

**EMPLOYMENT APPEALS BOARD DECISION**  
**2023-EAB-1132**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On April 18, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer, but not for a disqualifying act under the Department's drug, alcohol, and cannabis policy, and was not disqualified from receiving benefits based on the work separation (decision # 135920). The employer filed a timely request for hearing. On June 8, 2023, ALJ Roberts conducted a hearing at which claimant failed to appear and issued Order No. 23-UI-227364, affirming decision # 135920. On June 27, 2023, the employer filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** The employer did not declare that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them from offering the information at the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

The parties may offer new information, such as the new information contained in their written argument, or the documentation enclosed with their request for hearing, into evidence at the remand hearing. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

**FINDINGS OF FACT:** (1) Big 5 Sporting Goods employed claimant as a sales associate from December 6, 2015, until April 4, 2023.

(2) The employer sold firearms as part of their sporting goods retail operations. As such, claimant and other sales staff were required to comply with laws relating to the sale of firearms.

(3) The employer maintained a written drug and alcohol policy which, in relevant part, prohibited employees from using, purchasing, transferring or possessing any form of illegal drugs, or from reporting to work under the influence of illegal drugs or alcohol. The policy did not specifically prohibit the use of cannabis by name, but did prohibit controlled substances listed under Section 102 of the Controlled Substances Act, which includes cannabis. The policy also provided that the employer was permitted to have an employee submit to a test for illegal drugs or alcohol if the employer had reasonable suspicion that the employee had violated their policy. Claimant was provided with a copy of this policy when he was hired, and signed an acknowledgment that he had received it.

(4) Although the employer's general drug and alcohol policy did not specifically prohibit the use of cannabis by name, the employer explicitly informed employees during their firearms sales training that cannabis use was not permitted. Claimant received this training.

(5) Prior to March 16, 2023, claimant's supervisor received multiple reports from other employees that claimant had been working while seemingly intoxicated, based on observations that claimant's eyes appeared glassy, his speech was slurred, and his movements and actions were slower than typical. However, in each instance, this information was reported to the supervisor a week or more after the observations occurred, and the supervisor therefore felt unable to take action on the reports.

(6) On March 16, 2023, an employee reported to claimant's supervisor that they had personally observed claimant using cannabis off-site during non-work hours. Because of the report of off-duty cannabis use, the supervisor asked claimant about the incident, whether he had used drugs or alcohol, and whether he would pass a drug test. Claimant paused for some time, then denied having used any drugs or alcohol and suggested that he would pass a drug test. When the supervisor clarified and asked claimant if he would pass a drug test that day, claimant again paused for some time before stating, "Probably. I would hope so." Audio Record at 24:05. Based on the report of off-duty drug use and claimant's responses to the supervisor's questions, the supervisor ordered claimant to take a drug test. The supervisor drove claimant to a facility where claimant was given a urinalysis test. Claimant was not required to pay for the cost of the test or the transportation to the facility.

(7) Claimant's March 16, 2023, urinalysis test initially returned a positive result for cannabis. After the initial positive result, the lab "sent [it] out for further testing." Audio Record at 21:30. The employer received the test results approximately two weeks later.

(8) On April 4, 2023, after having received the results of claimant's drug test, the employer discharged claimant for violating their drug and alcohol policy.

(9) The notice of hearing that notified the parties of the hearing scheduled for June 8, 2023, did not state that the issue at hearing would relate to whether claimant was disqualified from receiving benefits based on the Department's drug and alcohol policy. At hearing, prior to the start of testimony, the ALJ notified the employer of this error, and advised the employer that they could either waive notice and proceed with the hearing that day, or reschedule the hearing so that the parties could receive proper written notice of the issue at hearing. Audio Record at 6:35. The employer agreed to waive notice and proceed with the hearing that day. Audio Record at 7:28. The ALJ did not explain what applicable laws and rules under the Department's drug and alcohol policy were relevant to the issue at hearing.

**CONCLUSIONS AND REASONS:** Order No. 23-UI-227364 is set aside and this matter remanded for further development of the record.

**Sufficiency of notice.** OAR 471-040-0015(1) (August 1, 2004) provides, “To afford all parties a reasonable opportunity for a fair hearing, notice of hearing setting forth the time, date, place, and issue(s) in general shall be personally delivered or mailed at least five days in advance of the hearing to parties or their authorized agents at their last known address as shown by the record of the Director.”

OAR 471-040-0025(8) (August 1, 2004) provides, “In any hearing, the administrative law judge shall render a decision on the issue and law involved as stated in the notice of hearing. The administrative law judge’s jurisdiction and authority is confined solely to the issue(s) arising under the Employment Department Law. Subject to objection by any party, the administrative law judge 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. The administrative law judge may continue the hearing or remand the matter to the authorized representative for consideration and action upon such issue(s) under the provisions of ORS 657.265. However, in no event shall the administrative law judge accept 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 notice of the June 8, 2023, hearing failed to properly apprise the parties of the issue at hearing, which was whether claimant should be disqualified for a disqualifying act in accordance with the Department’s drug and alcohol policy. While the employer verbally agreed to waive the notice requirement, the ALJ did not offer the employer an explanation of how disqualifications are determined under the Department’s drug and alcohol policy as opposed to discharges adjudicated under ORS 657.176(2)(a). Because the ALJ did not adequately explain the issues involved in the hearing and the matters that employer employer had to either prove or disprove, the ALJ did not 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 this case.<sup>1</sup> Remand therefore is appropriate to properly place the parties on notice of the law and rules applicable to discharges under the Department’s drug and alcohol policy.

