

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-1074**

*Modified*  
*Overpayment; No Penalties*

**PROCEDURAL HISTORY:** On August 22, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision assessing a \$5,825 overpayment, \$1,747.50 monetary penalty, and 46 penalty weeks (decision # 193635). On September 11, 2019, decision # 193635 became final without claimant having filed a request for hearing. On September 27, 2019, claimant filed a late request for hearing. On October 18 and 23, 2019, ALJ Murdock conducted a hearing, and on October 25, 2019 issued Order No. 19-UI-138716, allowing claimant's late request for hearing, and affirming decision # 193635. On November 10, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant did not declare that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2). That includes the pay statements mentioned in claimant's written argument that were received into the record on October 24, 2019, prior to the record being closed.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review allowing claimant's late request for hearing is **adopted**.

**FINDINGS OF FACT:** (1) On March 29, 2018, claimant filed an initial claim for unemployment insurance benefits (BYE 12-19). The Department determined that the claim was monetarily valid with a weekly benefit amount of \$604. On March 27, 2019, claimant filed another initial claim for unemployment insurance benefits (BYE 12-20). The Department determined that the claim was monetarily valid with a weekly benefit amount of \$624.

(2) Macy's West Stores Inc. employed claimant as a part-time salesperson from October 15, 2015 through the weeks at issue.<sup>1</sup>

(3) Claimant claimed benefits for weeks in 2018 from April 8 through August 4 (weeks 15-18 through 31-18), August 12 through September 15 (weeks 33-18 through 37-18), September 30 through October 27 (weeks 40-18 through 43-18) and November 11 through December 29 (weeks 46-18 through 52-18). She claimed benefits for weeks in 2019 from December 30, 2018 through January 5, 2019 (week 01-19), March 31 through April 13 (weeks 14-19 and 15-19), April 21 through June 8 (weeks 17-19 through 23-19), June 16 through July 6 (weeks 25-19 through 27-19) and July 14 through August 10 (weeks 29-19 through 32-19). These are the weeks at issue.

(4) During the weeks at issue, claimant suffered from depression and suicidal thoughts and was receiving treatment from both a mental health therapist and psychiatrist. As a result of her mental health conditions, she experienced difficulty getting out of bed in the morning, monitoring her mail and otherwise attending to difficulties in her life.

(5) During the weeks at issue, the employer paid claimant between \$13.65 per hour and \$14.25 per hour plus commissions. The employer's pay periods were Sunday through Saturday and claimant was paid weekly, on the following Friday. Her paychecks included commission pay, and occasionally retroactive and holiday pay for weeks prior to the week in which she was paid. When she reported her earnings for each week she claimed, claimant did not know the amount of commissions or other pay she had earned, so she reported only her base pay.

(6) Claimant's reported earnings for the weeks at issue are reflected in Exhibit 1 (Schedule of Adjustments). From an earnings audit of claimant's claim, the Department received information from claimant's employer that she was paid remuneration of various amounts for the weeks at issue. That information is also reflected in Exhibit 1 (Schedule of Adjustments). When claimant claimed benefits for weeks 35-18 through 37-18 and 40-18 through 43-18, she reported that she was available for work although she spent much of that time outside of her labor market. On November 6, 2018, the Department mailed claimant an administrative decision that concluded claimant was not available for work during those weeks. That decision became final on November 26, 2018 without a request for hearing having been filed. As a result of claimant's failure to report all the remuneration she received, and that she was not available for work during some weeks, claimant received \$5,825 in regular benefits to which she was not entitled. Exhibit 1 (Schedule of Adjustments).

**CONCLUSIONS AND REASONS:** Claimant was paid regular benefits she was not entitled to receive and is liable to repay \$5,825 in benefits or have that amount deducted from future benefits otherwise payable to her. However, claimant is not subject to penalty weeks or a monetary penalty.

