

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0974**

*Affirmed*  
*Overpayment and Penalties*

**PROCEDURAL HISTORY:** On July 30, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision assessing a \$1,201 overpayment, a \$360.30 monetary penalty and 12 penalty weeks (decision # 201628). Claimant filed a timely request for hearing. On September 11, 2018, ALJ Murdock conducted a hearing, and on September 18, 2018, issued Order No. 18-UI-116803, concluding claimant was liable to repay an overpayment of \$729, and assessing a monetary penalty of \$145.80 and 5 penalty weeks. On October 9, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB that contained a letter from Ashland Public School District that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented her from offering the letter into evidence at the hearing. Moreover, the letter contained information that was already part of the record. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we did not consider the letter, but considered all information received into evidence at the hearing when reaching this decision.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the ALJ's findings and analysis with respect to the conclusions that claimant is not subject to a reduction in benefits due to the differences in the earnings she and the employers reported, and that claimant did not willfully fail to report her earnings from Ashland Public School District, are hereby **adopted**. The remaining issues are whether claimant was overpaid benefits for weeks 33-17 through 35-17, and whether she willfully made a false statement or misrepresentation to obtain benefits, and therefore is subject to penalty weeks and a monetary penalty for weeks 33-17 through 35-17.

**FINDINGS OF FACT:** (1) Prior to April 26, 2017, claimant had filed two valid claims for unemployment insurance benefits. Claimant had reported earnings for those claims.

(2) In April and June 2015, claimant participated in the Department's "UI Basics Review Test," which required her to answer certain questions before she was allowed to claim benefits. Claimant was asked to answer "true" or "false" to the question, "If you missed less than one hour of available work you must answer no," to the question that asked, "Each day last week were you willing to work and capable of accepting and reporting for full-time work, part-time work?" Claimant answered that it was "true" that she must answer "no" to that question. Transcript at 8.

(3) Claimant filed an initial claim for unemployment insurance benefits on April 26, 2017. The Department established a weekly benefit amount of \$243. The maximum benefit amount available when claimant filed her claim was \$590.

(4) Claimant claimed and was paid benefits for the period from August 13, 2017 through September 2, 2017 (weeks 33-17 through 35-17).

(5) Ashland YMCA employed claimant during weeks 33-17, 34-17 and 35-17 to teach three classes per week. Claimant was capable of working full-time during weeks 33-17 through 35-17, but took time off work, missing one class per week, due to having panic attacks. Claimant claimed benefits for weeks 33-17 through 35-17. Despite having missed work offered to her by Ashland YMCA during each of weeks 33-17 through 35-17, when she claimed each week, she certified to the Department that she was willing to work and capable of working and reporting for full-time, part-time and temporary work each day of those weeks. Based in part on claimant's certification, the Department paid claimant \$243 for each of weeks 33-17 through 35-17.

(6) On September 27, 2018, the Department issued an administrative decision for each week of 33-17, 34-17 and 35-17 concluding that claimant was not available for all suitable work during each of those weeks because she did not report for scheduled work with Ashland YMCA during each of those weeks. Claimant did not request hearings on those decisions, which therefore became final.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that claimant was overpaid \$729 in benefits for the period from August 13, 2017 through September 2, 2017 (weeks 33-17 through 35-17) and is liable to either repay the overpayment to the Department or have that amount deducted from future benefits otherwise payable. She is also liable for a \$145.80 monetary penalty and 5 penalty weeks for making a willful misrepresentation to the Department to obtain benefits.

**Overpayment.** To be eligible to receive benefits, unemployed individuals must be able to work, available for work, and actively seek work during each week claimed. ORS 657.155(1)(c). For purposes of ORS 657.155(1)(c), an individual is not available for work in any week claimed if she "has an opportunity to perform suitable work during the week and fails to accept or report for such work due to illness, injury or other temporary physical or mental incapacity." OAR 471-030-0036(3)(f)(A) (February 23, 2014). ORS 657.310(1) provides that an individual who received benefits to which the individual was not entitled is liable to either repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable to the individual under ORS chapter 657. That provision applies if the benefits were received because the individual made or caused to be made a false

statement or misrepresentation of a material fact, or failed to disclose a material fact, regardless of the individual's knowledge or intent. *Id.*

