

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0353**

*Affirmed in Part, Reversed & Remanded in Part*  
*Affirmed – Late Request for Hearing Allowed*  
*Reversed and Remanded Disqualifying Act*

**PROCEDURAL HISTORY:** On September 15, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for committing a disqualifying act under Department drug, cannabis, and alcohol adjudication policy,<sup>1</sup> and that claimant was disqualified from receiving unemployment insurance benefits effective March 22, 2020 (decision # 101406). On October 5, 2020, decision # 101406 became final without claimant having filed a timely request for hearing. On October 12, 2020, claimant filed a late request for hearing. On October 19, 2020, ALJ Kangas issued Order No. 20-UI-155406, dismissing claimant's late request for hearing, subject to claimant's right to renew the request by responding to an appellant questionnaire by November 2, 2020. On October 28, 2020, claimant filed a timely response to the appellant questionnaire, and the Office of Administrative Hearings (OAH) mailed a letter stating that Order No. 20-UI-155406 was vacated. On November 3, 2020, OAH mailed notice of a hearing scheduled for November 17, 2020 to consider claimant's late request for hearing, and if granted, the merits of decision # 101406. On November 17, 2020, ALJ Griffin conducted a hearing and on November 18, 2020 issued Order No. 20-UI-156545, re-dismissing claimant's late request for hearing as without good cause. On December 6, 2020, claimant filed a timely application for review of Order No. 20-UI-156545 with the Employment Appeals Board (EAB).

On January 5, 2021, EAB issued Appeals Board Decision 2020-EAB-0760, reversing Order No. 20-UI-156545, and remanding this matter to OAH for further development of the record on whether claimant's late request for hearing on decision # 101406 should be allowed and, if so, the merits of decision # 101406. On April 14, 2021, ALJ Griffin conducted a hearing and on April 21, 2021 issued Order No. 21-UI-165242 allowing claimant's late request for hearing and concluding that the employer discharged claimant, but not for committing a disqualifying act under the Department's drug, cannabis, and alcohol adjudication policy, and not disqualifying claimant from receiving benefits. On April 30, 2021, the employer filed a timely application for review of Order No. 21-UI-165242 with EAB.

<sup>1</sup> Although decision # 101406 concluded that claimant was discharged for misconduct, the decision's findings state that claimant was discharged for committing a disqualifying act under Department drug and alcohol adjudication policy.

**WRITTEN ARGUMENT:** The employer’s argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer’s reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered the employer’s written argument to the extent it was based on information that was part of the hearing record.

**EVIDENTIARY MATTER:** At the April 14, 2021 hearing, the ALJ overlooked documents submitted by the employer prior to the hearing. After the hearing, the ALJ reviewed the documents and determined they were relevant to the work separation issue. The ALJ marked the documents as Exhibit 5, entered them into evidence, and considered them in making their decision. Due process requires that the parties be given the opportunity to object to the admission of information in Exhibit 5, the employer have the opportunity to explain the information in Exhibit 5, and that claimant have the opportunity to respond to all new information. Accordingly, at the hearing on remand, the parties should be given these opportunities. A copy of Exhibit 5 is provided to the parties with this decision.

The parties may offer new information such as the information in the employer’s written argument into evidence at the remand hearing. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

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**. The remainder of this decision addresses whether claimant committed a disqualifying act and is disqualified from receiving benefits.

**FINDINGS OF FACT:** (1) Professional Dispatch Services, Inc. employed claimant as a tow truck dispatcher from approximately July 7, 2017 until March 26, 2020.

(2) The employer provided claimant with a copy of their written drug policy at hire. The same policy was in effect in March 2020.

(3) The policy prohibited the effects of drugs, cannabis, or alcohol in the workplace. The policy stated, “While [the employer] has no intention of intruding into the private lives of its employees, drug and alcohol use that affects job performance or public or personal safety, whether done on or off the job will not be tolerated.” Exhibit 5 at 8.

(4) With respect to testing for drugs, cannabis, or alcohol, the policy stated, “In the event of an on-the job injury, extensive sick leave, or behavior that is not consistent with a productive work environment, a drug test will be ordered at the company’s expense. Refusing to be tested or a failure of the test will result in immediate termination of employment.” Exhibit 5 at 8.

(5) During the weekend of March 14, 2020, claimant’s supervisor observed claimant experiencing “high-highs” and “low-lows” at work. Transcript at 13. On one occasion on March 14, 2020, the

supervisor observed claimant “nodding off” at work, but after going into the bathroom, coming back out “very hyper.” Transcript at 13. The employer determined that claimant’s conduct was probable cause to order a drug test.

(6) On March 18, 2020, an on-site testing company administered a drug test to claimant. It was a 12-hour, “rapid result test” to test for drugs in claimant’s system in the preceding 12 hours. Transcript at 15.

(7) On March 26, 2020, the employer received the results of the drug test. Claimant’s March 18, 2020 test detected THC, opiates, amphetamine, and methamphetamine.

(8) On March 26, 2020, the employer discharged claimant for violating their drug policy.

**CONCLUSIONS AND REASONS:** Order No. 21-UI-165242 is reversed and remanded for further inquiry as to whether claimant committed a disqualifying act and to allow the parties an opportunity to explain and respond to information contained in Exhibit 5.

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if the individual has committed a disqualifying act as described in ORS 657.176(9) or (10). ORS 657.176(9)(a) provides that an individual is considered to have committed a disqualifying act when the individual:

\* \* \*

(F) Tests positive for alcohol, cannabis or an unlawful drug in connection with employment[.]

