

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0982**

*Order No. 21-UI-178764 Affirmed ~ Late Request for Hearing Dismissed*  
*Order No. 21-UI-178787 ~ Reversed & Remanded*

**PROCEDURAL HISTORY:** On July 13, 2021, the Oregon Employment Department (the Department) served a Notice of Determination for Pandemic Unemployment Assistance (PUA) concluding that claimant was not entitled to receive PUA benefits effective March 15, 2020. On August 2, 2021, The July 13, 2021 administrative decision became final without claimant having filed a timely request for hearing. On August 27, 2021, the Department served notice of an administrative decision, based in part on the July 13, 2021 administrative decision, concluding that claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits, and assessing a \$13,530.00 overpayment of PUA benefits, a \$17,700.00 overpayment of Federal Pandemic Unemployment Compensation (FPUC) benefits, a \$1,800.00 overpayment of Lost Wages Assistance (LWA), and a \$4,684.50 monetary penalty. On September 3, 2021, claimant filed a late request for hearing on the July 13, 2021 administrative decision and a timely request for hearing on the August 27, 2021 administrative decision.

On October 25, 2021, ALJ Frank conducted a hearing on claimant's late request for hearing on the July 13, 2021 administrative decision and on the merits of the August 27, 2021 administrative decision. On November 2, 2021, ALJ Frank issued Order No. 21-UI-178764, dismissing claimant's late request for hearing as late without good cause and leaving the July 13, 2021 administrative decision undisturbed. Also on November 2, 2021, ALJ Frank issued Order No. 21-UI-178787, affirming the August 27, 2021 administrative decision. On November 19, 2021, claimant filed an application for review of Orders No. 21-UI-178764 and 21-UI-178787 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 21-UI-178764 and 21-UI-178787. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2021-EAB-0982 and 2021-EAB-0983).

**FINDINGS OF FACT:** (1) On June 18, 2020, claimant filed an application for PUA benefits with the Department. Portions of the June 18, 2020 PUA application were blank. On July 1, 2020, claimant filed another application for PUA benefits with the Department. Portions of the July 1, 2020 PUA application were also blank.

(2) In early July 2020, a Department representative called claimant and worked with claimant over the telephone to fill in the portions of claimant's June 18, 2020 and July 1, 2020 PUA applications that were blank.

(3) On July 16, 2020, the Department processed claimant's initial claim for PUA benefits. The Department established a weekly PUA benefit amount of \$205.00. On July 21, 2020, claimant retroactively claimed and was paid PUA benefits for the weeks including March 15, 2020 through May 16, 2020 (weeks 12-20 through 20-20), and June 7, 2020 through July 11, 2020 (weeks 24-20 through 28-20).<sup>1</sup> On July 27, 2020, claimant claimed and was paid PUA benefits for the week including July 19, 2020 through July 25, 2020 (week 30-20); on August 3, 2020, claimant claimed and was paid PUA benefits for the week including July 26, 2020 through August 1, 2020 (week 31-20); on August 10, 2020, claimant claimed and was paid PUA benefits for the week including August 2, 2020 through August 8, 2020 (week 32-20); and on August 18, 2020, claimant claimed and was paid PUA benefits for the week including August 9, 2020 through August 15, 2020 (week 33-20).<sup>2</sup> All told, claimant claimed PUA benefits for the weeks including March 15, 2020 through July 11, 2020 (weeks 12-20 through 28-20), July 19, 2020 through December 19, 2020 (weeks 30-20 through 51-20), and December 27, 2020 through July 3, 2021 (weeks 53-20 through 26-21). These are the weeks at issue.

(4) On August 25, 2020, the Department received an application for PUA benefits sent from claimant's internet protocol (IP) address, which the Department construed as another PUA application filed by claimant. The August 25, 2020 PUA application stated that claimant had been self-employed from September 2016 until March 2020.