The Department issued a separate administrative decision to claimant for week 33-17, 34-17 and 35-17 concluding that claimant was not available for work during each respective week. Claimant did not appeal those decisions, and they have become final. As a result, she was not eligible to receive benefits for weeks 33-17 through 35-17 because she was not available for work. Although claimant was not eligible to receive unemployment insurance benefits during weeks 33-17 through 35-17, the Department paid her \$243 for each week. Claimant was, therefore, overpaid. The Department paid the benefits to claimant because she falsely stated when she claimed benefits each of those weeks that she was available for full-time and part-time work. Regardless of claimant's knowledge or intent in providing incorrect answers, because her answers caused the Department to overpay her for weeks 33-17 through 35-17, claimant is liable to repay the amount of \$729 to the Department, or have it deducted from future benefits otherwise payable.

**Misrepresentation.** In addition to being liable to repay the overpayment, ORS 657.215 and ORS 657.310 provide that an individual who willfully made a false statement or misrepresentation, or willfully failed to report a material fact to obtain benefits, may be subject to penalties.

Claimant testified that she knew she missed work with Ashland YMCA during weeks 33-17 through 35-17, but that she interpreted the Department's question about being capable and willing to work "differently" when she claimed benefits for those weeks. Transcript at 51. However, it is implausible that the question was confusing to claimant, especially after having shown on the UI Basics Review Test in April and June 2015 that she understood that less than one hour of missed work meant she was not available for work. It is more likely than not that claimant intentionally provided a false response to the Department about her availability for work; the only logical reason an individual would have to make such a false statement to the Department would be to obtain benefits. Because claimant willfully made a false statement to the Department to obtain benefits, she is liable for misrepresentation penalties.

**Penalty weeks.** The length of the penalty disqualification period is determined by applying the provisions of OAR 471-030-0052 (January 11, 2018). Where, as here, the disqualification period is imposed because of disqualifying acts related to ORS 657.155, the length of the penalty is the greater of either the number of weeks in which the disqualifying act occurred, or the result reached by calculating the total amount of the overpayment divided by the maximum Oregon weekly benefit amount in effect at the time, rounding the result to the nearest two decimal places, multiplying the result by four, then rounding the result up to the nearest whole number. OAR 471-030-0052(1)(a) and (1)(c). Here, the number of weeks in which the disqualifying act occurred is 3. The total amount of the overpayment was \$729, divided by the maximum weekly benefit amount in effect at the time, \$590, equals 1.24, multiplied by 4 equals 4.96, and rounded up to the nearest whole number equals 5. Five is greater than 3; therefore, claimant's misrepresentation penalty period is 5 weeks.

**Monetary penalty.** An individual who has been disqualified for benefits under ORS 657.215 for making a willful misrepresentation is also liable for a monetary penalty in an amount of at least 15, but not greater than 30, percent of the amount of the overpayment. ORS 657.310(2). The penalty percentage depends on the number of "occurrences" of misrepresentation occurred. An "occurrence" is counted "each time an individual willfully makes a false statement or representation." OAR 471-0300052(7)

(February 23, 2014). In this case, claimant made misrepresentations when she claimed three weeks, weeks 33-17 through 35-17. In each of those weekly claims, claimant made at least one willful false statement. Here, the false statement was about being available for work. Therefore, we conclude that claimant had three misrepresentation “occurrences.”

OAR 471-030-0052(7)(a) provides that if an individual has three misrepresentation “occurrences” within five years of the occurrence for which a penalty is being assessed, the individual is assessed a monetary penalty equal to 20 percent of the total overpayment. Twenty percent of \$729 is \$145.80. Claimant’s monetary penalty is, therefore, \$145.80.

**Conclusion.** In sum, claimant was overpaid \$729 in benefits for weeks 33-17 through 35-17 and is liable to either repay the overpayment to the Department or have that amount deducted from future benefits otherwise payable. She is also liable for a \$145.80 monetary penalty and 5 penalty weeks for making a willful misrepresentation to the Department to obtain benefits for weeks 33-17 through 35-17.

**DECISION:** Order No. 18-UI-116803 is affirmed.

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

**DATE of Service: November 13, 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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