

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0971

Affirmed
Ineligible for Pandemic Unemployment Assistance

PROCEDURAL HISTORY: On June 20, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was ineligible for Pandemic Unemployment Assistance (PUA) benefits effective February 2, 2020. Claimant filed a timely request for hearing. On August 23, 2023, ALJ Adamson conducted a hearing, and on August 25, 2023, issued Order No. 23-UI-234349, affirming the June 20, 2023, administrative decision. On August 29, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered claimant’s written arguments in reaching this decision.

FINDINGS OF FACT: (1) From January 7, 2019, until September 4, 2020, claimant was incarcerated at an Oregon Department of Corrections facility.

(2) Beginning in 2019, while incarcerated, claimant participated in a work program under the authority of Oregon Corrections Enterprises (OCE), a “semi-independent agency” of the state government.¹ The work involved laundering hospital linens. Under applicable law, 20 percent of claimant’s earnings from this program was placed into an account managed by the Department of Corrections Inmate Trust and ultimately released to claimant, while the other 80 percent was retained by the state.

(3) For 2019, the Department of Corrections Inmate Trust issued an IRS form 1099-MISC to claimant reporting \$924.00 in box 3, “Other Income,” and no amount in box 7, “Nonemployee compensation.” Exhibit 1 at 26.

(4) In January 2020, claimant contracted COVID-19 and was quarantined in a Department of Corrections facility for two months. At approximately the same time, and continuing through claimant’s release from custody, OCE stopped accepting hospital linens for laundering due to the health hazard

¹ ORS 421.344.

posed to those exposed to the linens. As a result, that work program ceased. Claimant did not participate in any other work program during his incarceration.

(5) On September 4, 2020, claimant was released from incarceration. He did not work and was not offered work from September 4, 2020, through at least September 4, 2021. Claimant believed he was unable to work during this period because he “had to quarantine and [he] was not able to go out in public.” Transcript at 22.

(6) On December 21, 2020, claimant filed an initial claim for PUA benefits. Claimant claimed benefits for the weeks of February 23, 2020, through September 4, 2021 (weeks 09-20 through 35-21). These are the weeks at issue. The Department determined that claimant did not qualify for regular unemployment (regular UI) or other benefits for the weeks at issue, but did establish a valid claim for PUA benefits. Claimant was paid PUA benefits for the weeks of April 5, 2020, through September 4, 2021 (weeks 15-20 through 35-21).

(7) On his December 21, 2020, PUA application, claimant certified that he had been self-employed performing “transportation” services from June 8, 2018, through September 30, 2020, and that he had been diagnosed with or was experiencing symptoms of COVID-19 beginning April 23, 2020. Exhibit 1 at 12-13, 15.

CONCLUSIONS AND REASONS: Claimant was not eligible for PUA for the weeks at issue.

ORS 657.065 provides, in relevant part:

(2) “Employment” does not include services that are performed in the employ of the state, any political subdivision or instrumentality of the state or an Indian tribe:

...

(e) By an adult in custody in a custodial or penal institution when such services are performed for the custodial or penal institution in which the adult in custody is confined.

...

OAR 471-030-0036 (March 21, 2022) provides, in relevant part:

(f) For the purposes of ORS 657.155(1)(c), an individual is not available for work in any week claimed if:

...

(B) During the week, the individual is incarcerated during any days or hours customary for the type of work the individual is seeking.

...

ORS 421.354 provides, in relevant part:

(1) Oregon Corrections Enterprises may engage eligible adults in custody in state corrections institutions in work or on-the-job training. This authority is subject to the authority granted the Director of the Department of Corrections by section 41, Article I of the Oregon Constitution, and to any rules or orders issued by the director regarding care, custody and control of adults in custody. Oregon Corrections Enterprises shall ensure that all adult in custody work and on-the-job training programs are cost-effective and designed to develop motivation, work capabilities, cooperation and successful transition into the community.

...

ORS 421.437 provides:

(1) Adults in custody who participate in programs operated by the Department of Corrections or Oregon Corrections Enterprises shall be permitted to retain a portion of compensation earned, if any, for their personal use as determined and established by the Director of the Department of Corrections by rule. The director shall ensure that the rules adopted under this section are designed to:

- (a) Instill a viable work ethic;
- (b) Emulate private gainful employment;
- (c) Encourage productivity; or
- (d) Maintain the safe, secure and orderly operation and management of department facilities.