(5) The Department paid claimant \$205 in PUA benefits for each of the weeks at issue. The Department paid claimant \$600 in FPUC benefits for each of weeks 14-20 through 28-20, and 30-20. The Department paid claimant \$300 in FPUC benefits for each of weeks 53-20 through 26-21. The Department paid claimant \$300 in LWA benefits for each of weeks 31-20 through 36-20. Claimant received a combined total of \$33,030 in benefits for the weeks at issue, which consisted of \$13,530.00 in PUA benefits, \$17,700 in FPUC benefits, and \$1,800 in LWA benefits.

(6) In July or August 2021, the Department determined that the information contained in the August 25, 2020 PUA application relating to claimant having been self-employed from September 2016 until March 2020 was a false statement because information the Department had gathered from claimant suggested that claimant had no self-employment before May 2020. The Department determined that, but for the information in the August 25, 2020 PUA application which indicated that claimant had been self-employed from September 2016 until March 2020, claimant would not have received any of the benefits she was paid for the weeks at issue.

---

<sup>1</sup> EAB has taken notice of these facts, which are contained in Employment Department records. OAR 471-041-0090(1) (May 13, 2019). 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.

<sup>2</sup> EAB has taken notice of these facts, which are contained in Employment Department records. OAR 471-041-0090(1) (May 13, 2019). 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.

(7) On July 13, 2021, the Department mailed to claimant's address of record an administrative decision concluding that claimant was not entitled to receive PUA benefits effective March 15, 2020 because she was not unemployed, unable to work, or unavailable to work for a qualifying reason related to the COVID-19 pandemic. The decision stated, "[y]ou have the right to appeal this decision if you do not believe it is correct. Your request for appeal must be received by August 2, 2021." Order No. 21-UI-178764 Exhibit 1 at 2.

(8) Claimant received the July 13, 2021 administrative decision on July 16 or 17, 2021. At the time claimant received the decision, she did not read the appeal rights information but saw that she did not "qualify anymore" and believed it was "time to move on." Transcript at 10-11. On July 21, 2021, claimant called the Department to return a call from an investigator who was reviewing whether claimant was liable for an overpayment. The Department representative who took claimant's call advised her to either continue trying to contact the investigator or wait for the investigator to issue an overpayment administrative decision and appeal that overpayment decision. Claimant did not request a hearing on the July 13, 2021 administrative decision during the call.

(9) On July 26, 2021, claimant moved out of her house and decided to "put the PUA on the back burner and was trying to find a place for [her and her] kids to live. [She] figured [she'd] sort it out when [they] got to wherever [they] were going." Transcript at 13. Thereafter, claimant was homeless for three weeks until she found new housing. On August 16 and 25, 2021, claimant called the department about the status of the overpayment investigation and was advised that the investigation was ongoing. Claimant did not request a hearing on the July 13, 2021 administrative decision during these calls.

(10) On August 27, 2021, the Department issued an administrative decision assessing against claimant an overpayment of \$33,030.00 and a monetary penalty of \$4,684.50. Thereafter, claimant called the Department and realized she could appeal the July 13, 2021 administrative decision. On September 3, 2021, claimant requested a hearing on the July 13, 2021 administrative decision and the August 27, 2021 administrative decision.

**CONCLUSIONS AND REASONS:** Order No. 21-UI-178764, which dismissed claimant's late request for hearing on the July 13, 2021 administrative decision, is affirmed. Order No. 21-UI-178787 is set aside and this matter remanded for further development of the record.

**Order No. 21-UI-178764 - Late Request for Hearing.** ORS 657.269 provides that the Department's decisions become final unless a party files a request for hearing within 20 days after the date the decision is mailed. ORS 657.875 provides that the 20-day deadline may be extended a "reasonable time" upon a showing of "good cause." OAR 471-040-0010 (February 10, 2012) provides that "good cause" includes factors beyond an applicant's reasonable control or an excusable mistake, and defines "reasonable time" as seven days after those factors ceased to exist.

On July 13, 2021, the Department mailed the July 13, 2021 administrative decision to claimant at claimant's address of record on file with the Department. The 20-day deadline for claimant to file a timely request for hearing on that decision was August 2, 2021. Claimant did not file a request for hearing on decision # 161858 until September 3, 2021. Accordingly, claimant's request for hearing was late.

