

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0838

*Late Request for Hearing Allowed
Reversed & Remanded*

PROCEDURAL HISTORY: On August 31, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision denying claimant's request to waive recovery of an overpayment balance of \$12,075.00 in Pandemic Unemployment Assistance (PUA) and \$8,958.50 in Federal Pandemic Unemployment Compensation (FPUC) benefits that claimant was required to repay (decision # 154401). On September 20, 2023, decision # 154401 became final without claimant having filed a request for hearing. On February 27, 2023, claimant filed a late request for hearing. ALJ Kangas considered claimant's request, and on May 23, 2023 issued Order No. 23-UI-225755, dismissing the request as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by June 6, 2023.

On June 6, 2023, claimant filed a timely response to the appellant questionnaire. On June 14, 2023, the Office of Administrative Hearings (OAH) mailed a letter to claimant stating that Order No. 23-UI-225755 was vacated and that a hearing would be scheduled to determine whether to allow claimant's late request for hearing and, if so, the merits of decision # 154401. On July 7, 2023, ALJ Lucas conducted the hearing, and on July 14, 2023 issued Order No. 23-UI-230530, allowing claimant's late request for hearing and affirming decision # 154401. On July 31, 2023, claimant filed an application for review of Order No. 23-UI-230530 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 allowing claimant's late request for hearing is **adopted**. The rest of this decision addresses claimant's request for waiver of recovery of the overpayment.

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 June 3, 2022 PUA determination underlying the overpayment for which claimant sought a waiver, marked as EAB Exhibit 1, and the June 10, 2022 administrative decision concluding that claimant was overpaid benefits because she willfully made a misrepresentation and failed to report a material fact to obtain benefits, marked as EAB Exhibit 2. Copies of EAB Exhibits 1 and 2 have been provided to the parties with this decision. Any party that objects to our admitting EAB Exhibits 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.

FINDINGS OF FACT: (1) On June 3, 2022, the Department issued a Notice of Determination for PUA, concluding that claimant was not eligible to receive PUA benefits. After the June 3, 2022 PUA Determination became final, claimant filed a late request for hearing. On June 14, 2023, OAH mailed a letter to claimant stating that a hearing would be scheduled to determine whether to allow claimant's late request for hearing and, if so, the merits of the June 3, 2022 PUA determination. However, this hearing has not yet been held as of the date of this decision.¹

(2) On June 10, 2022, the Department served notice of an administrative decision based in part on the June 3, 2022 PUA determination, concluding that claimant willfully made a misrepresentation and failed to report a material fact to obtain \$18,290.00 in combined PUA and FPUC benefits that claimant was required to repay, and a \$2,743.50 monetary penalty. After the June 10, 2022 administrative decision became final, claimant filed a late request for hearing. On June 14, 2023, OAH mailed a letter to claimant stating that a hearing would be scheduled to determine whether to allow claimant's late request for hearing and, if so, the merits of the June 10, 2022 administrative decision. However, this hearing has not yet been held as of the date of this decision.²

(3) On August 29, 2022, claimant filed a request for waiver of recovery of the overpayment.

(4) On August 31, 2022, the Department issued decision # 154401, denying claimant's request for waiver because the overpayment was alleged to have been the result of claimant's willful misrepresentation.

CONCLUSIONS AND REASONS: Order No. 23-UI-230530 is set aside, and this matter remanded for further proceedings consistent with this order.

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." Under 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.

¹ EAB has taken notice of these facts, which are 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 facts will remain in the record.

² EAB has taken notice of these facts, which are 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 facts will remain in the record.

Recovering overpaid benefits is against equity and good conscience if: (1) the person requesting a waiver has “no means to repay the benefits,” and (2) “has total allowable household expenses that equal or exceed 90% of the total household income less unemployment benefits.” OAR 471-030-0053(2) (effective January 11, 2018). The Department uses the IRS Collection Financial Standards to determine maximum allowable household expenses. OAR 471-030-0053(2).

Waiver of recovery of overpayments received from federal benefits programs are governed by a similar, yet different, body of law. Waiver of FPUC overpayments are governed by the provisions of Section 2104(f)(2)(A)-(B) of the CARES Act, Pub. L. 116-136, which requires, for waiver to be granted, that the overpayment of FPUC benefits be: (1) without fault on the part of the claimant, and (2) that repayment be contrary to equity and good conscience. Section 262(b) of the Continued Assistance for Unemployed Workers Act of 2020 sets forth the same elements for waiver of overpayments of LWA benefits. 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. Unemployment Insurance Program Letter 20-21, Change 1 (February 7, 2022) at 10-13.

The order under review concluded that claimant was at fault for the overpayment and therefore ineligible for a waiver because the June 10, 2022 administrative decision—which concluded that claimant was overpaid benefits because she willfully made a misrepresentation and failed to report a material fact to obtain benefits—“remains in effect.” Order No. 23-UI-230530 at 1, 10. However, claimant appealed the June 10, 2022 administrative decision, and the matter is pending before OAH, awaiting a hearing date.

Claimant also appealed the June 3, 2022 PUA determination on which the June 10, 2022 administrative decision was based. That matter is also pending before OAH, awaiting a hearing date. Whether claimant was eligible for PUA benefits and, in turn, whether claimant was at fault for any overpayment if she was ineligible for benefits she received, are both unsettled matters. Once a hearing is held on the June 10, 2022 administrative decision, the ALJ might conclude that claimant was not overpaid benefits, or that claimant was overpaid but not at fault for that overpayment. If claimant was not at fault for an overpayment, she may be eligible for a waiver.

Remand is necessary to develop the record regarding whether claimant was overpaid benefits and, if so, whether she was at fault for the overpayment. On remand, OAH should consolidate this case with claimant’s appeals of the June 3, 2022 PUA determination and June 10, 2022 administrative decision. At the remand hearing, if the June 10, 2022 administrative decision is not affirmed as to claimant having been overpaid benefits as a result of willful misrepresentation, inquiry should be made into whether claimant was otherwise at fault for any overpayment. If the record shows that claimant did not make a willful misrepresentation to obtain benefits and was not otherwise at fault for any overpayment that is found, the ALJ should determine whether recovery of the overpayment would be against equity and good conscience in accordance with the authorities cited above.

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's overpayment waiver request should be granted, Order No. 23-UI-230530 is reversed, and this matter is remanded.

DECISION: Order No. 23-UI-230530 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: September 8, 2023

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 23-UI-230530 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 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.

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