

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0564**

*Affirmed*  
*Late Request for Hearing Dismissed*  
*Overpayment and Penalties Assessed*

**PROCEDURAL HISTORY:** On April 11, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work for the weeks including December 2, 2018 through February 23, 2019 (weeks 49-18 through 08-19) and was therefore ineligible for benefits for those weeks and until the reason for the denial ended (decision # 83749). On May 1, 2019, decision # 83749 became final without claimant having filed a timely request for hearing.

On April 11, 2019, the Department served notice of a second administrative decision concluding claimant was not available for work for the weeks including February 24, 2019 through March 9, 2019 (weeks 09-19 through 10-19), and was therefore ineligible for benefits for those weeks and until the reason for the denial had ended (decision # 85948). On May 1, 2019, decision # 85948 became final after no adversely affected party filed a timely request for hearing.

On April 11, 2019, the Department served notice of a third administrative decision concluding claimant refused an offer of work on February 11, 2019 (week 07-19) with good cause because he did not have childcare available that would allow him to accept a graveyard shift. The Department concluded claimant was eligible for benefits for that reason "if otherwise eligible" (decision # 82332). On May 1, 2019, decision # 82332 became final after no adversely affected party filed a timely request for hearing.

On April 24, 2019, the Department served notice of an administrative decision assessing a \$2,610 overpayment, a \$783 monetary penalty, and 22 penalty weeks (decision # 195237). On May 5, 2019, claimant filed a timely request for hearing on decision # 195237. Claimant's timely request for hearing on decision # 195237 also was construed as a late request for hearing on decision # 85948.

On May 30, 2019, ALJ Monroe conducted a consolidated hearing on decisions # 85948 and # 195237. The employer did not appear for the hearing. On June 4, 2019, ALJ Monroe issued Order No. 19-UI-131062, concluding that claimant failed to demonstrate good cause for his late request for hearing on

decision # 85948 and dismissing that hearing request. On June 13, 2019, ALJ Monroe issued Order No. 19-UI-131593, affirming decision # 195237. On June 18, 2019, claimant filed timely applications for review of Order Nos. 19-UI-131062 and 19-UI-131593 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Order Nos. 19-UI-131062 and 19-UI-131593. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2019-EAB-0565 and 2019-EAB-0564, respectively).

EAB reviewed the entire hearing record in Case No. 2019-UI-95646, regarding decision # 85948. On *de novo* review and pursuant to ORS 657.275(2), Order No. 19-UI-131062 is **adopted**. Accordingly, claimant's late request for hearing on decision # 85948 remains dismissed.

**FINDINGS OF FACT:** (1) On February 27, 2018, claimant filed an initial claim for unemployment insurance benefits (BYE 08-19). The Department determined that claimant's claim was valid with a weekly benefit amount of \$200. The maximum weekly benefit amount available at the time claimant filed his claim was \$604.

(2) Between December 2, 2018 and March 9, 2019, claimant had childcare responsibility for his 13 year-old child and was unwilling to work beyond 9:00 p.m. on any given day because he did not have a childcare resource after that time.

(3) On December 3, 2018, claimant had a telephone conversation with a Department employee regarding his work search during the week ending November 17, 2018 (week 46-18). During the conversation, claimant was advised, in part, as follows:

Eligibility for unemployment benefits requires that you be physically able to work, available for work and actively seeking work both full-time and part-time for each week that you claim benefits. Your labor market is Eugene Springfield and Junction City. Normal working hours for warehouse and maintenance are all days and all shifts...You have to provide 5 work seeking activities at least 2 of which are direct contacts.

After being so advised, claimant was asked, "Do you understand these requirements?" Claimant responded, "Yes." (Case No. 2019-UI-95646) Exhibit 3. On December 4, 2018, the Department sent claimant a work search advisory letter. *Id.*

(4) Claimant claimed and was paid benefits under BYE 08-19 for the weeks including December 2, 2018 through February 23, 2019 (weeks 49-18 through 08-19). When filing his claims for each of those 12 weeks, claimant was asked, "Each day last week, were you willing to work and capable of accepting and reporting for full-time, part-time and temporary work?" Transcript at 53. Claimant responded, "Yes" when he should have responded "No" due to the fact that he did not have childcare available during all of the usual days and hours for the type of work he was seeking. Transcript at 53. Claimant answered yes to that question because he was concerned that answering no would disqualify him from receiving benefits. Transcript at 57-61. Each of those weeks, when filing his claim, claimant certified to the Department that his reports and responses were true and accurate, although he knew he was not willing and capable of accepting swing and graveyard work shifts.

(5) On February 11, 2019 (week 07-19), claimant refused an offer of graveyard shift work from Galt Foundation (Galt). When filing his benefit claim for that week, claimant also was asked, "Did you fail to accept an offer of work last week?" Transcript at 49, 63-65. Claimant responded, "No" because he was concerned that if he responded yes it would have adversely affected his benefits. Transcript at 49, 63-65. Claimant certified to the Department that his reports and responses to its questions were true and accurate, even though he knew that he was not willing and capable of accepting swing and graveyard work shifts and had refused an offer of work on February 11, 2019.

