

**EMPLOYMENT APPEALS BOARD DECISION**  
**2024-EAB-0080**

*Requests to Reopen Allowed*  
*Late Request for Hearing Allowed*  
*Reversed & Remanded*

**PROCEDURAL HISTORY:** On December 31, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and therefore was disqualified from receiving unemployment insurance benefits effective July 19, 2020 (decision # 142111). On January 20, 2021, decision # 142111 became final without claimant having filed a request for hearing. On January 29, 2021, claimant filed a late request for hearing on decision # 142111. ALJ Kangas considered claimant's request, and on February 17, 2021, issued Order No. 21-UI-161119, dismissing claimant's request for hearing as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by March 3, 2021. On February 22, 2021, claimant filed a timely response to the appellant questionnaire. On March 25, 2021, the Office of Administrative Hearings (OAH) mailed a letter stating that Order No. 21-UI-161119 was vacated and that a new hearing would be scheduled to determine whether claimant had good cause to file the late request for hearing and, if so, the merits of decision # 142111.

On October 11, 2022, OAH served notice of a hearing scheduled for October 20, 2022. On October 20, 2022, claimant failed to appear at the hearing, and on October 21, 2022, ALJ Lewis issued Order No. 22-UI-205621, re-dismissing claimant's request for hearing due to her failure to appear and leaving decision # 142111 undisturbed. On October 26, 2022, claimant filed a timely request to reopen the October 20, 2022, hearing. On March 10, 2023, OAH served notice of a hearing scheduled for April 4, 2023. On April 4, 2023, claimant failed to appear at the hearing, and ALJ Logan issued Order No. 23-UI-221025, re-dismissing claimant's request for hearing due to her failure to appear and leaving decision # 142111 undisturbed. On April 14, 2023, claimant filed a timely request to reopen the April 4, 2023, hearing.

On September 21, 2023, ALJ Enyinnaya conducted a hearing at which the employer failed to appear, and on September 29, 2023, issued Order No. 23-UI-237240, allowing claimant's requests to reopen,<sup>1</sup> allowing claimant's late request for hearing, and modifying<sup>2</sup> decision # 142111 by concluding that claimant voluntarily quit work without good cause and therefore was disqualified from receiving benefits effective August 9, 2020. On October 9, 2023, claimant filed an application for review of Order No. 23-UI-237240 with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** Claimant did not declare that she provided a copy of her 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 claimant's reasonable control prevented her from offering the information during 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 documentation included with claimant's written argument, 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.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portions of the order under review allowing claimant's requests to reopen the hearings and late request for hearing are **adopted**. The remainder of this decision addresses whether proper notice of the issues addressed at hearing was given to the parties, and the merits of those issues.

**FINDINGS OF FACT:** (1) Kaiser Foundation Hospitals employed claimant as a registered nurse from February 16, 2004, until August 10, 2020.

(2) The employer maintained a drug, alcohol, and cannabis policy which, among other things, did not permit employees to use prescription drugs for which they did not personally have a prescription.

(3) In 2019, claimant underwent knee surgery that subsequently did not heal properly, causing her to regularly suffer from pain. Some time after this, claimant began using prescription pain medication for which she did not have a prescription. Claimant understood this to be a violation of the employer's policy.

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<sup>1</sup> Order No. 23-UI-237240 did not address claimant's request to reopen the October 20, 2022 hearing. As the ALJ proceeded to the merits of decision # 142111, however, good cause for claimant's failing to appear at the October 20, 2022 hearing is presumed.

<sup>2</sup> Although Order No. 23-UI-237240 stated that it affirmed decision # 142111, it modified that decision by changing the effective date of the disqualification from July 19, 2020 to August 9, 2020. Order No. 23-UI-237240 at 7.

(4) On July 25, 2020, the employer directed claimant to submit to a random drug test. Claimant did so, and subsequently tested positive for the unprescribed pain medication she had been taking. On July 26, 2020, the employer placed claimant on administrative leave.

(5) On or around July 26, 2020, claimant enrolled in a drug and alcohol treatment program.

(6) On August 10, 2020, the employer notified claimant they had decided to discharge her. However, the employer permitted claimant a “chance to resign” if she signed a separation agreement stating that the decision to separate from employment was “mutual.” Transcript at 27. The agreement provided that the employer would “not fight unemployment” and would pay for six months of post-separation medical insurance, but that claimant would be barred from working for the employer in the future. The employer would not have permitted claimant to continue working for them, even if she did not sign the agreement. Claimant signed the agreement and separated from employment.

(7) On September 7, 2020, OAH served on the parties notice of a hearing scheduled for September 21, 2023. The notice did not state that the issues to be considered at hearing included whether claimant was discharged for committing a disqualifying act under the Department’s drug, cannabis, and alcohol policy.

**CONCLUSIONS AND REASONS:** Claimant was discharged from work. However, the parties were not adequately notified of the issues to be addressed at hearing, and did not waive right to such notice. Order No. 23-UI-237240 is set aside and this matter remanded for further development of the record.

