

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0136

Order No. 19-UI-123080 Affirmed ~ No Disqualification
Order No. 19-UI-123076 Affirmed ~ No Overpayment

PROCEDURAL HISTORY: On November 7, 2018, the Oregon Employment Department (the Department) served notice of an administrative decisions concluding that the employer discharged claimant for misconduct (decision # 74004) and based on decision # 74004, served another administrative decision concluding that claimant was overpaid \$4,368 in unemployment insurance benefits and was liable to repay that amount to the Department (decision # 154237). Claimant filed timely requests for hearing on decisions # 74004 and # 154237. On January 14, 2019, ALJ Seideman conducted a consolidated hearing regarding decisions # 74004 and # 154237, and on January 18, 2019, issued Order No. 19-UI-123080, concluding the employer discharged claimant not for misconduct, and Order No. 19-UI-123076, concluding that claimant was not overpaid. On February 7, 2019, the employer filed applications for review of Order Nos. 19-UI-123080 and 19-UI-123076 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Order Nos. 19-UI-123080 and 19-UI-123076. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2019-EAB-0137 and 2019-EAB-0136).

The employer submitted written argument that presented new information not offered into evidence during the hearing. The employer did not explain why it was unable to present the new information at the hearing or otherwise show that factors or circumstances beyond its reasonable control prevented it from doing so as required by OAR 471-041-0090(2) (October 29, 2006). For this reason, EAB did not consider the employer's new information when reaching this decision.

FINDINGS OF FACT: (1) Lomakatsi Restoration Project (LRP) is a non-profit that does forest

and aquatic habitat watershed restoration. Lomakatsi Ecological Services (LES) is a for-profit corporation owned by LRP. LRP and LES shared staff, including claimant.

(2) LRP and LES employed claimant from the late 1995 until September 7, 2018, last as its chief financial officer (CFO) and co-director, respectively. The employer expected claimant to supervise accounting staff and manage the LRP accounting department to ensure proper maintenance of the LRP and LES accounting systems and internal controls. Proper oversight of LRP's finances was important to preserve LRP's reputation and promote a trust relationship with its community partners such as the Klamath Tribes and other tribes. LRP expected claimant to refrain from using the employers' funds for personal expenses.

(3) During 2017, LRP had a contract with the Klamath Tribes to perform personal services including development planning, training, mentoring, and inspecting for certain projects. During the fiscal year that ended in 2017, LRP had provided \$14,002.61 more value in services than allowed under the contract with the Klamath Tribes. Claimant asked LRP's accountant to categorize the cost overrun as profit. The accountant did so.

(4) On March 9 to 11, 2018, claimant traveled and stayed at a hotel in Eugene, Oregon for a work-related project with a nature conservancy and the City of Eugene. Claimant requested, and approved for himself, \$510 reimbursement from LRP for the hotel stay.

(5) In May 2018, the LRP staff accountant informed a member of the LRP board of directors that the accounting for the cost overrun was an "irregularity." Transcript at 51. In response to the accountant's information, on June 8, 2018, the board put claimant on paid administrative leave pending an investigation that included a limited financial audit. Exhibit 10.

(6) LRP's investigation identified the \$14,002.61 amount, which had been categorized as an account receivable and carried over to LRP's next fiscal year budget. The LRP accounting department had not treated a cost overrun as an account receivable in the past, and would normally categorize a cost overrun as a loss. LRP's board of directors did not know about the cost overrun or the fact that it was categorized as an account receivable. As part of its investigation, LRP asked the Klamath Tribes if they had agreed with claimant that the \$14,002.61 would be used against a future contract with the Klamath Tribes. At that time, LRP had not yet negotiated a contract renewal with the Klamath Tribes for the next fiscal year.

(7) Claimant did not receive a financial gain from the cost overrun. However, LRP was dissatisfied with claimant's handling of the cost overrun because of how it could affect its reputation, and because it could have damaged the trust relationship between LRP and LES, the Klamath Tribes, and other tribes.

(8) LRP's investigation also showed that claimant had requested, and approved for himself, the \$510 hotel reimbursement in March 2018 in Eugene, Oregon. The LRP understood the reimbursement to be related to LES fire projects and planning. LES did not have a contract in the Eugene area during 2018 for fire planning, and did not ask claimant what the purpose of his stay was while he was in Eugene. Other than the March 2018 hotel charge, LRP's investigation did not find other alleged problems with claimant's travel expenses.

(9) During its investigation, LRP found a November 2014 receipt for \$1,072.40 in repairs to a vehicle paid for by LRP. On the receipt, claimant had written and initialed that the repairs were for LES's truck. The repairs were not completed on an LES truck, but rather, on a vehicle belonging to claimant's son. The repairs were not work-related.