**Discharge for disqualifying act.** ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if the individual has committed a disqualifying act as described in ORS 657.176(9) or (10). ORS 657.176(9)(a) provides that an individual is considered to have committed a disqualifying act when the individual:

- (A) Fails to comply with the terms and conditions of a reasonable written policy established by the employer or through collective bargaining, which may include blanket, random, periodic and probable cause testing, that governs the use, sale, possession or effects of drugs, cannabis or alcohol in the workplace;

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<sup>1</sup> ORS 657.270(3) provides that, “When the claimant or the employer is not represented at the hearing by an attorney, paralegal worker, legal assistant, union representative or person otherwise qualified by experience or training, the administrative law judge shall explain the issues involved in the hearing and the matters that the unrepresented claimant or employer must either prove or disprove. The administrative law judge shall 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 administrative law judge in the case.

\* \* \*

(D) Is under the influence of intoxicants while performing services for the employer; [or]

\* \* \*

(F) Tests positive for alcohol, cannabis or an unlawful drug in connection with employment[.]

\* \* \*

OAR 471-030-0125 (January 11, 2018) provides:

\* \* \*

(2) Definitions. For the purpose of this rule:

\* \* \*

(c) For purposes of ORS 657.176(9) and 657.176(13), an individual is “under the influence” of intoxicants if, at the time of a test administered in accordance with the provisions of an employer's reasonable written policy or collective bargaining agreement, the individual has any detectable level of drugs, cannabis, or alcohol present in the individual’s system, unless the employer otherwise specifies particular levels of drugs, cannabis, or alcohol in its policy or collective bargaining agreement.

(d) “Performing services for the employer” as used in ORS 657.176(9) and “during work” as used in ORS 657.176(9) mean that an employee is on duty and is, or is expected to be, actively engaged in tasks as directed or expected by the employer for which the employee will or expects to be compensated with remuneration.

(e) For purposes of ORS 657.176(9), an individual “tests positive” for alcohol, cannabis, or an unlawful drug when the test is administered in accordance with the provisions of an employer's reasonable written policy or collective bargaining agreement, and at the time of the test:

(A) The amount of drugs, cannabis, or alcohol determined to be present in the individual’s system equals or exceeds the amount prescribed by such policy or agreement; or

(B) The individual has any detectable level of drugs, cannabis, or alcohol present in the individual’s system if the policy or agreement does not specify a cut off level.

(f) An individual fails a test for alcohol, cannabis, or unlawful drugs when the individual tests positive as described in subsection (e) of this section.

(g) For purposes of ORS 657.176(9) and 657.176(13), “unlawful drug” means a drug which is unlawful for the individual to use, possess, or distribute under Oregon law. This term does not include a drug prescribed and taken by the individual under the supervision of a licensed health care professional and used in accordance with the prescribed directions for consumption, or other uses authorized by law.

(h) “Connection with employment” as used in ORS 657.176(9) means where such positive test affects or has a reasonable likelihood of affecting the employee's work, the employer's interest, or workplace.

\* \* \*

(3) [A] written employer policy is reasonable if:

(a) The policy prohibits the use, sale, possession, or effects of drugs, cannabis, or alcohol in the workplace; and

(b) The policy does not require the employee to pay for any portion of the test; and

(c) The policy has been published and communicated to the individual or provided to the individual in writing; and

(d) When the policy provides for drug, cannabis, or alcohol testing, the employer has:

(A) Probable cause for requiring the individual to submit to the test; or

(B) The policy provides for random, blanket or periodic testing.

\* \* \*

(4) Probable Cause for Testing. For purposes of ORS 657.176(9), an employer has probable cause to require an employee to submit to a test for drugs, cannabis, alcohol, or a combination thereof if:

(a) The employer has, prior to the time of the test, observable, objective evidence that gives the employer a reasonable basis to suspect that the employee may be impaired or affected by drugs, cannabis, or alcohol in the workplace. Such evidence may include, but is not limited to, abnormal behavior in the workplace, a change in productivity, repeated tardiness or absences, or behavior which causes an on-the-job injury or causes substantial damage to property; or

(b) The employer has received reliable information that a worker uses or may be affected by drugs, cannabis, or alcohol in the workplace; or

(c) Such test is required by applicable state or federal law, or an applicable collective bargaining agreement that has not been declared invalid in final arbitration; or

(d) Such test is required or allowed pursuant to a reasonable agreement.

\* \* \*

(6) For purposes of ORS 657.176(9), (10), and (13), no employer policy is reasonable if the employer does not follow their own policy.

\* \* \*

(10) For the purposes of ORS 657.176(9) and (10):

(a) Testing for drugs, cannabis, or alcohol must be conducted in accordance with ORS 438.435.