(6) On February 28, 2019, claimant filed another initial claim for unemployment insurance benefits (BYE 08-20). The Department determined that claimant's claim was valid with a weekly benefit amount of \$210. The maximum weekly benefit amount available at the time claimant filed that initial claim was \$624.

(7) Claimant claimed and was given waiting week credit or paid a weekly benefit amount of \$210 under BYE 08-20 for the weeks including February 24 through March 9, 2019 (weeks 09-19 and 10-19). When filing his claims for each of those weeks, claimant was asked, "Each day last week, were you willing to work and capable of accepting and reporting for full-time, part-time and temporary work?" Transcript at 53. Claimant responded "Yes" when he should have responded no due to the fact that he did not have childcare available during all of the usual days and hours for the type of work he was seeking. Transcript at 53. Claimant was concerned that answering "no" would disqualify him from receiving benefits. Transcript at 57-61. Each of those weeks, when filing his claim, claimant certified to the Department that his reports and responses were true and accurate, although he knew he was not willing and capable of accepting swing and graveyard work shifts.

(8) Based on claimant's false certifications to the Department about his availability for work for each of the weeks claimed (weeks 49-18 through 10-19), the Department paid claimant a total of \$2,610 in benefits he was not entitled to receive.

**CONCLUSIONS AND REASONS:** Claimant was overpaid and made a false statement or material misrepresentation to get benefits. He is therefore required to repay a \$2,610 overpayment and a \$783 monetary penalty to the Department. Claimant is also liable for a penalty period of benefit disqualification of 22 weeks.

**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. 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. ORS 657.310(1).

On April 11, 2019, the Department issued decisions # 83749 and # 85948, which together concluded claimant was not available for work for the weeks including December 2, 2018 through March 9, 2019 (weeks 49-18 through 10-19), and was ineligible for benefits for those weeks. On May 1, 2019, decision # 83749 became final without claimant having filed a timely request for hearing with OAH. On June 4, 2019, Order No. 19-UI-131062 concluded that claimant failed to demonstrate good cause for his late request for hearing on decision # 85948 and dismissed that hearing request. These consolidated

decisions, EAB Decisions 2019-EAB-0565 and 2019-EAB-0564, have adopted Order No. 19-UI-131062 and unless and until these decisions are reversed, decision # 85948 is a final decision with the force and effect of law and its conclusions remain binding.

Accordingly, it has been concluded that claimant was not available for all suitable work during weeks 49-18 through 10-19 and therefore was ineligible to receive benefits for those weeks. Therefore, as a matter of law, claimant was not entitled to the \$2,610 in regular benefits he received for those weeks. Claimant's statements to the Department that he was available for work during those weeks were also false as a matter of law and caused him to receive the \$2,610 in regular benefits at issue. Regardless of claimant's knowledge or intent in making what turned out to be false statements to the Department, he is liable under ORS 657.310(1) to either repay the \$2,610 in regular benefits to the Department or have that amount deducted from any future benefits otherwise payable to him under ORS chapter 657.

**Misrepresentation.** ORS 657.215 and ORS 657.310(2), read together, provide that if an individual has received any benefits to which the individual is not entitled because the individual has willfully made a false statement or misrepresentation or willfully failed to report a material fact to obtain benefits, the individual is liable to pay a monetary penalty and to have a penalty period of benefit disqualification imposed.

Claimant did not dispute that on December 3 and December 4, 2018, before he filed his claims for benefits for weeks 49-18 through 10-19, the Department advised him both verbally and in writing that to be eligible for unemployment insurance benefits he was required to be willing to work the customary hours and days for the warehouse and maintenance work he was seeking during all days and all shifts. Exhibit 3. At hearing, claimant admitted that during the weeks at issue he was not willing to work after 9:00 p.m. due to limitations regarding his childcare resources for his 13 year-old child. Transcript at 65. He also admitted that he answered yes to the weekly claims question, "Each day last week were you willing to work and capable of accepting and reporting for full-time, part-time and temporary work?" even though he was not willing to work a graveyard shift, and did so because he believed a no answer would affect his benefit eligibility and "financially hurt me." Transcript at 62-63.

Claimant also admitted that he answered no to the weekly claims question, "Did you fail to accept an offer of work last week?" for week 07-19 even though he knew he had just refused a job offer from Galt on February 11, 2019 because he believed a yes answer "probably would have . . . adversely affect[ed] [his] benefits." Transcript at 65.

Based on claimant's testimony, more likely than not, claimant willfully made false statements or willfully failed to report material facts to obtain benefits. Accordingly, claimant is liable for misrepresentation penalties.