(10) On September 7, 2018, the LRP board of directors discharged claimant because claimant designated unrecovered costs from a contract with the Klamath Tribes to an account receivable, used employer funds for an allegedly personal hotel stay, and used employer funds to pay for personal automotive repairs. LRP also discharged claimant because he did not implement the financial controls necessary to detect and correct the foregoing incidents.

(11) Claimant filed weekly claims for benefits for the weeks of September 9, 2018 through November 3, 2018 (weeks 37-18 through 44-18). The Department paid claimant \$4,368 in unemployment insurance benefits for those weeks.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude that the employer discharged claimant, not for misconduct. We also conclude that claimant was not overpaid unemployment insurance benefits.

Discharge. ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) (January 11, 2018) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.

LRP discharged claimant in large part because he asked the LRP accountant to categorize a cost overrun as accounts receivable so that it would carry over to the next fiscal year, when LRP assumed claimant would attempt to recuperate it from the Klamath Tribes during a future contract. LRP's testimony that the incident risked its reputation and relationship with the Klamath Tribes and other tribes is uncontested in the record. However, for the accounting incident to constitute misconduct, the employer must prove by a preponderance of the evidence that either claimant showed conscious indifference to, or a willful deviation from, the standards the employer had the right to expect of him. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

LRP alleged that claimant treated the cost overrun as profit because he was "covering up" his "imbalance of his books." Transcript at 34. Although the record shows that the LRP accounting department had not treated a cost overrun as an account receivable in the past, the record falls short of establishing by a preponderance of the evidence that the manner in which claimant categorized the cost overrun was inconsistent with acceptable accounting practices or that claimant knew or should have known that LRP would not condone how claimant treated the cost overrun. Moreover, based on claimant's testimony that he planned to cover the cost overrun with funds from the National Forest

Service, and not the Klamath Tribes, the record does not show by a preponderance of the evidence that it was the accounting of the cost overrun rather than how LRP presented the issue to the Klamath Tribes that affected LRP's relationship with the tribes. *See* Transcript at 54. For these reasons, the preponderance of the evidence fails to show that the accounting incident was misconduct.

The employer failed to show by a preponderance of the evidence that claimant's hotel stay in March 2018 in Eugene was unrelated to work and an impermissible expense for reimbursement by LRP. Claimant's firsthand testimony that he was working on a project with the City of Eugene was, at minimum, equally balanced with the employer's evidence that claimant's time in Eugene was not work-related. *See* Transcript at 55-56. Therefore, to the extent LRP discharged claimant for that reimbursement, it failed to establish that it discharged claimant for misconduct.

To the extent that the employer discharged claimant because claimant authorized payment from LRP for repairs to his son's vehicle, the record does not show that the employer discharged claimant for misconduct. There was no dispute that claimant authorized LRP to pay for his son's vehicle repairs, or that the repairs were not work-related. Claimant testified that the payment was "nothing more than a mistake," and although he was not able to recall the circumstances that lead to the 2014 payment, his explanation that he accidentally miscoded a receipt was plausible. Being the only mistake of its kind shown at hearing by the employer during claimant's more than 20 years of employment with the LRP, it is more likely than not that claimant was not indifferent to the employer's expectations, and did not willfully or purposely authorize a payment for personal use. Claimant may have been careless or negligent when he authorized the payment, but a single instance of carelessness and ordinary negligence is not sufficient under the applicable rules to establish misconduct. Moreover, on this record, the employer's assertion that claimant failed to implement financial controls necessary to detect and correct accounting errors or irregularities is without merit where the record shows only one error.

Overpayment. 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.

Claimant was deemed ineligible for benefits based on the Department's conclusion that the employer discharged him for misconduct during the week of September 2 through September 8, 2018, was disqualified from receiving benefits based on that work separation, and was therefore overpaid for the weeks he claimed from September 9, 2018 through November 3, 2018 (weeks 37-18 through 44-18), and was therefore overpaid \$4,368, the amount of benefits he received during those weeks. Based upon our conclusion, above, that claimant was not disqualified from receiving benefits because of his work separation from LRP, however, claimant was not overpaid, and he is therefore not liable to repay those benefits to the Department.

DECISION: Order Nos. 19-UI-123080 and 19-UI-123076 are affirmed.

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

DATE of Service: March 12, 2019

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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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄຳຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄຳຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄຳຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄຳຮ້ອງຂໍການທົບທວນຄຳຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الاستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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