

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0480**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On March 19, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for committing a disqualifying act under the Department drug, cannabis, and alcohol adjudication policy, disqualifying claimant from receiving unemployment insurance benefits effective January 24, 2021 (decision # 92159). Claimant filed a timely request for hearing. On June 10, 2021, ALJ McGorin conducted a hearing, and on June 11, 2021 issued Order No. 21-UI-168560, reversing decision # 92159 and concluding that claimant did not commit a disqualifying act and is not disqualified from receiving benefits based on his work separation from the employer. On June 14, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Scappoose Express Lube and Car Wash employed claimant as a person-in-charge/pit technician until January 29, 2021.

(2) When claimant began his employment “a good seven years” earlier, the employer provided him a copy of the employer’s drug and alcohol policy. Audio Record at 19:48 to 20:08. The employer’s policy prohibited, among other things, the “use, possession of . . . any controlled substance, or any illegal substance or any other substances, which impair job performance or pose a hazard, when use or possession occurs on premises or property . . . during work time. . . .” Audio Record at 08:31 to 08:50. The employer’s policy allowed the employer to conduct drug testing of an employee “whenever the [the employer] has reasonable suspicion that the employee is under the influence of . . . illegal drugs, or controlled substances.” Audio Record at 16:06 to 16:15. The employer’s policy stated, “Refusing to be tested, which includes refusal to cooperate with testing . . . will result in termination.” Audio Record at 14:57 to 15:15. The employer’s policy provided that “any detectable level of drugs . . . in an employee’s blood or urine” would violate the policy. Audio Record at 17:20 to 17:48.

(3) On January 28, 2021, claimant worked a shift from 9:00 a.m. to 6:00 p.m. overseeing and performing oil changes in “the pit.” Audio Record at 21:53. Claimant spent his lunch break in his car, which was located in the employee parking area of the employer’s lot. When claimant failed to timely return to work from his 30-minute lunch break, the manager went to claimant’s car to let him know to come back

from lunch. The manager believed claimant “acted kind-of sporadic” when the manager came to his car door. Audio Record at 11:18. When claimant opened his car door the manager observed “a big cloud of smoke [come] out,” and the manager believed he smelled the odor of marijuana on claimant. Audio Record 11:24 to 11:32. Claimant returned to the work area, clocked back in, and finished his shift. The manager did not detect any additional signs of impairment from claimant for the remainder of the day, and was not approached by any coworkers regarding claimant’s potential impairment. Although the manager believed claimant was under the influence of marijuana, he was unsure of how to handle the situation, and he did not request claimant to take a drug test at that time.

(4) On January 29, 2021, prior to the start of claimant’s morning shift, the manager gave claimant a “disciplinary report” and recalled that he told claimant that if he could pass a drug test, he could continue his employment, but if he could not pass a drug test, the employer would discharge claimant. Audio Record at 14:05. The manager recalled that claimant refused the drug test and that claimant indicated on his disciplinary report that he did not “agree with the assessment of the encounter.” Audio Record at 14:37. Claimant did not recall the employer offering him a drug test. The manager asked claimant whether he had used marijuana and claimant neither confirmed, nor denied that he had. The manager then discharged claimant for “being under the influence” of marijuana while at work. Audio Record at 7:10, 9:14. A second manager, A.B., was present during this encounter. A.B. normally worked at one of the employer’s other locations.

**CONCLUSIONS AND REASONS:** Order No. 21-UI-168560 is reversed and this matter remanded for further development of the record.

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:

(A) Fails to comply with the terms and conditions of a reasonable written policy established by the employer or through collective bargaining, which may include blanket, random, periodic and probable cause testing, that governs the use, sale, possession or effects of drugs, cannabis or alcohol in the workplace;

(B) Fails or refuses to take a drug, cannabis or alcohol test as required by the employer’s reasonable written policy;

\* \* \*

(D) Is under the influence of intoxicants while performing services for the employer;

(E) Possesses cannabis or a drug unlawfully or in violation of the employer’s reasonable written policy during work[.]

\* \* \*

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

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

\* \* \*

(b) For purposes of ORS 657.176(9), an individual “fails or refuses to take” a drug, cannabis, or alcohol test when the individual does not take the test as directed by the employer in accordance with the provisions of an employer's reasonable written policy or collective bargaining agreement.

(c) For purposes of ORS 657.176(9) and 657.176(13), an individual is “under the influence” of intoxicants if, at the time of a test administered in accordance with the provisions of an employer's reasonable written policy or collective bargaining agreement, the individual has any detectable level of drugs, cannabis, or alcohol present in the individual's system, unless the employer otherwise specifies particular levels of drugs, cannabis, or alcohol in its policy or collective bargaining agreement.