Claimant did not establish that factors beyond her reasonable control prevented her from filing a timely hearing request. Claimant received the decision on July 16 or 17, 2021 and although the decision stated that August 2, 2021 was the deadline for filing a timely appeal, claimant decided “it’s time to move on” and did not read the appeal rights information when she received the decision. Transcript at 10-11. The record shows that claimant moved out of her home on July 26, 2021 and decided to “put the PUA on the backburner” and address the July 13, 2021 administrative decision when she “got to wherever [they] were going.” Transcript at 13. Although claimant was homeless for three weeks after July 26, 2021, she did not establish that this set of circumstances constituted circumstances beyond her reasonable control that prevented her from filing her hearing request by the deadline because she received the decision before July 26, 2021. Therefore, viewed objectively, it was within claimant’s reasonable control to carefully read the decision and, if she disagreed with it, request a hearing by the deadline that was stated therein.

To the extent that claimant’s failure to file a timely hearing request was the result of a mistake on claimant’s part, claimant did not show that the mistake was an “excusable mistake” within the meaning of the administrative rules. The record does not, for example, raise a due process issue, and fails to show that any mistake was the result of inadequate notice, reasonable reliance on another, or the inability to follow directions despite substantial efforts to comply. The record shows that claimant called the Department several times in July and August 2021 to inquire about the status of the investigation into whether claimant would be liable for an overpayment. Although related, this matter was distinct from the July 13, 2021 administrative decision that concluded that claimant was not entitled to receive PUA benefits. While claimant realized she could appeal the July 13, 2021 administrative decision only after she received the August 27, 2021 administrative decision and again spoke to a Department representative, this did not constitute an excusable mistake. This is because claimant did not read the appeal rights information in the July 13, 2021 administrative decision and therefore did not establish an inability to follow directions despite substantial efforts to comply.

Because claimant failed to show that factors beyond her reasonable control or an excusable mistake prevented her from filing a hearing request on the July 13, 2021 administrative decision by the August 2, 2021 deadline, claimant failed to establish good cause to extend the filing deadline beyond that date. Accordingly, claimant’s late request for hearing is dismissed, Order No. 21-UI-178764 is affirmed, and the July 13, 2021 administrative decision remains undisturbed. Because the July 13, 2021 administrative decision is final, its conclusion that claimant was ineligible to receive PUA benefits effective March 15, 2020 is binding as a matter of law.

**Order No. 21-UI-178787 - Overpayment and Penalty.** Claimant received benefits for the weeks at issue and, therefore, the Department had the burden to prove that she should not have been paid benefits for those weeks. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976) (where the Department has paid benefits it has the burden to prove benefits should not have been paid).

Overpayment of PUA benefits is governed by Section 2102(d)(4) of the CARES Act, Pub. L. 116-136, as amended by Section 201(d) of the Continued Assistance Act. That provision states that “[i]n the case of individuals who have received amounts of pandemic unemployment assistance to which they were not entitled, the State shall require such individuals to repay the amounts of such pandemic unemployment assistance to the State agency,” unless the state agency waives repayment. Under guidance issued by the United States Department of Labor, “if the overpayment amount is not subject to

waiver, the State agency must recover the amount of PUA to which an individual was not entitled in accordance with the same procedures as apply to recovery of overpayments of regular [unemployment insurance] paid by the State.” U.S. Dep’t of Labor, Unemployment Insurance Program Letter No. 16-20, Change 4 (January 8, 2021) (UIPL 16-20, Change 4), at I-26.

Regarding the procedures that apply to recovery of overpayments of regular unemployment insurance, 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. *Id.* Given that the Department has not waived repayment in this case, pursuant to UIPL 16-20, Change 4, ORS 657.310(1) sets forth the applicable state procedure for recovery of PUA benefits in this case.

With respect to FPUC benefits, under Section 2104(f)(2) of the CARES Act, an individual who receives FPUC payments to which the individual was not entitled is liable to repay those benefits, absent a waiver by the Department. Similarly, recovery of overpaid LWA benefits is governed by Section 262(b) of the Continued Assistance Act, which provides that “the State shall require” any individual who receives covered assistance to which they are not entitled “to repay the amounts of such assistance to the State agency.”

