EO: 200
BYE: 202001

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0262

Reversed & Remanded

PROCEDURAL HISTORY: On January 31, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant on December 31, 2018 for committing a disqualifying act by testing positive during a random test for drugs and alcohol (decision # 114354). Claimant filed a timely request for hearing. On March 5, 2019, ALJ Seideman conducted a hearing, and on March 7, 2019, issued Order No. 19-UI-125949, modifying the Department's decision and concluding that claimant was discharged for misconduct under ORS 657.176(2) due to dishonesty about drug use, but that he did not commit a disqualifying act under ORS 657.176(9). On March 3, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that included information not offered into evidence during the hearing. Because we are reversing and remanding this matter for additional evidence, we need not and do not rule on the admissibility of the new information. Claimant may offer the new information at the remand hearing, at which time the ALJ will determine whether it is relevant and material to the issues and should be admitted into evidence. Instructions for submitting written information into evidence for the remand hearing will be included with the notice of hearing the Office of Administrative Hearings (OAH) will send to the parties to schedule the remand hearing. Claimant should direct any questions about that process to OAH.

CONCLUSIONS AND REASONS: Order No. 19-UI-125949 is reversed and this matter remanded for further proceedings consistent with this order.[1]

Claimant was a commercial driver for the employer subject to the employer's drug and alcohol policy and Federal Motor Carrier Safety Administration[2] (FMCSA) regulations concerning testing for drugs and alcohol. On December 7, 2018, claimant underwent a random test for drugs at the direction of the

[1] Given the lack of inquiry that occurred at the original hearing and the breadth of issues that must be developed at the remand hearing, it is recommended that a different ALJ be assigned to conduct the hearing as if anew.

[2] The Federal Motor Carrier Safety Administration (FMCSA) was established within the U.S. Department of Transportation on January 1, 2000, pursuant to the Motor Carrier Safety Improvement Act of 1999 (49 U.S.C. 113).

employer. The following week the employer learned that the test had been compromised at the testing facility through no fault of claimant.

On December 17, 2018, the employer directed claimant to retake the test later that day. Before doing so, claimant told the operations manager that on December 15, 2018 he had been with friends, blacked out from drinking and later was told by a cousin that he also had smoked marijuana. The manager told claimant to take the test, and he did so.

On December 20, 2018, the employer and claimant learned that on December 17 claimant had tested positive for marijuana, amphetamine and methamphetamine for which the employer suspended him indefinitely on December 21, 2018. Because claimant was upset at the result, he requested that a split sample from the December 17 test be retested. On December 28, 2018, a medical review officer notified the employer that the chain of custody for the split sample had been broken and for that reason the December 17 test results had been cancelled.

Later on December 28, the operations manager instructed claimant to report for another test later that day at 2:00 p.m. Claimant told the manager he was going to call the testing facility about the invalid tests, and did so. Claimant was told by a review officer that he would investigate why the two tests had been invalidated and call him back. Claimant never received a return call and so he called the testing facility at approximately 1:30 p.m. and was told by an individual there that "the test results would not matter…[but claimant]… would still have to meet with a staff professional." Transcript at 22-23. Claimant immediately called the manager and related what he had been told, after which the manager emailed him a list of staff professionals in the area. When the manager called claimant later that day, claimant told him that he did not report for a test that day because he had never received a call back from the medical review officer.

On January 2, 2019, claimant was evaluated by a substance abuse professional (SAP) who recommended that he enroll in a VA program because he was a veteran. Claimant immediately contacted the VA program director, who scheduled claimant for an intake on January 15, 2019. On January 5, 2019, claimant spoke to the operations manager, who confirmed claimant still had a job. However, on January 7, 2019, the employer's owner mailed claimant an undated certified letter informing him that he had been terminated, effective December 31, 2018, because he had tested positive for drugs on December 20, 2018 and refused to take a drug test on December 28, 2018. On January 10, 2019, claimant received the letter. On January 15, 2019, claimant began an outpatient drug treatment program at the VA.

Order No. 19-UI-125949 found as fact that on December 17, 2018, claimant told the operations manager that he had smoked marijuana during the weekend of December 8 but did not mention his use of methamphetamine. The order then concluded that the employer discharged claimant for misconduct under ORS 657.176(2)(a) because claimant was untruthful about his drug use, and that claimant's dishonesty was not excused from being considered misconduct because methamphetamine use was a violation of law. Order No. 19-UI-125949 2, 4. The order further concluded that claimant did not commit a disqualifying act under ORS 657.176(2)(h) because he began a drug treatment program within five days of receiving his discharge letter on January 10, 2019. Order No. 19-UI-125949 5. However the record was not sufficiently developed to support either of those conclusions.

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) (December 23, 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.

657.176(2)(h) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for a disqualifying act under the Department's drug and alcohol policy. ORS 657.176(9)(a)(B) and (F) provide that refusing to take a drug test as required by the employer's reasonable written policy and testing positive for cannabis or an unlawful drug in connection with employment are disqualifying acts. For purposes of ORS 657.176(9)(a), a written employer drug policy is not reasonable if it is not followed by the employer or it requires an employee to pay for any portion of a drug test. OAR 471-030-0125(3)(b) and (6). ORS 657.176(9)(b) provides that an individual is not considered to have committed a disqualifying act if, on the date of separation or within 10 days after, the individual is participating in a recognized drug, cannabis or alcohol rehabilitation program and provides the Department with documentation of that participation. In a discharge case or a case involving a disqualifying act, the employer has the burden to establish misconduct or the disqualifying act by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

This case must be remanded for a number of reasons. The record fails to show what date the employer discharged claimant. On January 5th, claimant was told he still had a job. On January 7th, however, the employer mailed a letter to claimant retroactively discharging him effective December 31st. The record fails to show on what date the employer decided to discharge claimant. If the owner made the decision to discharge claimant on January 7, 2019, the record does not show what changed between January 5th when claimant was assured he was still employed and January 7th when the employer sent the termination letter. Nor does the record show why the employer made the termination letter effective December 31, 2018 as opposed to January 7th or some other date.

