

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

Reversed & Remanded

PROCEDURAL HISTORY: On September 6, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision denying claimant's August 16, 2023, request to waive recovery of overpayment balances of \$3,212 in Pandemic Emergency Unemployment Compensation (PEUC) benefits and \$3,527 in Federal Pandemic Unemployment Compensation (FPUC) benefits (decision # 160234). Claimant filed a timely request for hearing. On October 2, 2023, ALJ Ramey conducted a hearing, and on October 10, 2023, issued Order No. 23-UI-238115, denying claimant's waiver request. On October 14, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Abiqua School Foundation employed claimant as a teacher for the school years including 2019-2020 and 2020-2021. Claimant's employment contract for the 2020-2021 school year provided that claimant would be paid a salary of \$60,411 for working during the period of August 24, 2020, through June 18, 2021, which the employer reported to the Department as \$1,391.95 when apportioned on a weekly basis.¹ The salary was paid in 12 monthly installments of \$5,034.25. In addition, claimant was paid an hourly rate for teaching additional classes throughout the year, and for performing other ancillary duties.

(2) In July 2020, the employer cancelled all of claimant's classes for which she received hourly pay because claimant had potentially been exposed to the COVID-19 virus. She was expected to resume her salaried duties pursuant to the employment contract on August 24, 2020.

¹ This amount was reported by the employer as claimant's weekly earnings for weeks 34-20 through 24-21, totaling \$59,853.85. The record does not reveal how the remaining \$557.15 was apportioned by the employer.

(3) On July 13, 2020, claimant filed an initial claim for unemployment insurance benefits. The Department determined that a monetarily valid claim for regular unemployment insurance (regular UI) benefits was established with a weekly benefit amount of \$673. Claimant subsequently filed claims for benefits for the some of the weeks during the period of August 23, 2020, through June 12, 2021 (weeks 35-20 through 23-21), including weeks 01-21 through 03-21, 05-21 through 07-21, 10-21 through 11-21, 14-21 through 16-21, 18-21 through 20-21, and 23-21. These are the weeks at issue. Claimant was paid \$300 in FPUC benefits for each of these 16 weeks, totaling \$4,500. Claimant was also paid PEUC benefits of \$673 for week 16-21, \$642 for week 18-21, \$653 for week 19-21, \$571 for week 20-21, and \$673 for week 23-21, totaling \$3,212 in PEUC benefits. Claimant received regular UI benefits, not directly at issue in this appeal, in each of these weeks in which she did not receive PEUC benefits.

(4) Claimant filed her initial claim for unemployment benefits due to the loss of her hourly work teaching additional classes for the employer beginning in July 2020. While claimant’s salary contract period began August 24, 2020, she actually began performing her salaried teaching duties during the week of September 13, 2020, through September 19, 2020 (week 38-20). Exhibit 1 at 8. Claimant had no hourly earnings in addition to her salary from May 2020 through June 2021. Claimant reported earnings on her weekly claims during the contract period as follows:

Week	Claimant Reported Earnings	Week	Claimant Reported Earnings
35-20	\$0	02-21	\$300.80
36-20	\$0	03-21	\$328.70
37-20	\$1,208.00	05-21	\$121.40
38-20	\$1,208.00	06-21	\$272.31
39-20	\$960.00	07-21	\$239.81
40-20	\$668.00	10-21	\$238.00
41-20	\$331.21	11-21	\$290.00
42-20	\$2,605.30	14-21	\$241.00
43-20	\$1,418.04	15-21	\$303.16
44-20	\$210.00	16-21	\$298.00
46-20	\$300.00	18-21	\$331.00
48-20	\$150.00	19-21	\$320.00
50-20	\$300.00	20-21	\$420.00
52-20	\$0	23-21	\$208.00
01-21	\$318.00	24-21	\$211.00

(5) Claimant mistakenly believed that pandemic-era unemployment insurance programs were designed to compensate her for a partial loss of income attributable to the pandemic, even though she continued to receive salary payments that exceeded her weekly benefit amount. Prior to applying for unemployment insurance benefits, claimant contacted the Department, told the representative her “exact situation” regarding her salaried and hourly work, and was told that she “would qualify” for benefits. Transcript at 17. Claimant read the Claimant Handbook prior to filing her weekly claims, noting that it said, “Keep track of your hours and your earnings for each week. Report your earnings for the week you performed the work. . . NOT THE WEEK YOU ARE PAID.” Transcript at 18 (emphasis in original). Claimant also

contacted the Department with additional questions about filing her weekly claims during the weeks at issue. At some point after week 43-20, claimant called the Department and was told she did not need to file claims for weeks in which her earnings exceeded her weekly benefit amount, and claimant declined to file some weekly claims thereafter on that basis.