(2) Except as otherwise required by federal law to permit transportation in interstate commerce of goods, wares or merchandise manufactured, produced or mined, wholly or in part by adults in custody, the rules adopted under subsection (1) of this section may not authorize adults in custody engaged in prison work programs to retain for their personal use more than 20 percent of gross compensation paid.

OAR 291-081-0030 (October 7, 2021) provides, in relevant part:

(1) AICs [Adults In Custody] participating in a Private Sector/Prison Industries Enhancement Program shall be paid compensation as determined and established by the Director in accordance with these rules.

(2) In accordance with 18 USC § 1761, AICs participating in a PS/PIE Program work project shall be paid compensation for actual work performed that is not less than the amount paid for work of a similar nature in the locality in which the work is to be performed. In no case shall compensation paid be less than federal minimum wage. AICs who work more than 40 hours per work week shall be paid compensation for additional hours worked at a rate equal to 1½ times

their base hourly compensation rate. If the Director or designee determines that the Department shall pay AICs piece work compensation for their participation in a particular PS/PIE Program work project, the piece work compensation rate shall be determined and established by converting the piece work compensation to an hourly compensation equivalent.

...

OAR 291-081-0025 (October 7, 2021) provides the following definitions of terms used in OAR 291-081-0030:

(1) Adult In Custody: Any person under the supervision of the Department of Corrections who is not on parole, post-prison supervision or probation status.

...

(6) Prison Industry Enhancement Certification Program or PIECP: The federal program authorized under 18 USC § 1761(c) that requires certification of an AIC work program through the U.S. Department of Justice via the Bureau of Justice Assistance before goods produced through that program can be shipped in interstate commerce.

(7) Private Sector/Prison Industry Enhancement Program or PS/PIE Program: The Department of Corrections AIC work program that is certified under the Prison Industry Enhancement Certification Program.

(8) PS/PIE Program Work Project: A specific AIC work project that is part of the Private Sector/Prison Industry Enhancement Program.

...

18 U.S.C. § 1761(c) provides:

(c) In addition to the exceptions set forth in subsection (b) of this section, this chapter shall not apply to goods, wares, or merchandise manufactured, produced, or mined by convicts or prisoners who—

(1) are participating in—one of not more than 50 prison work pilot projects designated by the Director of the Bureau of Justice Assistance;

(2) have, in connection with such work, received wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work was performed, except that such wages may be subject to deductions which shall not, in the aggregate, exceed 80 per centum of gross wages, and shall be limited as follows:

(A) taxes (Federal, State, local);

(B) reasonable charges for room and board, as determined by regulations issued by the chief State correctional officer, in the case of a State prisoner;

(C) allocations for support of family pursuant to State statute, court order, or agreement by the offender;

(D) contributions to any fund established by law to compensate the victims of crime of not more than 20 per centum but not less than 5 per centum of gross wages;

(3) have not solely by their status as offenders, been deprived of the right to participate in benefits made available by the Federal or State Government to other individuals on the basis of their employment, such as workmen's compensation. *However, such convicts or prisoners shall not be qualified to receive any payments for unemployment compensation while incarcerated, notwithstanding any other provision of the law to the contrary;* and

(4) have participated in such employment voluntarily and have agreed in advance to the specific deductions made from gross wages pursuant to this section, and all other financial arrangements as a result of participation in such employment.

[*Emphasis added*]

15 U.S.C. § 9021 provides, in relevant part:

(a)(3) The term “covered individual”—

(A) means an individual who—

(i) is not eligible for regular compensation or extended benefits under State or Federal law or pandemic emergency unemployment compensation under section 9025 of this title, including an individual who has exhausted all rights to regular unemployment or extended benefits under State or Federal law or pandemic emergency unemployment compensation under section 9025 of this title;

(ii) provides self-certification that the individual—

(I) is otherwise able to work and available for work within the meaning of applicable State law, except the individual is unemployed, partially unemployed, or unable or unavailable to work because—

(aa) the individual has been diagnosed with COVID–19 or is experiencing symptoms of COVID–19 and seeking a medical diagnosis;

...

