

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1099

*Late Application for Review of Order No. 23-UI-235926 Dismissed
Order No. 23-UI-235942 Reversed – Waivers of PUA and FPUC Overpayments Denied*

PROCEDURAL HISTORY: On January 31, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant received \$1,435 in Pandemic Unemployment Assistance (PUA) and \$2,100 in Federal Pandemic Unemployment Compensation (FPUC) benefits to which he was not entitled and must repay (decision # 104936). On February 21, 2023, decision # 104936 became final without claimant having filed a request for hearing. On February 24, 2023, the Department served notice of an administrative decision denying claimant's requests for waiver of recovery of the PUA and FPUC overpayments assessed in decision # 104936 (decision # 114535). On March 16, 2023, decision # 114535 became final without claimant having filed a request for hearing. On March 29, 2023, claimant filed late requests for hearing on decisions # 104936 and 114535.

On September 13, 2023, ALJ Lewis conducted separate hearings on decisions # 104936 and 114535. On September 14, 2023, ALJ Lewis issued Order No. 23-UI-235926, dismissing claimant's request for hearing on decision # 104936 as late without good cause, leaving decision # 104936 undisturbed. On September 15, 2023, ALJ Lewis issued Order No. 23-UI-235942, allowing claimant's late request for hearing on decision # 114535 and reversing the decision by granting claimant's request for the PUA and FPUC overpayment waivers. On October 4, 2023, Order No. 23-UI-235926 became final without claimant having filed an application for review with the Employment Appeals Board (EAB). On October 5, 2023, the Department filed an application for review of Order No. 23-UI-235942 with EAB. On October 27, 2023, claimant filed a late application for review of Order No. 23-UI-235926 with EAB.

This matter comes before EAB based on the Department's timely application for review of Order No. 23-UI-235942 and claimant's late application for review of Order No. 23-UI-235926. Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 23-UI-235942 and 23-UI-235926. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2023-EAB-1099 and 2023-EAB-1177).

WRITTEN ARGUMENT: EAB considered the Department’s written argument in reaching its decision regarding whether waiver of claimant’s PUA and FPUC overpayments should be granted. EAB considered the narrative section of claimant’s written argument in reaching its decision regarding whether waiver of claimant’s PUA and FPUC overpayments should be granted. However, attachments to claimant’s written argument contained information that was not part of the hearing record regarding Order No. 23-UI-235942, and did not show that factors or circumstances beyond claimant’s reasonable control prevented him from offering the information during the hearing in that case. Except where notice is taken of Department records, and as indicated in the next section below regarding evidence additional to the record in Order No. 23-UI-235926, EAB considered only information received into evidence at the hearings when reaching this decision. *See* ORS 657.275(2); OAR 471-041-0090 (May 13, 2019).

EVIDENTIARY MATTER: For purposes of its review of Order No. 23-UI-235926, EAB has considered evidence additional to the record in that case when reaching this consolidated decision under OAR 471-041-0090(1) (May 13, 2019). The evidence additional to the record in Order No. 23-UI-235926 is the narrative section of the written argument claimant filed in response to the Department’s appeal of Order No. 23-UI-235942, which, EAB also is treating as a late application for review of Order No. 23-UI-235926 and the written statement attached thereto. This document has been marked as EAB Exhibit 1, and a copy provided to the parties with this decision. Any party that objects to our admitting EAB Exhibit 1 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 exhibit will remain in the record.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of Order No. 23-UI-235942 allowing claimant’s late request for hearing is **adopted**. The remainder of this decision pertaining to Order No. 23-UI-235942 relates to whether waiver of claimant’s PUA and FPUC overpayments should be granted. This decision also relates to claimant’s late application for review of Order No. 23-UI-235926.

FINDINGS OF FACT: (1) Claimant was a self-employed performing artist. Following the onset of the COVID-19 pandemic and the imposition of government safety restrictions, claimant’s ability to perform at public events was limited. On June 2, 2020, claimant filed an initial application for PUA benefits. Thereafter, claimant claimed PUA benefits for numerous weeks from the spring of 2020 through mid-December 2020.

(2) In late December 2020, Congress enacted an amendment to the law authorizing the PUA program that required certain PUA claimants to submit documentation substantiating their self-employment within a particular timeframe.¹ Failure of a PUA claimant to comply with the substantiation requirement authorized States to establish an overpayment for PUA benefits paid to the claimant for weeks of unemployment ending on or after December 27, 2020.²

¹ *See* Section 241 of the Continued Assistance for Unemployed Workers Act of 2020, enacted on December 27, 2020, under Division N, Title II, Subtitle A of the Consolidated Appropriations Act, 2021 (Pub. L. 116-260), codified at 15 U.S.C. § 9021(a)(3)(A)(iii).