\* \* \*

OAR 471-030-0125 (January 11, 2018) provides:

\* \* \*

(2) Definitions. For the purpose of this rule:

\* \* \*

(e) For purposes of ORS 657.176(9), an individual “tests positive” for alcohol, cannabis, or an unlawful drug when the test is administered in accordance with the provisions of an employer’s reasonable written policy or collective bargaining agreement, and at the time of the test:

\* \* \*

(B) The individual has any detectable level of drugs, cannabis, or alcohol present in the individual’s system if the policy or agreement does not specify a cut off level.

(f) An individual fails a test for alcohol, cannabis, or unlawful drugs when the individual tests positive as described in subsection (e) of this section.

(g) For purposes of ORS 657.176(9) and 657.176(13), “unlawful drug” means a drug which is unlawful for the individual to use, possess, or distribute under Oregon law. This term does not include a drug prescribed and taken by the individual under the supervision of a licensed health care professional and used in accordance with the prescribed directions for consumption, or other uses authorized by law.

(h) “Connection with employment” as used in ORS 657.176(9) means where such positive test affects or has a reasonable likelihood of affecting the employee’s work, the employer’s interest, or workplace.

\* \* \*

(3) [A] written employer policy is reasonable if:

(a) The policy prohibits the use, sale, possession, or effects of drugs, cannabis, or alcohol in the workplace; and

(b) The policy does not require the employee to pay for any portion of the test; and

(c) The policy has been published and communicated to the individual or provided to the individual in writing; and

(d) When the policy provides for drug, cannabis, or alcohol testing, the employer has:

(A) Probable cause for requiring the individual to submit to the test[.]

\* \* \*

(4) Probable Cause for Testing. For purposes of ORS 657.176(9), an employer has probable cause to require an employee to submit to a test for drugs, cannabis, alcohol, or a combination thereof if:

(a) The employer has, prior to the time of the test, observable, objective evidence that gives the employer a reasonable basis to suspect that the employee may be impaired or affected by drugs, cannabis, or alcohol in the workplace. Such evidence may include, but is not limited to, abnormal behavior in the workplace, a change in productivity, repeated tardiness or absences, or behavior which causes an on-the-job injury or causes substantial damage to property[.]

\* \* \*

(6) For purposes of ORS 657.176(9), (10), and (13), no employer policy is reasonable if the employer does not follow their own policy.

\* \* \*

(10) For the purposes of ORS 657.176(9) and (10):

(a) Testing for drugs, cannabis, or alcohol must be conducted in accordance with ORS 438.435.

\* \* \*

Order No. 21-UI-165242 concluded that claimant's discharge was not for a disqualifying act in part because the employer's drug policy was not reasonable. The order concluded that the drug policy was not reasonable, in part, because the testing portion of the policy was not reasonable. The order reasoned that the testing provision in the policy that provided for testing "[i]n the event of an on-the job injury, extensive sick leave, or behavior that is not consistent with a productive work environment," did not qualify as probable cause, random, periodic, or blanket testing. Order No. 21-UI-165242 at 8. The record does not support the conclusion that the employer's drug policy was not reasonable due to the testing portion of their policy.

The conduct that was considered to be probable cause in the employer's policy was reasonable because it mirrored the conduct described in OAR 471-030-0125 as establishing probable cause for testing. OAR 471-030-0125, like the employer's policy, provides that an on-the-job injury, repeated absences, and changes in productivity are probable cause for drug testing. Moreover, the employer had probable cause for requiring claimant to submit to a drug test. The employer observed objectively suspicious behavior that gave the employer a reasonable basis to drug test claimant. Prior to the time of the March 18, 2020 drug test, claimant's supervisor observed claimant fluctuating between "high-highs" and "low-lows," and acting drowsy before entering a bathroom, but acting "very hyper" when he exited the bathroom. Such conduct, when viewed objectively, was a reasonable basis to suspect that claimant was impaired by drugs.

However, the order under review also found that the employer's policy was not reasonable because rather than prohibiting the use or effects of drugs, cannabis, or alcohol only in the workplace, the employer's policy also prohibited off-duty drug or alcohol use, and was thus unreasonable because it was too broad. Order No. 21-UI-165242 at 8. On remand, the record must be developed regarding the reasonableness of the employer's drug policy, including how a policy that regulates off-duty conduct complies with OAR 471-030-0125 and how a positive drug test affects or has a reasonable likelihood of affecting the employee's work, the employer's interest, or the employer's workplace.

Order No. 21-UI-165242 also concluded that claimant's discharge was not for a disqualifying act in part because the record did not show that the drug test complied with ORS 438.435, as required by OAR 471-030-0125(10). Order No. 21-UI-165242 at 8-9. However, at hearing, when the employer attempted to respond to questions regarding the drug test's compliance with ORS 438.435, the employer's witness

referred to documents contained in Exhibit 5, and was not given the opportunity to explain those documents because Exhibit 5 was not located until after the hearing. Transcript at 16-20. For example, information in Exhibit 5 refers to claimant's drug test results being "in confirmation," and show they may have been reviewed by a medical review service. Exhibit 5 at 6, 22, 27. On remand, the ALJ should ask questions with reference to Exhibit 5 and otherwise to develop the record as to whether the employer's drug and cannabis testing of claimant was conducted in accordance with ORS 438.435, which requires, among other things, that laboratories performing tests be licensed under the provisions of ORS 438.010 to 438.510 and must employ qualified technical personnel to perform the tests.

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 further development of the record is necessary to allow the parties to explain and respond to Exhibit 5, and to determine if claimant committed a disqualifying act under Department drug, cannabis, and alcohol adjudication policy, Order No. 21-UI-165242 is reversed, and this matter is remanded.

**DECISION:** Order No. 21-UI-165242 affirmed in part, and reversed and remanded in part, as outlined above.

S. Alba and A. Steger-Bentz;  
D. Hettle, not participating.

**DATE of Service: June 9, 2021**

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-165242 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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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 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 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.

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