

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1139

Order No. 23-UI-237004 Affirmed – Late Request for Hearing Dismissed
Order No. 23-UI-237163 Reversed – Overpayment Not Assessed

PROCEDURAL HISTORY: On November 6, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer for misconduct and disqualified from receiving benefits effective March 15, 2020 (decision # 90552). On November 30, 2020, decision # 90552 became final without claimant having filed a request for hearing. On May 4, 2022, the Department served notice of an administrative decision concluding that claimant received \$5,520 in regular unemployment insurance (regular UI) and \$10,200 in Federal Pandemic Unemployment Compensation (FPUC) benefits to which he was not entitled and must repay (decision # 94437). On May 24, 2022, decision # 94437 became final without claimant having filed a request for hearing.

On July 15, 2022, claimant filed late requests for hearing on decisions # 90552 and 94437. ALJ Kangas considered claimant's requests, and on October 12, 2022, issued Orders No. 22-UI-204888 and 22-UI-204889, dismissing claimant's requests as late, subject to claimant's right to renew the requests by responding to an appellant questionnaire by October 26, 2022. On October 24, 2022, claimant filed a timely response to the appellant questionnaire. On March 2, 2023, the Office of Administrative Hearings (OAH) mailed letters stating that Orders No. 22-UI-204888 and 22-UI-204889 were vacated and that hearings would be scheduled to determine whether to allow claimant's late requests for hearing and, if so, the merits of decisions # 90552 and 94437. On September 26, 2023, ALJ Adamson conducted separate hearings on decisions # 90552 and 94437. On September 27, 2023, ALJ Adamson issued Order No. 23-UI-237004, dismissing claimant's request for hearing on decision # 90552 as late without good cause and leaving decision # 90552 undisturbed. On September 28, 2023, ALJ Adamson issued Order No. 23-UI-237163, claimant's request for hearing on decision # 94437 as timely, but affirming decision # 94437 on the merits.

On October 10, 2023, claimant filed applications for review of Orders No. 23-UI-237004 and 23-UI-237163 with the Employment Appeals Board (EAB). Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 23-UI-237004 and 23-UI-237163. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2023-EAB-1138 and 2023-EAB-1139).

FINDINGS OF FACT: (1) On March 23, 2020, claimant filed an initial claim for regular UI benefits. The Department determined that claimant had a valid claim for benefits with a weekly benefit amount of \$276.

(2) Claimant claimed benefits for the weeks from March 29 through August 15, 2020 (weeks 14-20 through 33-20). These are the weeks at issue. The Department paid claimant \$276 in regular UI benefits for each of the weeks at issue, for a total in \$5,520 of regular UI benefits. The Department paid claimant \$600 in FPUC benefits for each of weeks 14-20 through 30-20, for a total of \$10,200 in FPUC benefits. All of these benefits were paid on or before August 17, 2020. Exhibit 1 at 1.

(3) On November 6, 2020, the Department issued decision # 90552, concluding that claimant was discharged by the employer for misconduct and disqualified from receiving benefits effective March 15, 2020.

(4) On May 4, 2022, the Department issued decision # 94437, concluding that claimant received \$5,520 in regular UI and \$10,200 of FPUC to which he was not entitled and must repay. Decision # 94437 made no allegations that the overpayments were the result of fraud or willful misrepresentation.

CONCLUSIONS AND REASONS: Order No. 23-UI-237004 is affirmed and decision # 90552 remains undisturbed. The portion of Order No. 23-UI-237163 concluding that claimant's request for hearing on decision # 94437 was timely is affirmed. The portion of Order No. 23-UI-237163 affirming decision # 94437 is reversed. The Department was not authorized to amend the original decisions allowing benefits for the weeks at issue and assess an overpayment for those weeks.

Late Request for Hearing on Order No. 23-UI-237004. EAB reviewed the entire hearing record regarding Order No. 23-UI-237004. On *de novo* review and pursuant to ORS 657.275(2), the order under review is **adopted**. Decision # 90552 remains undisturbed.

Order No. 23-UI-237163 – Overpayment, Lack of Authority to Amend Decisions Allowing Benefits. Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review concluding that claimant's request for hearing on decision # 94437 was timely is **adopted**. The remainder of this decision relates the Department's lack of authority to amend its decisions allowing claimant benefits.

ORS 657.267 provides:

(1) *An authorized representative shall promptly examine each claim for waiting week credit or for benefits and, on the basis of the facts available, make a decision to allow or deny the claim.* Information furnished by the claimant, the employer or the employer's agents on forms provided by the Employment Department pursuant to the authorized representative's examination must be accompanied by a signed statement that such information is true and correct to the best of the individual's knowledge. *Notice of the decision need not be given to the claimant if the claim is allowed* but, if the claim is denied, written notice must be given to the claimant. If the claim is denied, the written notice must include a statement of the reasons for denial, and if the claim is denied under any provision of ORS 657.176, the notice must also set forth the specific material facts obtained from the employer and the employer's agents that are used by the authorized

representative to support the reasons of the denial. The written notice must state the reasons for the decision.

(2) If the claim is denied under any provision of ORS 657.176, written notice of the decision must be given to the employing unit, or to the agent of the employing unit, that, in the opinion of the Director of the Employment Department, is most directly involved with the facts and circumstances relating to the disqualification.