² *See* U.S. Dep’t of Labor, Unemployment Insurance Program Letter No. 16-20, Change 4 (January 8, 2021) at I-11.

(3) On February 24, 2021, the Department sent claimant an email requesting proof of income to substantiate his self-employment for weeks of PUA benefits he intended to claim beginning the last week of December 2020. Claimant read the email and decided to ignore the Department's request because he thought he was not going to claim PUA benefits for the last week of December 2020 or after.

(4) On April 29, 2021, the Department sent claimant a different email that listed several of the weeks claimant had previously claimed in 2020 along with the weeks at issue and prompted claimant to provide the COVID-19 related reason he was unemployed for each of the listed weeks by clicking on a drop-down menu and selecting a reason. Because it was easy for claimant to use the drop-down menu and because the April 29, 2021, email came about two months after the February 24, 2021, email requesting proof of income to substantiate self-employment, claimant selected a COVID-19 related reason for all of the weeks listed, including the weeks at issue.

(5) Thereafter, claimant claimed PUA benefits for the weeks from December 27, 2020, through January 30, 2021 (weeks 53-20 through 04-21), and the weeks from February 7 through February 20, 2021 (weeks 06-21 through 07-21). These are the weeks at issue. Claimant received \$205 in PUA benefits for each of the weeks at issue for a total of \$1,435 of PUA benefits. Claimant received \$300 in FPUC benefits for each of the weeks at issue for a total of \$2,100 of FPUC benefits.

(6) Claimant never submitted proof of income to substantiate his self-employment as the February 24, 2021, email had requested. Claimant did not contact the Department after receiving the April 29, 2021, email to inquire whether it had any effect on the February 24, 2021, email's request that claimant submit proof of income to substantiate his self-employment.

(7) On June 9, 2021, the Department issued a Notice of PUA Determination concluding that claimant was not entitled to receive PUA benefits starting December 27, 2020. Claimant did not receive the June 9, 2021, Notice of PUA Determination. On June 29, 2021, the June 9, 2021, Notice of PUA Determination became final without claimant having filed a request for hearing. On March 29, 2023, claimant filed a late request for hearing on the June 9, 2021, Notice of PUA Determination. ALJ Kangas considered claimant's request, and on August 8, 2023, issued Order No. 23-UI-232663, dismissing the request as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by August 22, 2023. On August 28, 2023, Order No. 23-UI-232663 became final without claimant having filed an appellant questionnaire response or an application for review with EAB.³

(8) On January 31, 2023, the Department issued decision # 104936. On February 21, 2023, decision # 104936 became final without claimant having filed a request for hearing. On March 29, 2023, claimant filed a late request for hearing on decision # 104936. On September 13, 2023, ALJ Lewis conducted a hearing on decision # 104936, and on September 14, 2023, issued Order No. 23-UI-235926, dismissing claimant's request for hearing on decision # 104936 as late without good cause, and leaving decision # 104936 undisturbed.

³ 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.

(9) Order No. 23-UI-235926, mailed to claimant on September 14, 2023, stated, “You may appeal this decision by filing the attached form Application for Review with the Employment Appeals Board within 20 days of the date that this decision is mailed.” Order No. 23-UI-235926 at 4. Order No. 23-UI-235926 also stated on its Certificate of Mailing, “Any appeal from this Order must be filed on or before October 4, 2023, to be timely.”

(10) On October 27, 2023, claimant filed a written argument submitted in response to the Department’s appeal of Order No. 23-UI-235942. EAB treated the written argument as also being a late application for review of Order No. 23-UI-235926.

CONCLUSIONS AND REASONS: Claimant’s late application for review of Order No. 23-UI-235926 is dismissed. Order No. 23-UI-235942 is reversed. Claimant is not entitled to waiver of his PUA and FPUC overpayments.

Claimant’s Late Application for Review of Order No. 23-UI-235926. An application for review is timely if it is filed within 20 days of the date that the Office of Administrative Hearings (OAH) mailed the order for which review is sought. ORS 657.270(6); OAR 471-041-0070(1) (May 13, 2019). The 20-day filing period may be extended a “reasonable time” upon a showing of “good cause.” ORS 657.875; OAR 471-041-0070(2). “Good cause” means that factors or circumstances beyond the applicant’s reasonable control prevented timely filing. OAR 471-041-0070(2)(a). A “reasonable time” is seven days after the circumstances that prevented the timely filing ceased to exist. OAR 471-041-0070(2)(b). A late application for review will be dismissed unless it includes a written statement describing the circumstances that prevented a timely filing. OAR 471-041-0070(3).

