

**EMPLOYMENT APPEALS BOARD DECISION**  
**2023-EAB-0509**

*Modified*  
*Overpayment Assessed*

**PROCEDURAL HISTORY:** On November 2, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits, and assessing a \$734.00 overpayment of regular unemployment insurance (regular UI) benefits that claimant was required to repay to the Department, a \$2,400 overpayment of Federal Pandemic Unemployment Compensation (FPUC) benefits that claimant was required to repay to the Department, a \$783.50 monetary penalty, and a 20-week penalty disqualification from future benefits (decision # 194343). Claimant filed a timely request for hearing. On March 23, 2023, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for April 6, 2023. On April 6, 2023, the Department failed to appear, and the hearing was postponed to April 7, 2023.

On April 7, 2023, ALJ Scott conducted a hearing at which the employer failed to appear, and on April 12, 2023 issued Order No. 23-UI-221895, modifying decision # 194343 by concluding that claimant did not willfully make a misrepresentation and fail to report a material fact to obtain benefits, and assessing an overpayment of \$1,391.00 in regular unemployment insurance (regular UI) benefits and \$1,200.00 in Federal Pandemic Unemployment Compensation benefits (FPUC), and did not assess a monetary penalty or penalty disqualification. On May 22, 2023, the Department filed an application for review with the Employment Appeals Board (EAB).

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the portion of the order under review concluding that claimant did not willfully make a misrepresentation and fail to report a material fact to obtain benefits is **adopted**. The rest of this decision addresses the amount of the overpayment assessed.

**WRITTEN ARGUMENT:** EAB considered the Department's written argument in reaching this decision. The Department's argument expressed disagreement only with the amount of the overpayment assessed.

**FINDINGS OF FACT:** (1) Galveston Pub employed claimant for the weeks including May 17, 2020 through July 4, 2020. Claimant’s hours and compensation were reduced during this period as compared to earlier in the year.

(2) On March 18, 2020, claimant filed an initial claim for unemployment insurance benefits. The Department determined she had a valid claim for regular UI with a weekly benefit amount of \$341.

(3) Claimant filed weekly claims for the weeks including May 17, 2020 through June 20, 2020 (weeks 21-20 through 25-20), and June 28, 2020 through July 4, 2020 (week 27-20). These are the weeks at issue.

(4) During the weeks at issue, claimant was unaware when filing her weekly claims of what her earnings were likely to be for each week due to the employer’s new practice of pooling tips and paying them to employees as much as two weeks later. Claimant therefore estimated her weekly earnings when filing the claims. Claimant’s estimates, as reported on her weekly claims, varied from the amounts eventually paid, as shown below. Claimant received regular UI and FPUC benefits for the weeks at issue, as shown below.

Week	Claimant Reported Wages	Actual Wages	Regular UI Paid	FPUC Paid
21-20	\$180.00	\$171.54	\$286	\$600
22-20	\$285.00	\$319.95	\$181	\$600
23-20	\$288.00	\$511.94	\$178	\$600
24-20	\$288.00	\$488.67	\$178	\$600
25-20	\$288.00	\$552.44	\$178	\$600
27-20	\$300.00	\$539.73	\$173	\$600

**CONCLUSIONS AND REASONS:** Claimant was overpaid \$734.00 in regular UI benefits and \$2,400.00 in FPUC benefits for the weeks at issue.

The order under review concluded that claimant was overpaid \$1,391.00 in regular UI benefits and \$1,200.00 in FPUC benefits. Order No. 23-UI-221895 at 7. The record does not support these conclusions.

**Remuneration.** An individual is not eligible to receive unemployment insurance benefits if they are not unemployed. ORS 657.155(1)(e) (“An *unemployed individual* shall be eligible to receive benefits with respect to any week . . . .”) (emphasis added). Per ORS 657.100(1), an individual is deemed “unemployed”:

in any week during which the individual performs no services and with respect to which no remuneration for services performed is paid or payable to the individual, or in any week of less than full-time work if the remuneration paid or payable to the individual for services performed during the week is less than the individual’s weekly benefit amount.

In weeks 23-20, 24-20, 25-20, and 27-20, claimant's earnings exceeded her weekly benefit amount. As a result, claimant was not "unemployed" during any of these weeks within the meaning of ORS 657.100(1) and therefore was not eligible to receive benefits for those weeks.

ORS 657.150(6) states:

An eligible unemployed individual who has employment in any week shall have the individual's weekly benefit amount reduced by the amount of earnings paid or payable that exceeds whichever is the greater of the following amounts:

- (a) Ten times the minimum hourly wage established by the laws of this state; or
- (b) One-third of the individual's weekly benefit amount.

Claimant did not dispute the employer's reports of claimant's earnings for the weeks at issue, nor the amount of benefits the Department alleged she received for those weeks. Audio Record at 34:30 to 35:00. The minimum hourly wage in effect during weeks 21-20 through 25-20 was \$12.50, and ten times that amount is \$125.00.<sup>1</sup> That amount is greater than one-third of claimant's weekly benefit amount, \$113.66. Accordingly, for weeks 21-20 and 22-20, claimant's regular UI benefit amounts should have been reduced by the amount of her wages, less \$125.00. For week 21-20, the amount of claimant's \$171.54 earnings that exceeded \$125.00 was \$46.54. Claimant's \$341.00 weekly benefit amount was therefore reduced dollar for dollar by \$46.54, which equals \$294.46 and is rounded down to the next lower full dollar amount.

For week 22-20, the amount of claimant's \$319.95 earnings that exceeded \$125.00 was \$194.95. Claimant's \$341.00 weekly benefit amount was therefore reduced dollar for dollar by \$194.95, which equals \$146.05 and is rounded down to the next lower full dollar amount.