(6) On May 9, 2023, the Department issued decision # 200144, concluding that claimant willfully misrepresented her earnings to obtain benefits, and was ineligible to receive benefits for weeks including the weeks at issue because her earnings exceeded her weekly benefit amount. Decision # 200144 therefore assessed an overpayment of \$20,799.00 in combined regular UI, PEUC, and FPUC benefits, as well as a monetary penalty and penalty disqualification weeks. Claimant filed a timely request for hearing on decision # 200144. On June 12, 2023, the Office of Administrative Hearings (OAH) issued Order No. 23-UI-227514, modifying decision # 200144 by concluding that claimant did not willfully misrepresent her earnings to obtain benefits, but that she was overpaid \$3,212² in PEUC benefits and \$4,500 in FPUC benefits for the weeks at issue that she was required to repay to the Department pursuant to ORS 657.310 because the overpayment was caused by claimant's "false statements." Exhibit 1 at 7. Order No. 23-UI-227514 became final on July 3, 2023.

(7) On August 16, 2023, claimant filed a request to waive recovery of the outstanding overpayment balances of \$3,212 in PEUC benefits and \$3,527 in FPUC benefits.³

(8) On September 6, 2023, the Department issued decision # 160234, denying claimant's waiver request "because Claimant caused overpayment due to misreported earnings." Decision # 160234 at 1. Decision # 160234 also stated, "Recovery of the overpaid benefits is not against equity and good conscience," and included the standard set forth in OAR 471-30-0053 (effective June 23, 2021) for making such a determination. Decision # 160234 at 2. However, the Department had not conducted an analysis of whether recovery would have been against equity and good conscience.

(9) Also on September 6, 2023, claimant paid the outstanding overpayment balances of \$3,212 in PEUC benefits and \$3,527 in FPUC benefits using money she borrowed.

CONCLUSIONS AND REASONS: Order No. 23-UI-238115 is set aside, and this matter remanded for further proceedings.

OAR 471-030-0017 (effective January 11, 2018, until June 22, 2021) provided, in relevant part:

(1) Definitions. For purposes of applying ORS 657.100 and 657.150, and as used in this rule:

* * *

² Order No. 23-UI-227514 did not distinguish between regular UI and PEUC benefits, and assessed an overpayment of \$12,634 encompassing both types of benefits. Exhibit 1 at 13. The record shows that \$3,212 of that amount was PEUC benefits.

³ The Department's records suggest that claimant made a payment of \$973 on July 7, 2023 which was applied to the FPUC overpayment, reducing the outstanding balance from \$4,500 to \$3,527.

(c) Where an employer-employee relationship exists, "remuneration" means compensation resulting from the employer-employee relationship, including wages, salaries, incentive pay, sick pay, compensatory pay, bonuses, commissions, stand-by pay, and tips;

* * *

(g) For purposes of ORS 657.150(7), the term "holiday" means those holidays listed in 187.010(1)(b)–(j) and (2), 187.020 and any holiday designated by the employer, union contract or otherwise;

(h) For purposes of ORS 657.150(7), the term "vacation" means a specific period of time, paid or unpaid, during which the individual is freed from work/job/employment duties and responsibilities and is free to use the time away from work for any purpose the individual chooses.

* * *

* * *

(3) Allocating Remuneration: For purposes of ORS 657.100 and 657.150(6) remuneration or an applicable pro-rata share thereof shall be allocated as follows:

(a) In the case of services, allocated to the week in which the service was performed;

* * *

(d) If the dates of sale or service are not clearly established, allocation shall be made upon a reasonable estimate provided by the claimant. If the individual cannot or will not provide a reasonable estimate, the remuneration shall be allocated equally over the period during which services were rendered or products were sold.

* * *

Waiver of PEUC and FPUC overpayments are governed by the provisions of Sections 2107(e)(2) and 2104(f)(2)(A)-(B) of the CARES Act, 15 U.S.C. §9025(e)(2) and 15 U.S.C. § 9023(f)(2), respectively, which require, for waiver to be granted, that the overpayment of PEUC or FPUC benefits be: (1) without fault on the part of the claimant, and (2) that repayment be contrary to equity and good conscience.

With respect to the “contrary to equity and good conscience” element of the PEUC and FPUC overpayment waiver analysis, federal guidance provides that states may defer to state law in defining what it means for repayment to be contrary to equity and good conscience, or may use the federal standard. UIPL 20-21 Change 1, at 10. 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. UIPL 20-21 Change 1, at 10-13. The guidance elaborates that recovery would cause financial hardship where “review of the individual’s income to debts (including copies of pay records and bills) reflects the hardship caused by having to repay an overpayment because the individual needs much of their current income and liquid assets (including the CARES Act benefits received) to meet ordinary and necessary living expenses and liabilities.” UIPL 20-21 Change 1, at 11.

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.” Recovering overpaid benefits is against equity and good conscience under state law 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(3). The Department uses the IRS Collection Financial Standards to determine maximum allowable household expenses. OAR 471-030-0053(2).

The order under review concluded that claimant’s request for waiver of her overpayment balance of PEUC and FPUC benefits should be denied because claimant was not without fault in causing the overpayment, but did not apply the standard that governs waiver of PEUC and FPUC overpayments. Order No. 23-UI-238115 at 2-3. In failing to apply the standard set forth by 15 U.S.C. §9025(e)(2) and 15 U.S.C. § 9023(f)(2) regarding whether claimant was at fault for the overpayment, the order under review erred.