(ee) the individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID–19 public health emergency;

(ff) the individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID–19;

...

(jj) the individual’s place of employment is closed as a direct result of the COVID–19 public health emergency; or

(kk) the individual meets any additional criteria established by the Secretary for unemployment assistance under this section; or

(II) is self-employed, is seeking part-time employment, does not have sufficient work history, or otherwise would not qualify for regular unemployment or extended benefits under State or Federal law or pandemic emergency unemployment compensation under section 9025 of this title, and meets the requirements of subclause (I); and

(iii) provides documentation to substantiate employment or self-employment or the planned commencement of employment or self-employment not later than 21 days after the later of the date on which the individual submits an application for pandemic unemployment assistance under this section or the date on which an individual is directed by the State Agency to submit such documentation in accordance with section 625.6(e) of title 20, Code of Federal Regulations, or any successor thereto, except that such deadline may be extended if the individual has shown good cause under applicable State law for failing to submit such documentation; and

...

(b) Subject to subsection (c), the Secretary shall provide to any covered individual unemployment benefit assistance while such individual is unemployed, partially unemployed, or unable to work for the weeks of such unemployment with respect to which the individual is not entitled to any other unemployment compensation (as that term is defined in section 85(b) of title 26) or waiting period credit.

...

Eligibility during incarceration. Claimant was not eligible to receive PUA benefits from February 23, 2020, through September 5, 2020 (weeks 09-20 through 36-20) because he was incarcerated during those weeks. The CARES Act defines a “covered individual” as one who, in pertinent part, is “*otherwise able to work and available for work within the meaning of applicable State law*, except the individual is unemployed, partially unemployed, or unable or unavailable to work because [of one or more of eleven

numerated COVID-19 related reasons].” 15 U.S.C. § 9021(a)(3)(A)(ii)(I) [*emphasis added*]. Therefore, to be a “covered individual,” a claimant may not be unavailable for work, as determined under state law, for reasons other than those COVID-19 related reasons listed in the CARES Act.

OAR 471-030-0036(f)(B) provides that an individual is not available for work for a week claimed if, during the week, the individual is incarcerated during any days or hours customary for the type of work the individual is seeking. Claimant was incarcerated for all, or nearly all, of each week from week 09-20 through 36-20, and therefore was not “otherwise. . . available for work” during those weeks, even if he was also unable or unavailable to work due to one or more of the eleven enumerated COVID-19 related reasons. Accordingly, claimant did not meet the definition of a “covered individual” pursuant to 15 U.S.C. § 9021(a)(3)(A)(ii)(I) and was not eligible to receive PUA benefits from February 23, 2020, through September 5, 2020 (weeks 09-20 through 36-20) due to his incarceration.

Eligibility following incarceration. Claimant was also ineligible to receive PUA benefits from September 6, 2020, through September 4, 2021 (weeks 37-20 through 35-21) because he was not self-employed, nor was he unemployed as a direct result of one or more of the eleven enumerated COVID-19 related reasons.

15 U.S.C. § 9021(a)(3)(A)(ii)(II) includes in the definition of a “covered individual” a person who “is self-employed. . . and meets the requirements of subclause (I).” The record does not show that claimant was self-employed before, during, or after his incarceration, or at any time during the weeks at issue. Claimant certified in his December 21, 2020, initial application for PUA benefits that he was self-employed in the field of transportation from June 8, 2018 through September 30, 2020. At hearing, however, he testified with regard to having certified “transportation” as his field of self-employment “I don’t know where that came from,” and stated that his self-employment field “was hospital laundry.” Transcript at 28-29. As the record does not suggest that claimant was engaged in or attempting to engage in either transportation or hospital laundry work as a business, or in any other form, either prior to or following his period of incarceration, it can reasonably be inferred that claimant was referring to his hospital laundry work for OCE during his incarceration as the asserted self-employment that served as the basis for his PUA claim.