(3) Notice of a decision that was wholly or partially based on information filed with the director in writing within 10 days after the notice provided for in ORS 657.265 must be given to any employing unit or agent of the employing unit that filed the information.

(4) If a decision to allow payment made pursuant to this section does not require notice, that decision may be amended by an authorized representative. The amendment must be made by written notice informing the recipient of the right of appeal pursuant to ORS 657.269. ***The amendment must be issued within one year of the original decision to allow payment, except in cases of alleged willful misrepresentation or fraud.*** A decision requiring notice, made pursuant to this section, may be amended unless it has become a final decision under ORS 657.269.

(Emphasis added.)

ORS 657.176 provides, in relevant part:

* * *

(2) An individual shall be disqualified from the receipt of benefits until the individual has performed service in employment subject to this chapter or the equivalent law of another state or Canada or as defined in ORS 657.030 (2) or as an employee of the federal government, for which remuneration is received that equals or exceeds four times the individual's weekly benefit amount subsequent to the week in which the act causing the disqualification occurred, if the authorized representative designated by the director finds that the individual:

* * *

(a) Has been discharged for misconduct connected with work[.]

* * *

Order No. 23-UI-237163 concluded that claimant was overpaid benefits for the weeks at issue and was liable for an overpayment of \$5,520 in regular UI and \$10,200 in FPUC benefits to be repaid to the Department. Order No. 23-UI-237163 at 5-6. However, the record does not demonstrate that the Department had authority to amend its original decision to allow payment and assess an overpayment for the weeks at issue.

The Department made its original decisions under ORS 657.267(1) to allow payment of claimant's weekly claims for benefits for the weeks at issue by paying each of these claims on or before August 17,

2020. Because a decision to allow payment does not require notice to claimant pursuant to ORS 657.267(1), the Department may only amend decisions allowing payment within one year of the decision to allow, except in cases of “alleged willful misrepresentation or fraud.” ORS 657.267(4).

The Department issued decision # 90552 on November 6, 2020, disqualifying claimant from benefits effective March 15, 2020. By law, such a disqualification ends when an individual has “performed service in employment . . . for which remuneration is received that equals or exceeds four times the individual’s weekly benefit amount subsequent to the week in which the act causing the disqualification occurred[.]” ORS 657.176(2). However, decision # 90552 did not amend the Department’s original decisions to allow payment for the weeks at issue partly because it did not purport to assess whether claimant had requalified for benefits each week and, accordingly, whether each weekly payment was allowed or denied on that basis.

On May 4, 2022, the Department issued decision # 94437, concluding that claimant was not entitled to the benefits he received for the weeks at issue based on the disqualification imposed in decision # 90552. For the reasons that follow, it is appropriate to regard decision # 94437, and not decision # 90552, as the amendment of the original decisions to allow benefits for the weeks at issue.

First, decision # 94437 effectively constituted a decision that payment for the weeks at issue should not have been allowed based on the implicit conclusion that claimant *remained* disqualified from receiving benefits during those weeks. Thus, decision # 94437 constituted an amendment to each original decision to allow payment of those weekly claims by retroactively concluding that payment should not have been allowed.

Further, the effect of decision # 94437 was to reverse the original decisions to allow payment through creation of liability for an overpayment, whereas decision # 90552 merely established the predicate for the resulting overpayment by concluding that claimant was disqualified from receiving benefits effective on a specific date, absent requalifying by receiving earnings in the amount of four times claimant’s weekly benefit amount for work performed in future weeks. Decision # 90552 did not conclude that claimant was disqualified from receiving, overpaid, or liable to repay, benefits for any of the weeks at issue.

Moreover, ORS 657.267(4) excludes amendments in cases of alleged fraud from the one-year time limitation. This implies that overpayment decisions—whether they be fraud, claimant fault but non-fraud, or agency error—are what the statute contemplates as the amendment of the original decision to allow payment. Since the one enumerated (but excepted) type of case, an alleged case of fraud, takes the form of an overpayment decision, it follows that the one-year time limitation applies to claimant fault but non-fraud cases, like the case at hand, and agency error cases, and that ORS 657.267(4) contemplates the overpayment decisions that give rise to those kinds of cases as the amending decisions. Finally, decision # 94437 itself cites ORS 657.267 as law that authorizes the Department to issue the administrative decision. Decision # 94437’s invocation of the statute suggests that the authorized representative who drafted the decision regarded decision # 94437 as an amendment made pursuant to ORS 657.267. Thus, decision # 94437 amended the original decisions to allow payments of benefits for the weeks at issue in this case.

Decision # 94437 was not made within one year of August 17, 2020. Instead, it was issued on May 4, 2022, approximately one year and nine months after claimant was paid benefits. Further, the record does not show that the Department alleged that claimant made a willful misrepresentation or committed fraud. Therefore, claimant's case was subject to the one-year limitation on amending the original decisions to allow benefits imposed by ORS 657.267(4). Accordingly, the Department lacked authority to amend the original decisions that allowed the payment of benefits to a decision that payment for the weeks at issue should not have been allowed and, in turn, to assess an overpayment of benefits for those weeks.

DECISION: Order No. 23-UI-237004 is affirmed. Order No. 23-UI-237163 is set aside, as outlined above.

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

DATE of Service: November 17, 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.

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

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.