\* \* \*

(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; or

(B) The policy provides for random, blanket or periodic testing.

(4) Probable Cause for Testing. For purposes of ORS 657.176(9), an employer as 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.

\* \* \*

(9) The employee is discharged or suspended for committing a disqualifying act if:

\* \* \*

(b) In the absence of a test, there is clear observable evidence that the employee is under the influence of alcohol in the workplace.

\* \* \*

The order under review concluded that the employer discharged claimant on January 29, 2021 because claimant refused to take a drug test when requested to do so by the employer. Order No. 21-UI-168560 at 5. The order under review also concluded that, notwithstanding the employer's decision to discharge claimant for his refusal to take a drug test on January 29, 2021, the employer had failed to follow their own drug and alcohol policy when they waited until January 29, 2021 to request that claimant take a drug test. Order No. 21-UI-168560 at 5. As to this latter conclusion, the order reasoned that because the employer's decision to request a test was based only on the manager's lunch break observations of claimant on January 28, 2021, the employer did not have reasonable suspicion that claimant remained under the influence of marijuana on January 29, 2021, when they requested that claimant take a drug test. Order No. 21-UI-168560 at 5. The record fails to support either of these conclusions, however.

Addressing the second conclusion first, and assuming, for the sake of argument, that claimant was discharged for refusing to take a drug test on January 29, 2021, the record does not show that the employer's drug policy required it to conduct a drug test contemporaneously with claimant's alleged marijuana use, nor need ORS 657.176 and OAR 471-030-0125 be read so narrowly. Although some proximity between the events giving rise to the employer's reasonable suspicion and the request for a drug test is needed, there is nothing in law or rule that requires the testing be done immediately. Here, the record shows that when the manager approached claimant's vehicle on January 28, 2021, he observed claimant to be acting "kind-of sporadic," before noticing a cloud of smoke escaping claimant's car, and believing that he detected the odor of marijuana on claimant's person. This evidence was sufficient to establish probable cause for the employer to believe on January 29, 2021 that claimant was under the influence of marijuana in the workplace.

As it stands, however, the record does not support the order under review's finding that the employer discharged claimant for refusing to take a drug test. Here, the manager expressly testified that he discharged claimant for being "under the influence" of drugs while at work on January 28, 2021. While it is true that a positive drug test result, in many circumstances, can provide compelling evidence to find that an individual was under the influence of drugs, it is also true that an employer can find an individual to be under the influence even in the absence of a drug test. OAR 471-030-0125(9)(b). Here, the record is unclear whether the employer's ultimate decision to discharge claimant was because he was "under the influence" of marijuana, *with that conclusion being supported by claimant's refusal to take a drug test*; or whether the employer's decision to discharge claimant was based solely on his refusal to

take a drug test, standing alone. This lack of clarity in the record is further compounded by a discrepancy in the testimony that exists between the manager's statement that he requested that claimant take a drug test on January 29, 2021, and claimant's testimony that the manager never made such a request.

On remand, further development of the record is needed in order to establish the basis for the employer's discharge of claimant. This additional inquiry should be directed at the circumstances surrounding the January 29, 2021 conversation between claimant and the manager, and should specifically address the substance of the disciplinary report issued by the employer to claimant and the discrepancy that exists regarding whether the employer offered claimant a drug test. If possible, the testimony of any eyewitnesses to the January 29, 2021 discussion between the manager and claimant should be developed. Likewise, further clarification of the record is necessary to address whether the employer based any part of their decision to discharge claimant on claimant's alleged use or possession of marijuana on January 28, 2021, independently of whether claimant may have been under the influence of marijuana or refused to take a drug test. *Compare* ORS 657.176(9)(a)(D), *with* ORS 657.176(9)(a)(E).

Further inquiry also is needed to clarify whether the employer's drug and alcohol policy was reasonable. Although the order under review concluded that the employer's policy "prohibited employees from being under the influence of drugs in the workplace, and provided for reasonable suspicion drug testing," the order did not address the reasonableness requirement in OAR 471-030-0125(3)(b) that "[t]he policy . . . not require the employee to pay for any portion of the test . . ." Order No. 21-UI-168560 at 5. On remand, further inquiry should include, but not be limited to, the question of whom the employer's policy required to pay for any portion of the drug test.

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 for a determination of whether claimant committed a disqualifying act under ORS 657.176(9), Order No. 21-UI-168560 is reversed, and this matter is remanded.

**DECISION:** Order No. 21-UI-168560 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service:** July 22, 2021

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-168560 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 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 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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