Claimant’s participation in the OCE program cannot be considered self-employment pursuant to applicable law. Regulations at 20 C.F.R. part 625, which pertain to the Disaster Unemployment Assistance program, apply to the PUA program, unless otherwise provided or contrary to the CARES Act. 15 U.S.C. § 9021(h). 20 C.F.R. 625.2(o) defines “self-employment” as “services performed as a self-employed individual.” 20 C.F.R. 625.2(n) defines “self-employed individual” as “an individual whose primary reliance for income is on the performance of services in the individual’s own business, or on the individual’s own farm.” The record shows that claimant’s hospital laundry work did not constitute the performance of services in claimant’s own business. The work was performed for OCE, presumably at an hourly wage in accordance with the requirements of OAR 291-081-0030(2), and with the goal of providing job training to claimant. Claimant testified in describing the program that, “We do all the OHSU and Salem Regional Hospital, um, linens, um, their scrubs. Everything like that and so we actually get trade skills doing a laundry program.” Transcript at 18. The characterization of the program as one to provide claimant with job skills, rather than to provide him income through the operation of his own business while incarcerated, is consistent with the stated purposes for which OCE was created, as set forth in ORS 421.354 and ORS 421.437. Additionally, the federal law upon which the statutes

creating OCE and the regulations implementing those statutes were based, 18 U.S.C. § 1761(c), appears to prohibit qualification for unemployment benefits in any form based on participation in programs such as the ones operated by OCE. *See* 18 U.S.C. § 1761(c)(3).

The primary argument advanced by claimant that his participation in the OCE program constituted self-employment was the issuance of an IRS form 1099-MISC for 2019, reporting compensation he received in trust from the program for that year. *See* Transcript at 23-24. Per IRS guidelines, income paid to an independent contractor for work performed in self-employment would have been reported on box 7 of that form, “Nonemployee compensation,” rather than box 3, “Other income,” where “. . . prizes, awards. . . or other taxable income” was to be reported.² Claimant’s compensation from the OCE program was reported in box 3, presumably in accordance with those guidelines. Exhibit 1 at 26. This supports that both the state and federal government viewed such compensation not as self-employment income, but as other taxable non-employment income. Accordingly, the record does not show that claimant was self-employed, and he therefore did not meet the definition of a “covered individual” under 15 U.S.C. § 9021(a)(3)(A)(ii)(II).

Further, 15 U.S.C. § 9021(a)(3)(A)(ii)(I) includes in the definition of a “covered individual” a person that is otherwise able to work and available for work within the meaning of applicable State law, except the individual is *unemployed* due to one or more of the eleven enumerated COVID-related reasons. Claimant could not have been unemployed during or after his incarceration as a direct result of one or more of the eleven COVID-related reasons because his unemployment commenced prior to the start of the COVID-19 pandemic.

While the record does not show whether claimant was employed prior to his incarceration, he nevertheless became unemployed on or before January 7, 2019, when his period of incarceration began. Claimant’s participation in the OCE program, or any other work performed while incarcerated, is explicitly excluded from the definition of “employment” for purposes of unemployment insurance programs by ORS 657.065(2)(e). Claimant therefore could not have become unemployed as a result of employment beginning and ending during the time he was incarcerated. The record does not suggest that claimant became employed, or that he received a definite offer of employment, between his release from incarceration on September 4, 2020, and the end of the weeks at issue, September 4, 2021. Accordingly, the record shows that claimant became unemployed no later than January 7, 2019, prior to the outbreak of the COVID-19 pandemic, and that that unemployment continued uninterrupted during the weeks at issue. Therefore, claimant was not unemployed at any time during the weeks at issue as a direct result of one of the eleven enumerated COVID-19 related reasons in the CARES Act. Further, the record shows that none of the other provisions of the CARES Act were applicable to claimant’s situation, such that he could be considered a “covered individual” under that provision.

For these reasons, claimant was not a “covered individual” under the CARES Act during the weeks at issue. He was therefore ineligible to receive PUA benefits for the weeks of February 23, 2020, through September 5, 2020 (weeks 09-20 through 36-20).

² *See* 2019 Form 1099-MISC Instructions for Recipient (<https://www.irs.gov/pub/irs-prior/f1099misc--2019.pdf>).

DECISION: Order No. 23-UI-234349 is affirmed.

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

DATE of Service: October 11, 2023

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.

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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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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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.