’s “new policy” was “adopted” “by issuance of an internal memorandum,” “without going through the formal rulemaking procedures specified in the Oregon Administrative Procedures Act.” *Id.* The ALJ then concluded that the Department’s “new policy” was actually an administrative rule, but because the “internal policy directive revoking the Department’s policy of giving retroactive effect to late-provided information was not validly adopted it is not enforceable against claimant.” *Id.*

The ALJ erred in finding that the Department’s “new policy” ending retroactive payment of benefits to claimants during weeks in which they failed to provide the Department with information was a “rule” subject to the rulemaking requirements of the Administrative Procedures Act (the APA). The Oregon Legislature duly enacted ORS 657.155, ORS 657.156, 657.159, 657.176 and 657.260, all of which obligate claimants to provide the Department with information relevant to their claims for benefits, and implicitly delegated to the Department the authority to enact rules defining the statutory terms contained therein. The Department, duly authorized, did so by enacting OAR 471-030-0025, thus specifying the types of information it may compel claimants to provide, under what circumstances, and within what

timelines. The Department’s policies, both the former version and new version, derive from that rule, but are not themselves administrative rules. The Department’s policies are, rather, an expression of the Department’s interpretation of its own rule.

In a “question involving interpretation of the department’s rules defining [a] statutory term,” the question is not whether or not the interpretation was enacted in accordance with the APA. The question is whether under the principle announced in *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or. 132, 142, 882 P.2d 119 (1994), “an agency's plausible interpretation of a rule that the agency itself promulgated deserves deference,” and, generally speaking, it is entitled to deference “unless the interpretation conflicts with the rule's text, context, or another source of law (including case law); and that, in a case involving the department, the articulator of the agency's interpretation is the authorized representative and not an ALJ or the EAB.”¹

The Department’s adoption of a policy – and its amendment of its policy – interpreting its own administrative rule is entitled to deference in this instance. The Department articulated its own policy, through publication of a benefit memorandum by an authorized representative and through the testimony of a different authorized representative at the hearing. The Department’s policy interpretation was consistent with the text and context of OAR 471-030-0025, which requires claimant to furnish the Department with information within the prescribed timelines. Not only is the policy interpretation *not* in conflict with another source of law, the application of the requirement is actually *required* by and/or consistent with ORS 657.155(1)(a), which limits eligibility for benefits in any week to situations where the unemployed individual “has continued to report at an employment office in accordance with such rules as the director may prescribe” in that week. In other words, to allow claimant retroactive payment for week 28-18 – a week in which claimant did not report information to the Department as instructed and was out of compliance with the timelines set forth in OAR 471-030-0025 – would be contrary to the plain text of ORS 657.155(1)(a) and in violation of the Department’s validly adopted administrative rule.

In this case, claimant did not comply with the Department’s requirements during the week at issue (week 28-18); he provided the information during the following week (week 29-18). The Department therefore appropriately denied claimant benefits for week 28-18, and appropriately ended claimant’s ineligibility for benefits and paid him benefits effective week 29-18.²

¹ See accord *Jordan v. Employment Dept.*, 195 Or App 404, 97 P3d 1273 (2004); see also *Johnson v. Employment Dept.*, 187 Or. App. 441, 67 P.3d 984, rev. den. 336 Or. 60, 77 P.3d 635 (2003); *Johnson v. Employment Dept.*, 189 Or. App. 243, 74 P.3d 1159, *adh'd to as modified on recons.*, 191 Or. App. 222, 81 P.3d 730 (2003).

² We take notice of Employment Department benefit memorandum, “Failure to Provide Changes,” issued May 14, 2018, which states that once an individual has provided the Department with information the period of ineligibility should end “the week prior to the week the information is provided,” meaning, for example, if an individual provided information in week 12-18, the last week denied would be week 11-18, and benefits for week 12-18 would be payable. Applying the benefit memorandum’s example to this case, because claimant provided information in week 29-18, the last week denied would be 28-18, and benefits for week 29-18 would be payable. Any party that objects to our taking notice of the Department’s benefit memorandum 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. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed information will remain in the record.

DECISION: Order No. 18-UI-115522 is set aside, as outlined above.

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

DATE of Service: October 17, 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.

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