The record also fails to show by a preponderance of the evidence why the employer discharged claimant. Although the order in this case concluded that the employer discharged claimant for being untruthful about drug use, the record does not support the conclusion. Although the employer's owner testified that he believed that claimant had been dishonest when discussing his drug use on the weekend in question with the operations manager, untruthfulness was not included as a reason for claimant's discharge in the owner's letter to claimant mailed January 7, 2019. Exhibit 1; Transcript at 11-12. The ALJ did not ask and the employer's owner did not assert at hearing that it was a reason for claimant's discharge.

Despite the absence of such evidence, the order found that the employer discharged claimant, in part, for not being truthful about what drugs he had used just prior to his initial positive test on December 17, 2018. Order No. 19-UI-125949 2, 4. However, the record does not show whether or to what extent claimant's alleged untruthfulness was, in fact, a reason the employer discharged claimant. Nor does it show upon what information the employer based its decision, especially given that the employer did not specify that reason for discharge in the termination letter it sent to claimant. The record fails to show, and the ALJ in the original hearing did not ask claimant, whether he had in fact been dishonest with the operations manager when discussing his alleged drug use during a weekend prior to December 17, 2018. Nor does the record conclusively establish whether the weekend in question was the weekend of

December 8th or December 15th, 2018. Without such an inquiry the record cannot show that it is more likely than not that the employer actually discharged claimant for dishonesty, nor can the record show whether or not claimant was, willfully or with wanton negligence, dishonest.

The record also fails to show whether claimant committed disqualifying acts under ORS 657.176(2)(h), by testing positive for specified drugs on December 17, 2018 and refusing to submit to a December 28, 2018 drug test as alleged by the employer in its discharge letter. The record does not show, and the ALJ at the original hearing did not ask, whether the employer discharged claimant based on the results of the December 17, 2018 drug test, which the employer learned of on December 20, 2018, or because he failed to attend the 11:30 a.m. drug test originally scheduled on December 28, 2018, or because he failed to attend the rescheduled 2:00 p.m. test on December 28, 2018. The record is ambiguous about whether or to what extent those drug tests contributed to the discharge decision.

For example, the owner asserted that claimant was notified about the 2:00 p.m. test, and when operations manager contacted claimant after 2:00 p.m., claimant responded that he did not go because he was waiting for a return call from the doctor. Transcript at 11. However, claimant asserted that he had told the manager that he was going to contact the testing facility "to find out what had happened", spoke to someone there at about 1:30 p.m., who told him "the test results would not matter…[but claimant]… would still have to meet with a staff professional." Transcript at 22-23. Claimant asserted that he immediately called the manager and told him what he had been told, after which the manager emailed him a list of staff professionals in the area. On remand, the record must be developed about whether the manager told claimant that he was required to take the 2:00 p.m. drug test regardless of claimant's intention to contact the testing facility, whether the manager had agreed to wait or postpone the test until the facility reported back to claimant or both of them, and who called whom on the afternoon of December 28th. Without reconciling the potentially conflicting evidence on this issue, the question of whether claimant committed a disqualifying act by failing to comply with a testing request directed by the employer on December 28, 2018 cannot be resolved.

On remand, since no employer policy is reasonable if it requires the individual to pay for drug testing, and violation of an unreasonable employer policy is not disqualifying, the employer must also be asked whether claimant was required to pay for any portion of the drug tests he participated in on December 7, 2018 or December 17, 2018, including claimant's request for testing of a split sample.

On remand, the ALJ must also fully develop the record as to claimant's entry into a rehabilitation program. As developed, the record fails to show whether claimant's disclosure to his manager on December 17, 2018 constituted a request for voluntary rehabilitation under the employer's policy. The record fails to show whether the manager's activities referring claimant to evaluators on December 28, 2018 was or was not part of that process. Given that the record fails to show on what date the employer actually discharged claimant, the record fails to show whether claimant was, on the date of his separation or within 10 days after, participating in a recognized drug, cannabis or alcohol rehabilitation program. The record also fails to show whether claimant has ever provided the Department with documentation of that participation as required by ORS 657.176(9)(b) and 471-030-0125 (2)(i).[3]

[3] 471-030-0125 (2)(i) provides:

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether claimant's discharge was for misconduct or a disqualifying act, Order No. 19-UI-125949 must be reversed, and this matter remanded for development of the record.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-125949 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

DECISION: Order No. 19-UI-125949 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: April 19, 2019

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For purposes of ORS 657.176(9):

(A) "Recognized drug, cannabis, or alcohol rehabilitation program" means a program authorized and licensed by the State of Oregon, or another state.

(B) "Documentation of participation in the program" means a signed statement by an authorized representative of the recognized program that the individual is or was participating in a treatment program.

(C) "Participation" means to be engaged in a course of treatment through a recognized drug, cannabis, or alcohol rehabilitation program.

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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فورا، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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