

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0335

Modified
Lost Wages Assistance Overpayment Waiver Granted

PROCEDURAL HISTORY: On February 24, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision denying claimant’s request for a waiver of an overpayment of Lost Wages Assistance (LWA) benefits that the Department had previously assessed on December 7, 2021 (decision # 110015). Claimant filed a timely request for hearing. On February 23, 2023, ALJ Mott conducted a hearing, and on February 27, 2023 issued Order No. 23-UI-217211, modifying¹ decision # 110015 by concluding that claimant’s overpayment waiver requests should be granted as to claimant’s overpayments of regular unemployment insurance (regular UI) benefits, extended benefits, Pandemic Emergency Unemployment Compensation (PEUC) benefits, and Federal Pandemic Unemployment Compensation (FPUC) benefits. On March 20, 2023, the Department filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered the Department’s written argument in reaching this decision.

EVIDENTIARY MATTER: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence is the notice of hearing in this case, which has been marked as EAB Exhibit 1, and the administrative decision in this case, decision # 110015, which has been marked as EAB Exhibit 2. Copies of EAB Exhibit 1 and 2 are being provided to the parties with this decision. Any party that objects to our admitting EAB Exhibit 1 or 2 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 exhibits will remain in the record.

¹ Although Order No. 23-UI-217211 described its disposition as setting aside decision # 110015, it modified decision # 110015 by addressing waiver of overpayments relating to program types not addressed in decision # 110015.

FINDINGS OF FACT: (1) Prior to mid-March 2020, claimant worked at a cosmetology school. In mid-March 2020, at the start of the COVID-19 pandemic, the school was closed due to shelter-in-place restrictions. On March 18, 2020, claimant filed an initial claim for unemployment insurance benefits.

(2) Among other weeks, claimant claimed benefits for the weeks including July 26, 2020 through September 5, 2020 (weeks 31-20 through 36-20). Claimant received \$1,800 in Lost Wages Assistance (LWA) benefits for these weeks.²

(3) In July 2020, claimant voluntarily left work at the school due to difficulties with childcare and the death of her father.

(4) The Department subsequently investigated claimant's work separation. On November 22, 2021, the Department issued an administrative decision concluding that claimant voluntarily quit work without good cause and was disqualified from receiving unemployment insurance benefits effective July 5, 2020.

(5) On December 7, 2021, the Department issued an administrative decision, based in part on the November 22, 2021 voluntary quit administrative decision, concluding that claimant received LWA benefits to which she was not entitled and assessing a \$1,800 overpayment of LWA benefits.³

(6) On June 14, 2022, the Department issued an administrative decision, based in part on the November 22, 2021 voluntary quit decision, assessing a combined overpayment of regular UI benefits, extended benefits, PEUC benefits, and FPUC benefits in the amount of \$26,813 that claimant was liable to repay the Department.

(7) In June 2022, claimant submitted to the Department requests for waiver of her overpayments. On February 3, 2023, the Department applied a blanket waiver to claimant's LWA overpayment, waiving the entire LWA \$1,800 overpayment amount.

CONCLUSIONS AND REASONS: Order No. 23-UI-217211 is modified. Claimant is entitled to waiver of the \$1,800 LWA benefits overpayment assessed by the December 7, 2021 overpayment decision.

OAR 471-040-0025(8) (August 1, 2004) provides that "In any hearing, the administrative law judge shall render a decision on the issue and law involved as stated in the notice of hearing." OAR 471-040-0025(8) further specifies that "[s]ubject to objection by any party," the ALJ "may also hear and enter a decision on any issue not previously considered by the authorized representative of the Director and which arose during the hearing." However, "in no event shall the administrative law judge accept

² EAB has taken notice of this fact, which is contained in Employment Department records. OAR 471-041-0090(1). 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.

³ EAB has taken notice of this fact, which is contained in Employment Department records. OAR 471-041-0090(1). 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.

jurisdiction of a new issue and proceed with hearing on such issue when an interested party to such new issue has not waived right to notice.”

The order under review concluded that claimant was entitled to a waiver of the \$26,813 combined overpayment amount that reflected overpayments of regular UI benefits, extended benefits, PEUC benefits, and FPUC benefits. Order No. 23-UI-217211 at 3-6. This conclusion was improper because the administrative decision in this case was limited in scope to claimant’s request for waiver of the \$1,800 LWA overpayment.