Federal guidance regarding PEUC and FPUC overpayments 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 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.

Order No. 23-UI-227514 established that claimant was overpaid PEUC and FPUC benefits because she failed to properly report her salaried earnings when filing her claims for the weeks at issue. Claimant earned a salary of \$60,411 for approximately 43 weeks of work pursuant to the terms of an employment contract. As claimant’s salary was payable for each week of the contract period regardless of the specific number of hours she worked that week, her salary should have been allocated equally over those weeks pursuant to OAR 471-030-0017(3). Therefore, for each of the weeks at issue, claimant should have reported earnings of approximately \$1,404.91 each week.⁴

⁴ \$60,411 / 43 weeks = \$1,404.91. As discussed above, the employer reported a similar weekly allocation of \$1,391.95. The difference in these amounts is immaterial since both amounts exceeded claimant’s weekly benefit amount of \$673, and would have resulted in a denial of benefits if reported on weekly claims.

However, the record shows that claimant provided the incorrect information due to conflicting or confusing information or instructions from the state. Claimant told the Department prior to filing her initial claim, and again in writing on August 14, 2020, that she continued to be paid her normal salary but was seeking unemployment insurance benefits to compensate for the loss of additional income from the hourly wages she ordinarily made in addition to her salary. *See* Exhibit 2 at 7. Claimant understood from her reading of the Claimant Handbook and communications with the Department’s representatives that she was to report earnings by “multipl[y]ing the number of hours worked by an hourly rate that she calculated using her total annual salary.” Exhibit 1 at 5. Claimant’s reporting of earnings which exceeded her weekly benefit amount for weeks 37-20 through 39-20 and 42-20 through 43-20 demonstrated that claimant believed she was accurately reporting her earnings through this method, even though such a report negatively impacted her eligibility for benefits. Similarly, claimant declined to file claims for several weeks after week 43-20 because she believed her earnings exceeded her weekly benefit amount, further evincing that she was not intentionally misreporting the earnings to obtain benefits. It can reasonably be inferred that in the weeks claimant reported earnings less than her weekly benefit amount, which caused benefits to be overpaid, she did so based on information from the Department’s representatives that was confusing, or appeared to conflict with information in the Claimant Handbook. This information related to the relatively complex task of allocating a salary paid over the course of a year, for work performed in less than a year, on a weekly basis. The record shows claimant requested advice on this subject from the Department, and it can be presumed from her actions thereafter that the responses she received from the Department’s representatives were incorrect or misunderstood. Accordingly, claimant can be considered “without fault” in causing the overpayment pursuant to UIPL 20-21 Change 1 because she provided incorrect information due to conflicting or confusing information or instructions from the state.

In considering the second prong of the waiver analysis, that repayment be contrary to equity and good conscience, the record as presently developed is insufficient to conclude whether the Department used the state or federal standard, or whether claimant met the applicable standard. Decision # 160234 specifically referenced the state standard set forth in OAR 471-030-0053(3) without making a conclusion as to whether claimant met that standard. However, the Department’s representative testified at hearing that no consideration of whether repayment would be contrary to equity and good conscience had been conducted due to the Department’s conclusion that claimant was at fault for the overpayment. Transcript at 10. It is therefore unclear whether the state or federal standard was or will be used by the Department to determine if repayment would have been contrary to equity and good conscience. On remand, inquiry should be made of the Department as to which standard it elects to utilize.

Once the appropriate standard has been established on remand, further development of the record is needed to determine whether claimant met that standard as of August 16, 2023, the date her request for waiver was filed. If the state standard is used, inquiry should be made into claimant’s means to repay the overpayment, as well as her household income and total allowable household expenses, as of August 16, 2023. If the federal standard is used, inquiry should be made into claimant’s income, debts, and liquid assets, as well as her ordinary and necessary living expenses and liabilities; whether due to the notice that benefit payments would be made or because of receipt of the benefits, claimant either relinquished a valuable right or changed positions for the worse; and, whether recovery of benefits would be unconscionable under the circumstances.

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 repayment of benefits would have been against equity and good conscience, and therefore, whether waiver of repayment should be granted, Order No. 23-UI-238115 is reversed, and this matter is remanded.⁵

DECISION: Order No. 23-UI-238115 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: November 29, 2023

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 23-UI-238115 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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⁵ Note that if the record on remand shows that waiver of claimant’s PEUC and FPUC overpayments should be granted, claimant would in most circumstances be entitled to a refund of amounts collected prior to the determination of the waiver for the applicable overpayment. UIPL 20-21 Change 1 at 18 (“Additionally, as described in Section 4.d.iv.B. of UIPL No. 20-21, if recovery of an overpayment is waived, the state must refund any amounts that were collected prior to the determination of the waiver for the applicable overpayment. There is one exception to this refund requirement: specifically, that the state may not issue a refund for any benefits that were restored and then subsequently paid to the individual.”).



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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