**Overpayment of regular benefits.** ORS 657.310(1)(a) 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.*

For week 21-20, claimant received \$286.00 in regular UI benefits, but was entitled to \$294.00 in regular UI benefits. She was therefore underpaid \$8.00 in regular UI benefits for week 21-20. For week 22-20, claimant received \$181.00 in regular UI benefits, but was entitled to \$146.00 in regular UI benefits. She was therefore overpaid \$35.00 in regular UI benefits for week 22-20. Claimant was not entitled to any regular UI benefits for weeks 23-20, 24-20, 25-20, and 27-20. She was therefore overpaid all of the regular UI benefits she received for those weeks, which were \$178.00, \$178.00, \$178.00, and \$173.00,

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<sup>1</sup> OAR 471-030-0017(2)(i) (effective January 11, 2018) provides that "[f]or purposes of ORS 657.150(6)(a), the term "minimum hourly wage" means the minimum wage rate as computed under 653.025(2)." ORS 653.025(2)(d) establishes a \$12.50 per hour minimum wage for the Portland, Oregon metropolitan area applicable from July 1, 2019 to June 30, 2020.

respectively. The total net regular UI overpayment for the weeks at issue is therefore \$734.00.<sup>2</sup> Claimant is liable under 657.310(1)(c) to repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable to claimant during the five-year period following the date decision # 194343 becomes final.

**Overpayment of FPUC benefits.** Under the provisions of the CARES Act, 15 U.S.C. § 9023, claimant also received FPUC benefits to which he was not entitled. FPUC is a federal benefits program that provided eligible individuals with \$600 per week, in addition to their regular UI weekly benefit amount, during the period of March 29, 2020 through July 25, 2020 (weeks 14-20 through 30-20). UIPL 15-20 at 6. Individuals were eligible to receive the full \$600 FPUC benefit if they were eligible to receive at least one dollar of regular UI benefits for the claimed week. UIPL 15-20 at I-5.

For the weeks at issue, claimant was entitled to receive regular UI benefits only for the weeks of 21-20 and 22-20. She was therefore entitled to receive and did receive \$600 in FPUC benefits for each of those weeks. However, as claimant was not entitled to receive regular UI benefits for weeks 23-20, 24-20, 25-20, and 27-20, she was not entitled to FPUC benefits for those weeks. *See* UIPL 15-20 at I-7 (“If an individual is deemed ineligible for regular compensation in a week and the denial creates an overpayment for the entire weekly benefit amount, the FPUC payment for the week will also be denied. And the FPUC overpayment must also be created.”). Because claimant received \$600 in FPUC benefits to which she was not entitled for each of those four weeks, claimant was overpaid a total of \$2,400.00 in FPUC benefits for the weeks at issue.

Pursuant to 15 U.S.C. § 9023(f)(2), an individual who receives FPUC payments to which the individual was not entitled is liable to repay those benefits, unless the Department waives such repayment because it determines that the payment of those benefits was without fault on the part of the individual and such repayment would be contrary to equity and good conscience. The record does not show the Department has waived repayment here.

Under 15 U.S.C. § 9023(f)(3)(A), the Department may recover the FPUC benefits by deduction from any future FPUC payments payable to claimant or from any future unemployment compensation payable to claimant under any state or federal unemployment compensation law administered by the Department during the three-year period following the date she received the FPUC benefits to which she was not entitled.

United States Department of Labor guidance documents elaborate that while an FPUC overpayment may be offset by other State and Federal unemployment benefits payable during this three-year period, State agencies “must recover the amount of FPUC to which an individual was not entitled in accordance with the same procedures as apply to recovery of overpayments of regular [UI] paid by the State.” UIPL 15-20 at I-7. “After three years, a State may continue to recover FPUC overpayments through means other than benefit offsets, according to State law.” UIPL 15-20 at I-7. Accordingly, because the provision of state law governing claimant’s regular UI overpayment is ORS 657.310(1)(c), claimant is liable to repay the amount of her FPUC overpayment or have it deducted from any future benefits otherwise payable to claimant under ORS Chapter 657 during the five-year period following the date the September 16, 2022 administrative decision becomes final.

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<sup>2</sup> (8.00) + \$35.00 + \$178.00 + \$178.00 + \$178.00 + \$173.00 = \$734.00

In sum, claimant is liable for an overpayment of \$734.00 in regular UI benefits and is liable to repay the benefits or have the amount of the benefits deducted from future benefits payable during the five-year period following the date decision # 194343 becomes final. Claimant is liable for an overpayment of \$2,400.00 in FPUC benefits to be recovered in accordance with the same procedures as apply to recovery of claimant's regular UI overpayment .

**DECISION:** Order No. 23-UI-221895 is modified, as outlined above.

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

**DATE of Service:** June 6, 2023

**NOTE:** The Department may defer recovery or completely waive the overpaid amount if certain standards are met. To make a request for Waiver of Overpayment Recovery, call 503-947-1995 or email [OED\\_Overpayment\\_unit@employ.oregon.gov](mailto:OED_Overpayment_unit@employ.oregon.gov) . You must submit waiver applications that correspond to the program for which you were overpaid benefits. **If you were overpaid benefits under both state and federal benefits programs, you will need to file two separate waiver applications.** To access a State UI Overpayment Waiver application go online to <https://unemployment.oregon.gov/waivers> and click the link for "State UI Overpayment Waiver". To access a Federal Program Overpayment Waiver application go online to <https://unemployment.oregon.gov/waivers> and click the link for "Federal Program Overpayment Waiver".

**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.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**  
 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)

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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.