**Monetary Penalty.** ORS 657.310(2) provides that a monetary penalty for willful misrepresentations to obtain benefits shall be between 15 and 30 percent of the benefits the individual received to which the individual was not entitled. OAR 471-030-0052(7) (January 11, 2018) specifies that the monetary penalty assessed for a willful misrepresentation that is made to obtain benefits is a function of the number of occurrences of misrepresentation. An "occurrence" is counted as having occurred each time the individual willfully made a misrepresentation of obtain benefits. OAR 471-030-0052(7).

Here, there are fourteen weeks constituting the weeks at issue, and for each week, claimant willfully misrepresented that he was “willing to work and capable of accepting and reporting for full-time, part-time and temporary work” regardless of whether work offered was for swing or graveyard shifts which he was unwilling to accept. He also willfully denied that he had “failed to accept an offer of work” during week on February 11, 2019 (week 07-19). OAR 471-030-0052(7)(d) states that for seven or more occurrences of misrepresentation within five years, the penalty to be assessed is 30 percent of the total amount of the benefits the individual received to which the individual was not entitled. Thirty percent of the \$2,610 in benefits that claimant received to which he was not entitled is \$783. Accordingly, claimant is liable for a monetary penalty of \$783, which he must repay to the Department.

**Penalty Disqualification Period.** ORS 657.215 provides that an individual who willfully made a false statement or misrepresentation, or willfully failed to report a material fact to obtain benefits, may be disqualified for benefits for a period not to exceed 52 weeks. OAR 471-030-0052(1)(c) sets out the formula for calculating the weeks of penalty disqualification if the disqualifying acts relate to the provisions of ORS 657.155 (other than nondisclosure of work and/or earnings), and OAR 471-030-0052(1)(b) sets out the formula for calculating the weeks of penalty disqualification if the disqualifying acts relate to the provisions of ORS 657.176 (job refusal).<sup>1</sup>

Applying those formulas to this case, the total amount of benefits overpaid to claimant based on the disqualifying acts relating to the provisions of ORS 657.155 during BYE 08-19 (12 weeks x \$200 = \$2,400) shall be divided by the maximum weekly benefit amount in effect during the first effective week of the initial claim in effect at the time of the disqualifying act (\$604), which equals 3.974, then rounding that number off to two decimal places (3.97), multiplying that result by 4 (15.88), and rounding that number up to the nearest whole number, 16, which equals 16 weeks. The total amount of benefits overpaid to claimant based on the disqualifying acts relating to the provisions of ORS 657.155 during BYE 08-20 (1 week x \$210 = \$210) shall be divided by the maximum weekly benefit amount in

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<sup>1</sup> OAR 471-030-0052 provides:  
Misrepresentation Disqualification

(1) An authorized representative of the Employment Department shall determine the number of weeks of disqualification under ORS 657.215 according to the following criteria:

(a) When the disqualification is imposed because the individual failed to accurately report work and/or earnings, the number of weeks of disqualification shall be determined by dividing the total amount of benefits overpaid to the individual for the disqualifying act(s), by the maximum Oregon weekly benefit amount in effect during the first effective week of the initial claim in effect at the time of the individual's disqualifying act(s), rounding off to the nearest two decimal places, multiplying the result by four rounding it up to the nearest whole number.

(b) When the disqualification is imposed because the disqualifying act(s) under ORS 657.215 relates to the provisions of 657.176, the number of weeks of disqualification shall be the number of weeks calculated in the same manner as under subsection (a) above, or four weeks, whichever is greater.

(c) When the disqualification is imposed because the disqualifying act(s) relates to the provisions of ORS 657.155 (other than work and/or earnings), the number of weeks of disqualification shall be the number of weeks calculated in the same manner as under subsection (a) above, or the number of weeks in which a disqualifying act(s) occurred, whichever is greater.

effect during the first effective week of the initial claim in effect at the time of the disqualifying act (\$624), which equals 0.337, then rounding that number off to two decimal places (0.34), multiplying that result by 4 (1.36), and rounding that number up to the nearest whole number, 2, which equals 2 weeks. The total amount of benefits overpaid to claimant based on the disqualifying acts relating to the provisions of ORS 657.176 (failure to report a job refusal) is \$0. Therefore, the number of penalty weeks under that formula is 4 weeks because 4 weeks is greater than 0 weeks. Claimant is assessed a total penalty period of benefit disqualification of 22 (16 + 2 + 4) weeks.

In sum, claimant is required to repay the Department a total of \$3,393 (\$2,610 + \$783). Claimant is also assessed a penalty period of benefit disqualification of 22 weeks.

**DECISION:** Order Nos. 19-UI-131062 and 19-UI-131593 are affirmed.

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

**DATE of Service:** July 26, 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](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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# 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 desisyong ito.

## 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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

**Arabic**

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**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.

**Employment Appeals Board - 875 Union Street NE | Salem, OR 97311**  
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