**Remuneration.** Only "unemployed" individuals are eligible for benefits. ORS 657.155(1). An individual is "unemployed" "in any week of less than full-time work if the remuneration paid or payable

---

<sup>1</sup> EAB has taken notice of this fact, which is contained in Employment Department records. Any party that objects to our taking notice of this information 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(2). Unless such objection is received and sustained, the noticed fact will remain in the record.

to the individual for services performed during the week is less than the individual's weekly benefit amount." ORS 657.100(1). A claimant is responsible for furnishing the Department with the information required for correctly processing the claim, including "current work activity and earnings." OAR 471-030-0025 (January 11, 2018). The information required may include the amount of time devoted to the work activity and the gross amount of remuneration or wages, including commissions, received or expected to be received. *Id.* An eligible individual who has employment in any week claimed shall have her weekly benefit amount reduced by the amount of earnings paid or payable that exceeds the greater of ten times the Oregon minimum hourly wage or one-third of her weekly benefit amount. ORS 657.150(6).

The employer did not participate in the hearing, but had presented evidence to the Department for an audit of the claim. The evidence provided showed that claimant received remuneration for each of the weeks at issue in the amounts reflected in Exhibit 1 (Schedule of Adjustments). Although claimant argued that, for some weeks, the amounts reflected did not correspond to her paycheck amounts, she only provided twenty-two pay statements for the 53 weeks at issue. Considering that claimant's commission pay, retroactive pay and perhaps even her holiday pay was earned in the week or weeks prior to week the pay statements were provided, the employer reported gross earnings for the week did not match claimant's earnings for the week reflected on her pay statements. More likely than not, the employer correctly reported claimant's gross earnings for the weeks at issue, and the correct adjustments to her weekly benefit amounts, based on those reported earnings, are reflected in Exhibit 1 (Schedule of Adjustments). Accordingly claimant was overpaid a total of \$5,825 in benefits for the weeks at issue.

**Repayment.** 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).

The total amount of benefits the Department overpaid to claimant was \$5,825. The Department paid those benefits to claimant because she failed to report information about all of her earnings from employment when she claimed benefits for the weeks at issue, and that she was not available for work during some weeks. That information was material to claimant's eligibility to receive benefits. Regardless of claimant's knowledge or intent in failing to report information material to her claims for benefits, claimant is liable to repay the total amount of the overpaid benefits to the Department or have them deducted from future benefits otherwise payable.

**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.

Here, because the Department originally paid claimant benefits it subsequently denied, the Department had the burden to not only establish that claimant received benefits to which she was not entitled, but

that she willfully made false statements or misrepresentations to obtain those benefits. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

Order No. 19-UI-138716 concluded that claimant willfully failed to disclose her correct earnings and availability issues to receive benefits, was subject to penalties and imposed a \$1,747.50 monetary penalty and a 46 week penalty disqualification period. The order reasoned,

Claimant failed to claim all of her earnings over a multitude of weeks. While she did not know her commission amounts at the times she needed to claim the weeks, she failed to later correct her earnings amounts after receiving the information in her pay statements, even though she knew she was required to provide true and accurate information on her claim. She also asserted that she believed she had not claimed benefits while she was unavailable for work for a significant number of weeks. However, she agreed that she received all of the payments the Department paid to her. The record is persuasive that claimant willfully failed to disclose her correct earnings and her availability issues in order to receive benefits.

Order No. 19-UI-138716 at 9.

However, given claimant's poor mental health and the conditions for which she was receiving treatment during most if not all of weeks at issue, the evidence as to whether she willfully misrepresented her earnings and availability to obtain benefits is no more than equally balanced. The Department's witness explained that the Department based its conclusion that claimant was subject to penalties, in large part, on claimant's failure to respond to its mail inquiry requesting clarification concerning her claims reporting. Transcript at 32. However, it was undisputed that claimant's failure to respond to that inquiry was based on her depression and anxiety regarding opening her mail, for which she was receiving treatment during the weeks at issue. Consequently, viewing the record as a whole, the Department failed to meet its burden to establish that claimant willfully made false statements or misrepresentations or willfully failed to report material facts to obtain benefits when filing her claims. Accordingly claimant is not subject to penalty weeks under ORS 657.215, or a monetary penalty under ORS 657.310(2).

**Conclusion.** Claimant was overpaid \$5,825 in benefits is liable to repay the total amount of the overpayment to the Department or have it deducted from future benefits otherwise payable. Claimant is not subject to penalty weeks or a monetary penalty.

**DECISION:** Order No. 19-UI-138716 is modified, as outlined above.

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

**DATE of Service: December 13, 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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.



# 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 Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación 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**

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 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 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**  
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711  
[www.Oregon.gov/Employ/eab](http://www.Oregon.gov/Employ/eab)

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.