\* \* \*

The employer discharged claimant after they received the results of a drug test, which showed that claimant tested positive for cannabis and therefore violated their written drug and alcohol policy. The order under review concluded that claimant's positive test was not a disqualifying act because the Department's rules "specifically require that a second, confirmatory test be conducted by a properly licensed and certified laboratory for tests other than a breathalyzer. OAR 471-030-0125(10)(a); ORS 438.435(3)." Order No. 23-UI-227364 at 6. The record as developed does not support this conclusion.

The order under review is correct in stating that OAR 471-030-0125(10)(a) requires testing for drugs, cannabis, or alcohol to be conducted in accordance with the provisions of ORS 438.435(3). ORS 438.435(3) states:

When the specimen of a person tested for substances of abuse is submitted to the laboratory and the test result is positive, **the laboratory shall perform a confirming test** which has been designated by rule of the Oregon Health Authority as the best available technology for use to determine whether or not the substance of abuse identified by the first test is present in the specimen prior to reporting the test results.

(emphasis added). The Oregon Health Authority's rules promulgated under ORS 438.435(3) are found under OAR Chapter 333 Division 24. OAR 333-024-0310 (November 3, 2000) defines "confirmatory test" to mean "a highly specific test to identify a substance of abuse or metabolite after a positive screening, based on a different analytical method than that of the initial screening test, at or below the

cutoff concentration used for the screening test.” OAR 333-024-0345 (November 3, 2000) specifically governs confirmatory tests. OAR 333-024-0345(1) states:

When the substances of abuse screening laboratory obtains a positive test result and the submitter indicates the result is to be used to deprive or deny any person any employment or any benefit, **that same specimen must be submitted and confirmed prior to the release of the screening results.** When performed within the State of Oregon, the confirmatory testing shall be by a clinical laboratory licensed under ORS 438.110 and 438.150 or certified under the Clinical Laboratory Improvement Amendments of 1988, Public Law 100-578, 42 U.S.C. 201 and 263a for that testing. The confirmatory testing shall be as described in section (4) of this rule.

(emphasis added).

At hearing, claimant’s supervisor testified that claimant took the drug test on March 16, 2023, that there was an “initial, in-house positive result” which was “sent... out for further testing” based on the same initial sample. Audio Record at 21:14 – 21:48. The supervisor also testified that there was not a “second, confirming test” performed. Audio Record at 21:54. This testimony appears to be the basis for the order under review’s conclusion that a confirmatory test was not performed. As noted above, OAR 333-024-0345(1) explains that a confirmatory test is a re-test of the *same specimen*, rather than a second specimen. Therefore, to the extent that the order under review concluded that the employer failed to adhere to the requirements of the Department’s drug and alcohol policy by not ordering that a *second* specimen be tested, that conclusion was in error.

However, further development of the record is necessary to determine whether claimant was discharged for a disqualifying act under the Department’s drug, alcohol, and cannabis policy. First, the employer submitted a copy of a document entitled “Specimen Result Certificate” with their request for hearing, which appears to be the results of claimant’s drug test. However, that document was not offered or admitted into evidence, and the ALJ did not discuss it at hearing. On remand, the ALJ should conduct further inquiry as to what that document states and whether it shows that claimant committed a disqualifying act under the Department’s drug and alcohol policy by testing positive for cannabis.

Further inquiry is also necessary as to the events which led claimant’s supervisor to order claimant to take the drug test. The employer’s written drug and alcohol policy allows the employer to test employees if they have “reasonable suspicion” that the employee violated the policy. The evidence currently in the record shows that claimant’s supervisor had received prior reports of claimant having been intoxicated or impaired while at work, but that the supervisor did not take action upon receiving those reports because they were made after some time had passed. By contrast, the event which informed the supervisor’s decision to have claimant submit to the drug test on March 16, 2023, was a report from an employee that day that they had personally observed claimant using cannabis off-site during non-work hours. It is not clear from the record when this observation was purported to have taken place, or therefore whether the test was performed pursuant either to the policy itself or pursuant to OAR 471-030-0125(4)(a) (requiring, prior to the time of the test, observable, objective evidence that gives the employer a reasonable basis to suspect that the employee may be impaired or affected by drugs, cannabis, or alcohol in the workplace) or (b) (requiring the employer to have received reliable information that a worker uses or may be affected by drugs, cannabis, or alcohol in the workplace).

On remand, the ALJ should develop the record to determine whether the employer had probable cause for requiring claimant to submit to the drug test. This should include further explanation of the timing of events that led the employer to direct claimant to submit to the drug test, whether the employer had observable, objective evidence that gave them a reasonable basis for suspecting that claimant may have been impaired or affected by drugs, cannabis, or alcohol, and whether the information that the employer acted on in requiring claimant to submit to the test constituted reliable information that claimant may have used or been affected by drugs, cannabis, or alcohol.

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 was discharged for a disqualifying act under the Department's drug, alcohol, and cannabis policy, Order No. 23-UI-227364 is reversed, and this matter is remanded.

**DECISION:** Order No. 23-UI-227364 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:** October 27, 2023

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 23-UI-227364 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.

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