The application for review of Order No. 23-UI-235926 was due October 4, 2023. Because claimant did not file his application for review until October 27, 2023, the application for review was late. Claimant provided a written statement with the application for review. However, claimant’s written statement did not describe the circumstances that prevented claimant from filing the application for review on time. Rather, the statement was a written argument filed in response to the Department’s appeal of Order No. 23-UI-235942, and so made arguments that went to the merits of that hearing order. EAB treated the written argument as also being a late application for review of Order No. 23-UI-235926 because, although the substance of the submission related to Order No. 23-UI-235942, claimant indicated that the written argument was regarding Order 23-UI-235926. EAB Exhibit 1 at 1. Because the statement did not describe the circumstances that prevented claimant from filing an application for review of Order No. 23-UI-235926 on time, claimant failed to establish good cause to allow the late application for review. Accordingly, claimant’s late application for review of Order No. 23-UI-235926 is dismissed.

Order No. 23-UI-235942, PUA and FPUC Overpayment Waiver. Waiver of PUA overpayments is governed by the provisions of the CARES Act as amended, 15 U.S.C. § 9021(d)(4), which requires, for waiver to be granted, that the overpayment of PUA benefits be: (1) without fault on the part of the claimant, and (2) that repayment be contrary to equity and good conscience. 15 U.S.C. § 9023(f)(2)(A)-(B) sets forth the same elements for waiver of overpayments of FPUC benefits.

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.

The order under review erroneously applied overpayment waiver criteria applicable to state benefits programs and concluded that claimant’s request for waiver must be granted. Order No. 23-UI-235942 at 4-6. The record does not support this conclusion.

As an initial matter, it bears noting that the Department’s witness testified at hearing that because the overpayment decision, decision # 104936, “was written as a claimant’s fault,” that is, was determined by the Department to be governed by ORS 657.310, that meant the waiver of recovery of the PUA and FPUC overpayments “had to be denied due to federal regulations.” Transcript at 13. However, federal law does not require an automatic denial. To the contrary, the U.S. Department of Labor guidance cited above instructs that, apart from blanket waiver scenarios not applicable here, states are to consider waiving recovery of overpayments under CARES Act benefits programs “by evaluating the overpayment on an individual, case-by-case basis[.]” UIPL 20-21 Change 1, at 9. In particular, the guidance requires that when evaluating whether an individual is without fault due to conflicting or changing information and the like, “[f]inding an individual to be without fault under these circumstances is fact-specific and must be done on a case-by-case basis.” UIPL 20-21 Change 1, at 9. Thus, it is not accurate to regard the fact that the Department assigned fault to claimant under the terms of ORS 657.310 in the decision assessing the overpayment as outcome determinative on the issue of whether the overpayment of federal benefits was without fault on the part of the claimant for purposes of waiver.

Nevertheless, the record shows that claimant was at fault in causing the overpayment because he received the Department’s request for proof of income to substantiate his self-employment but decided to ignore the request. Claimant’s decision to ignore the request caused the PUA substantiation requirement to go unsatisfied, which rendered him ineligible for PUA benefits (and accompanying FPUC benefits) beginning the last week of December 2020. This, in turn, meant that the PUA and FPUC benefits claimant received for the weeks at issue, the weeks from December 27, 2020, through January 30, 2021 (weeks 53-20 through 04-21) and the weeks from February 7 through 20, 2021 (weeks 06-21 through 07-21), were overpaid. Because claimant failed to provide the proof of income information the Department requested, he failed to provide all information correctly as requested by the state, and therefore was at fault for the overpayment.

Although an individual may be considered to be without fault if the individual provided incorrect information due to conflicting, changing, or confusing information or instructions from the state, claimant’s circumstances do not meet this standard. The instructions provided in the February 24, 2021, email compared to those contained in the April 29, 2021, email was not conflicting, changing, or confusing. The February 24, 2021, email requested proof of income to substantiate claimant’s self-employment. The April 29, 2021, email requested claimant to select the COVID-19 related reason he was unemployed for each listed week. The information requested in the two emails were independent of each other, and the April 29, 2021, email did not conflict with or change the instructions provided in the

February 24, 2021, email. To the extent receiving the April 29, 2021, email after having already received the February 24, 2021, email had the potential to confuse claimant, claimant made no effort to contact the Department to inquire whether the April 29, 2021, email had any effect on the request for information contained in the February 24, 2021, email.

Accordingly, claimant failed to establish that he was without fault for the overpayments of PUA and FPUC benefits. As such, claimant did not satisfy the first element required to obtain a PUA or FPUC overpayment waiver. Therefore, claimant is not entitled to waiver of the PUA and FPUC overpayments and the second element of the analysis, whether claimant's circumstances are such that repayment would be contrary to equity and good conscience, need not be addressed.

For these reasons, Order No. 23-UI-235942 is reversed. Claimant's PUA and FPUC overpayment waiver requests are denied.

DECISION: Claimant's late application for review of Order No. 23-UI-235926 is dismissed. Order No. 23-UI-235942 is set aside, as outlined above.

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

DATE of Service: November 15, 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

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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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