Under OAR 471-040-0025(8), unless an interested party waives right to notice, the scope of the hearing must be limited to the issue as stated in the notice of hearing. The notice of hearing in this case stated, “The hearing is regarding the Administrative Decision(s) dated February 24, 2022” and identified the issue to be considered as “Whether claimant’s request for a waiver of overpayment should be granted.” EAB Exhibit 1 at 1.

The February 24, 2022 administrative decision to which the notice refers is decision # 110015. *See* EAB Exhibit 2 at 1-2. It is plain that decision # 110015 is a denial solely of claimant’s overpayment of LWA benefits, and that it does not relate to overpayments of the other types of benefits programs considered in the order under review. Decision # 110015 states that the overpayment was created by the LWA overpayment decision dated December 7, 2021, not the June 14, 2022 overpayment decision that related to claimant’s overpayments of regular UI benefits, extended benefits, PEUC benefits, and FPUC benefits. EAB Exhibit 2 at 1. Further, decision # 110015 states that the overpayment is question is in the amount of \$1,800, which corresponded to claimant’s LWA overpayment amount, not the other types of benefits for which claimant had been overpaid. EAB Exhibit 2 at 1.

Thus, the scope of the hearing was to be limited to the issue of waiver of claimant’s LWA overpayment, unless the ALJ expanded the scope after the parties were afforded an opportunity to object and waived notice to addressing additional issues. At hearing, as the ALJ began questioning regarding waiver of overpayments relating to the other programs, the witness for the Department testified that she had prepared only for the issue of the LWA overpayment waiver and “didn’t prepare for a . . . full overpayment.” Transcript at 9. Thus, the record fails to show that the Department was given an opportunity to object or waived notice to additional issues being considered during the hearing. Accordingly, the proper scope of the hearing included only the issue of denial of claimant’s request for waiver of the \$1,800 LWA overpayment.

Although not essential to decide this case, a discussion of the standards that govern waiver of overpayments of regular UI benefits, extended benefits, PEUC, and FPUC benefits is warranted.

Overpayment Waiver Standard for State Programs. Regular UI and extended benefits are state unemployment benefits programs. The waiver of recovery of state benefits programs are governed by ORS 657.317. Under ORS 657.317(2)(a), the Department “may waive recovery of all or any part of overpaid benefits subject to repayment or deduction under ORS 657.310(1) or 657.315(1)” if the Department finds “that recovery of the benefits would be against equity and good conscience.” Recovering overpaid benefits is against equity and good conscience if the person requesting a waiver has “no means to repay the benefits” and “has total allowable household expenses that equal or exceed 90% of the total household income less unemployment benefits.” OAR 471-030-0053(2) (effective June

23, 2021). The Department uses the IRS Collection Financial Standards to determine maximum allowable household expenses. OAR 471-030-0053(2).

Per ORS 657.317(2)(b), the Department may not waive recovery of overpaid benefits that are subject to the penalty imposed under ORS 657.310(2). ORS 673.310(2) provides for the assessment of monetary penalties when an overpayment results from an individual having willfully made a misrepresentation to obtain benefits pursuant to ORS 657.215. The bottom line effect of these provisions is that waiver is not available for fraud-type overpayments, *i.e.*, overpayments in which an individual willfully makes a misrepresentation to obtain benefits per ORS 657.310(2) and ORS 657.215. However, overpayments that are due to claimant fault but are non-fraud (*i.e.*, are subject to recovery under ORS 657.310(1)) and overpayments that are not due to claimant fault (*i.e.*, are subject to recovery under ORS 657.315) may be waived so long as recovery of the benefits would be against equity and good conscience.⁴

Overpayment Waiver Standard for Federal Programs. Waiver of recovery of PEUC benefits and FPUC benefits are governed by the provisions of 15 U.S.C. § 9025(e)(2)(A)-(B) and 15 U.S.C. § 9023(f)(2)(A)-(B), respectively. The provisions are identical and require, for waiver to be granted, that the overpayment of benefits be: (1) without fault on the part of the claimant, and (2) that repayment be contrary to equity and good conscience.