With respect to PUA benefits, federal guidance provides that “[a]n individual commits fraud if he or she knowingly has made or caused to be made by another, a false statement or representation of a material fact . . . and as a result of such false statement or representation . . . has received an amount of PUA to which such individual was not entitled.” UIPL 16-20, Change 4 at I-24. “States must apply a 15 percent penalty to an individual’s overpayment when the state determines that it made an erroneous PUA payment to an individual due to fraud the individual committed.” *Id.*

Order No. 21-UI-178787 concluded that claimant was liable for a combined overpayment amount of \$33,030.00 and a fraud penalty of \$4,684.50. Order No. 21-UI-178787 at 6-8. The record as developed does not support this conclusion.

At hearing, the witness for the Department testified that the source of the overpaid benefits and monetary penalty in this case was the information contained in the August 25, 2020 PUA application, which stated that claimant had been self-employed from September 2016 until March 2020. Transcript at 22. Because that information was conveyed to the Department on August 25, 2020, it is not evident from the record how it could have resulted in claimant receiving benefits to which she was not entitled for weeks 12-20 through 20-20, 24-20 through 28-20, and 30-20 through 33-20, all of which were claimed and paid before August 25, 2020. Additionally, assessing a monetary penalty requires finding that claimant made a false statement of material fact, and the inquiry at hearing was not sufficient to evaluate whether the statement relating to claimant being self-employed from September 2016 until March 2020 was actually false.

On remand, the ALJ should develop the record to determine what information the Department used to determine that claimant was eligible for PUA benefits for the weeks that she claimed before August 25,

2020 and how, if at all, that information differed from the information contained in the August 25, 2020 PUA application. The ALJ should also ask whether the Department's determination of claimant's eligibility changed in light of the information contained in the August 25, 2020 PUA application. The ALJ should further inquire whether the date the Department witness ascribed to the August 25, 2020 PUA application was accurate,<sup>3</sup> and why the August 25, 2020 PUA application was submitted to the Department if claimant was already receiving PUA benefits. Further, to assess whether claimant is liable for a monetary penalty, the record should be developed to determine whether claimant made a false statement and whether she did so knowingly by including information relating to being self-employed in the August 25, 2020 PUA application. To this end, the ALJ should inquire why claimant believed she was self-employed from September 2016 until March 2020 and why the Department concluded that claimant had no self-employment before May 2020.<sup>4</sup>

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 is liable for an overpayment and monetary penalty, Order No. 178787 is reversed, and this matter is remanded.

**DECISION:** Order No. 21-UI-178764 is affirmed. Order No. 21-UI-178787 is set aside, and remanded for further proceedings consistent with this order.

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

**DATE of Service: December 30, 2021**

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-178787 or return the issues presented by that hearing order to EAB. Only a timely application for review of the subsequent order will cause the issues presented by Order No. 21-UI-178787 to return to EAB.

**NOTE:** You may appeal EAB Decision 2021-EAB-0982 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

---

<sup>3</sup> At hearing, the Department witness testified that claimant filed applications for PUA benefits on June 18, 2020, July 1, 2020, August 8, 2020, and August 25, 2020, and that the information the Department considered to be false was contained in the August 25, 2020 PUA application. Transcript at 18-19. However, the documentary evidence the Department offered at hearing, admitted as Exhibit 1 to Order No. 21-UI-178787, also includes an apparent PUA application. Order No. 21-UI-178787 Exhibit 1 at 10-15. The application is unsigned but is dated July 16, 2020, a date not ascribed to any of the applications mentioned at hearing. Order No. 21-UI-178787 Exhibit 1 at 15. It also included a statement that claimant had been self-employed from September 2016 until the present. Order No. 21-UI-178787 Exhibit 1 at 10.

<sup>4</sup> This inquiry is relevant to the issue of the monetary penalty. Note that because the July 13, 2021 administrative decision is final, its conclusion that claimant was ineligible to receive PUA benefits effective March 15, 2020 is binding as a matter of law regardless of what the record on remand shows relating to whether claimant was self-employed from September 2016 until March 2020.

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.surveymzmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need 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 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 ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

**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**  
 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.