**Nature of the work separation.** If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (September 22, 2020). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

At hearing, claimant asserted that she did not quit, but that the employer had decided to “let [her] go regardless.” Transcript at 19–20. Despite this, the order under review concluded that claimant voluntarily quit work because “[m]utual agreements to separate meet the definition of voluntary leaving.” Order No. 23-UI-237240 at 6. The record does not support this conclusion. On August 10, 2020, the employer notified that they planned to discharge claimant, but that they would permit her to “resign” if she agreed to certain conditions. The fact that the employer characterized claimant’s separation as a resignation or a “mutual agreement,” however, does not determine the nature of the work separation for purposes of OAR 471-030-0038(2). Instead, the relevant question is whether the employer would have permitted claimant to work for an additional period of time. The record shows that they would not have, and that claimant had no choice but to leave. As such, the separation was not voluntary on claimant’s part, but was a discharge which occurred on August 10, 2020.

**Inadequate notice.** 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. OAR 471-040-0025(8) (August 1, 2004).

The record strongly suggests that the employer discharged claimant due to her having used pain medication for which she did not have a prescription, apparently a violation of the employer's policy. However, a discharge for this reason must, in most circumstances, be analyzed under the Department's drug, cannabis, and alcohol policy. Notice of this type of issue, and the applicable statutory provisions and administrative rules, were not included in the notice of hearing served on September 21, 2023, and the record does not show that either party waived their rights to notice. On remand, this defect must be cured so that the parties are properly noticed of the issues to be addressed at hearing.

**Discharge.** 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;

\* \* \*

(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.

(i) For purposes of ORS 657.176(9):

(A) “Recognized drug, cannabis, or alcohol rehabilitation program” means a program authorized and licensed by the State of Oregon, or another state.

(B) “Documentation of participation in the program” means a signed statement by an authorized representative of the recognized program that the individual is or was participating in a treatment program.

(C) “Participation” means to be engaged in a course of treatment through a recognized drug, cannabis, or alcohol rehabilitation program.

\* \* \*

(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.

\* \* \*

(5) Random, blanket and periodic testing. For purposes of ORS 657.176(9) and (10):

(a) A “random test for drugs, cannabis, or alcohol, or a combination thereof” means a test for drugs, cannabis, or alcohol, or a combination thereof given to a sample drawn from a population in which each member of the population has an equal chance to be selected for testing.

(b) A “periodic test for drugs, cannabis, or alcohol, or a combination thereof” means a drug, cannabis, or alcohol test or a combination thereof administered at prescribed intervals.

(c) A “blanket test for drugs, cannabis, or alcohol, or a combination thereof” means a test for drugs, cannabis, or alcohol, or a combination thereof applied uniformly to a specified group or class of employees.

(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.

\* \* \*

(9) The employee is discharged or suspended for committing a disqualifying act if:

(a) The employee violates or admits a violation of a reasonable written employer policy governing the use, sale, possession or effects of drugs, cannabis, or alcohol in the workplace; unless in the case of drugs the employee can show that the violation did not result from unlawful drug use.

(b) In the absence of a test, there is clear observable evidence that the employee is under the influence of alcohol in the workplace.

(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.

\* \* \*

As noted above, the employer discharged claimant on August 10, 2020, apparently for violation of its drug, cannabis, and alcohol policy. At hearing, the ALJ asked claimant if there was a final incident which led the employer to make its decision. Claimant responded, “No. There was no incident, but I was asked to take a drug and alcohol test, a U/A, and it was positive.” Transcript at 21–22. As the record suggests, but does not conclusively show, that this was the reason for discharge, the ALJ should confirm this on remand. To the extent that claimant was discharged for some other reason that was not an alleged violation of the employer’s drug, cannabis, and alcohol policy, the ALJ should inquire as to the reason for discharge and whether that reason met the definition of misconduct under OAR 471-030-0038. Otherwise, the ALJ should develop the record to determine whether claimant violated the employer’s written policy regarding the use of drugs, cannabis, and alcohol; and, if so, whether that violation constituted a disqualifying act.

To that end, the record on remand should be developed to show: whether the employer’s policy allowed for random testing; whether the employer’s policy was “reasonable” as defined under OAR 471-030-0125(3), including whether the employer followed their own policy; whether the treatment program in which claimant enrolled on or around July 26, 2020 was authorized and licensed by the State of Oregon or another state; whether claimant has provided, or can provide, a signed statement by an authorized representative of the recognized program that the individual is or was participating in a treatment program;<sup>3</sup> and whether claimant was enrolled in the program within ten days of her discharge.

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). In order to properly notice the parties of the issues at hearing, and because further development of the record is necessary for a determination of whether claimant was discharged for a disqualifying reason, Order No. 23-UI-237240 is reversed, and this matter is remanded.

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<sup>3</sup> Claimant is informed to obtain this documentation with sufficient time, prior to the remand hearing, to submit it as evidence in accordance with the instructions included with the notice of hearing, including **service on the opposing party**.

**DECISION:** Order No. 23-UI-237240 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:** February 15, 2024

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 23-UI-237240 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**

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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.

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