As to the first element of the PEUC and FPUC overpayment waiver analysis, federal guidance provides that, in general, “an individual is considered to be without fault when the individual provided all information correctly as requested by the state, but the state failed to take appropriate action with that information or took delayed action when determining eligibility.” Unemployment Insurance Program Letter 20-21, Change 1 (UIPL 20-21 Change 1) at 9 (February 7, 2022). However, “a state may also find that an individual is without fault if the individual provided incorrect information due to conflicting, changing, or confusing information or instructions from the state; the individual was unable to reach the state despite their best efforts to inquire or clarify what information the individual needed to provide; or other similar difficulties (*e.g.*, education, literacy, and/or language barriers) in understanding what information the state needed from the individual[.]” UIPL 20-21 Change 1, at 10.

With respect to the “contrary to equity and good conscience” element of the PEUC and FPUC overpayment waiver analysis, federal guidance provides that states may defer to state law in defining what it means for repayment to be contrary to equity and good conscience, or may use the federal standard. UIPL 20-21 Change 1, at 10. The federal standard provides that recovery is “contrary to equity and good conscience” when one of at least three circumstances are present. Those circumstances are: (1) recovery would cause financial hardship to the person from whom it is sought; (2) the recipient of the overpayment can show (regardless of their financial situation) that due to the notice that such payment would be made or because of the incorrect payment, either they have relinquished a valuable right or changed positions for the worse; or (3) recovery would be unconscionable under the circumstances. UIPL 20-21 Change 1, at 10-13.

⁴ This arrangement was established with the passage of SB 172. *See* 2021 Regular Session, SB 172 Enrolled *available at* <https://olis.oregonlegislature.gov/liz/2021R1/Measures/Overview/SB172>. SB 172 was enacted on June 23, 2021 and applied retroactively. *See* <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureDocument/SB172/Enrolled> (“The amendments to ORS 657.310, 657.315 and 657.317 by sections 1 to 3 of this 2021 Act apply to benefits determined to have been overpaid before, on or after the effective date of this 2021 Act.”). Prior to enactment of SB 172, ORS 657.317(2) authorized waiver only in situations where the overpayment was not due to claimant fault.

LWA Overpayment Waiver. Turning to the issue at hand, decision # 110015 denied claimant's request for waiver of her \$1,800 LWA overpayment. Waiver of LWA overpayments is governed by the provisions of Section 262(b) of the Continued Assistance for Unemployed Workers Act of 2020.⁵ Similar to the PEUC and FPUC standards, Section 262(b) requires, for waiver to be granted, that the overpayment of LWA benefits be: (1) without fault on the part of the claimant, and (2) that repayment be contrary to equity and good conscience.

The record shows that on February 3, 2023, the Department applied a blanket waiver to claimant's LWA overpayment, waiving the entire \$1,800 LWA overpayment amount. Because the Department granted claimant's LWA overpayment waiver request by applying a blanket waiver, the issue is moot and whether claimant's circumstances fulfill the elements of Section 262(b) need not be addressed.

For these reasons, Order No. 22-UI-217211 is modified. The Department is required to waive claimant's \$1,800 LWA overpayment consistent with the blanket waiver it applied. The scope of the hearing was limited to the issue of denial of claimant's request for waiver of the \$1,800 LWA overpayment. Therefore, Order No. 23-UI-217211's conclusion that claimant was entitled to a waiver of the \$26,813 combined overpayment amount reflecting overpayments of regular UI benefits, extended benefits, PEUC benefits, and FPUC benefits is set aside.

Claimant may wish to file a request for hearing of the administrative decisions that denied claimant's requests for waiver of the \$26,813 combined overpayment amount. Department records suggest that the Department denied claimant's waiver request for the PEUC and FPUC overpayments via administrative decisions issued March 28, 2022, June 23, 2022, and December 8, 2022.⁶ Claimant may wish to contact the Department and request a hearing on these administrative decisions. Department records also suggest that the Department partially granted claimant's waiver request for the regular UI and extended benefits overpayments on November 15, 2022.⁷ Claimant may wish to contact the Department and request a hearing on that administrative decision.

DECISION: Order No. 23-UI-217211 is modified, as outlined above.

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

DATE of Service: April 26, 2023

⁵ The Consolidated Appropriations Act, 2020, including Division N, Title II, Subtitle A, the Continued Assistance for Unemployed Workers Act of 2020 was signed into law on December 27, 2020.

⁶ EAB has taken notice of this fact, which is contained in Employment Department records. OAR 471-041-0090(1). 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.

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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. 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.surveygizmo.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 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
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