

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0524

*Order No. 2023-UI-01311 Affirmed
Request to Reopen Denied*

*Order No. 2024-UI-05864 Modified
Late Request for Hearing Allowed
Overpayment, No Penalties*

PROCEDURAL HISTORY: On October 27, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for a disqualifying act under the Department's drug, cannabis, and alcohol adjudication policy and disqualified from receiving benefits effective September 3, 2023 (decision # 74443). Claimant filed a timely request for hearing. On November 9, 2023, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for November 22, 2023. On November 22, 2023, claimant failed to appear at the hearing, and ALJ Ramey issued Order No. 23-UI-241863, dismissing claimant's request for hearing due to his failure to appear. On December 1, 2023, claimant filed a timely request to reopen the hearing.

On January 4, 2024, the Department served notice of an administrative decision based in part on decision # 74443, concluding that claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits, and assessing a \$1,594 overpayment of benefits that claimant was required to repay, a \$239.10 monetary penalty, and a 9-week penalty disqualification from future benefits (decision # 193646). On January 24, 2024, decision # 193646 became final without claimant having filed a request for hearing. On January 30, 2024, claimant filed a late request for hearing. ALJ Kangas considered claimant's request, and on February 5, 2024, issued Order No. 24-UI-247298, dismissing the request as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by February 19, 2024.

On February 21, 2024, claimant filed a late response to the appellant questionnaire and a timely application for review of Order No. 24-UI-247298 with the Employment Appeals Board (EAB). On February 26, 2024, ALJ Kangas mailed a letter to the parties stating that because the appellant questionnaire response was late, it would not be considered and another order would not be issued in the

matter. On March 26, 2024, EAB issued EAB Decision 2024-EAB-0223, reversing Order No. 24-UI-247298 and remanding that matter for further development of the record to determine whether to allow claimant's late request for hearing on decision # 193646 and, if so, the merits of that decision.

On June 13, 2024, ALJ Goodrich conducted hearings on decisions # 74443 and 193646. On June 21, 2024, ALJ Goodrich issued Order No. 24-UI-257171, denying claimant's request to reopen the November 22, 2023, hearing on decision # 74443, leaving decision # 74443 undisturbed. Also on June 21, 2024, ALJ Goodrich issued Order No. 24-UI-257175, allowing claimant's late request for hearing on decision # 193646 and modifying that decision by concluding that claimant was overpaid \$1,594 in benefits that he was required to repay under ORS 657.310, but that he did not make a willful misrepresentation to obtain benefits, and therefore was not liable for a monetary penalty or a penalty disqualification.

On June 27, 2024, claimant filed applications for review of Orders No. 24-UI-257171 and 24-UI-257175 with EAB. Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 24-UI-257171 and 24-UI-257175. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2024-EAB-0525 and 2024-EAB-0524).

EVIDENTIARY MATTER: At the hearing on decision # 193646, the ALJ admitted Exhibit 3 into evidence, but failed to mark the exhibit, and likewise failed to note in the subsequent order that the exhibit had been admitted into evidence without objection. As a clerical matter, EAB identified the exhibit based on the ALJ's description of it and marked it as Exhibit 3. *See* Order No. 24-UI-257175, Audio Record at 9:19 to 18:42.

EAB considered the entire consolidated hearing record. EAB agrees with Order No. 24-UI-257171's findings of fact, reasoning, and denial of claimant's request to reopen the November 22, 2023, hearing on decision # 74443, leaving decision # 74443 undisturbed. Pursuant to ORS 657.275(2), Order No. 24-UI-257171 is **adopted**. Additionally, EAB agrees with the portion of Order No. 24-UI-257175 allowing claimant's late request for hearing on decision # 193646. Pursuant to ORS 657.275(2), that portion of Order No. 24-UI-257175 is **adopted**. The rest of this decision addresses the merits of decision # 193646.

FINDINGS OF FACT: (1) On January 27, 2023, claimant filed an initial claim for unemployment insurance benefits. The Department determined that claimant's weekly benefit amount was \$338.

(2) Claimant worked for the employer from July 2023 through approximately September 6, 2023, at which point the employer discharged claimant.

(3) On September 8, 2023, claimant contacted the Department by phone to restart his claim. During that phone call, claimant reported to a Department representative that he had been discharged. The representative restarted claimant's claim, and also filed a weekly claim for the week of August 27, 2023, through September 2, 2023 (week 35-23) on claimant's behalf. Thereafter, the Department representative entered the following comment into claimant's claim:

CLMT NEEDS TO AC WEEK 35/23, CLMT ATTESTS HE WORKED 24 HRS @16.80
SINCE 8/12/23 WK 32/23. ER WAS ALBERTSONS; WILL AC WEEK EARNINGS 403.20.

ALBERTSONS TENURE 7/17 > 09/08/23.BIN 01553957-0. I AM FILING FOR CLMT AS THIS IS FRIDAY; CLMT IS NOT COMPLETING HIS WEEKS HIMSELF.

The Department representative also mistakenly indicated in claimant's restart that claimant's status with the employer was "still working," and did not indicate that claimant had been discharged.¹

(4) Claimant subsequently claimed benefits for the weeks of September 3 through October 7, 2023 (weeks 36-23 through 40-23) using the Department's online claims system. These are the weeks at issue. On September 11, 2023, when claimant claimed benefits for week 36-23, the week during which he had been discharged, claimant did not report that he had been separated from work during that week.

(5) The Department paid claimant a total of \$1,594 for all of the weeks at issue. If the Department representative who helped claimant on September 8, 2023, had recorded claimant as having been discharged from work, the Department would have flagged claimant's claim for the following week and, once the week had been claimed, adjudicated the work separation to determine claimant's eligibility before paying claimant benefits for week 36-23 or any of the subsequent weeks at issue.²

(6) On September 30, 2023, the Department received a notification from the National Directory of New Hires indicating that claimant had worked for the employer. On October 2, 2023, the Department sent claimant a letter requesting information about his work for the employer, which claimant returned on or around October 5, 2023. Claimant indicated in his response that he was no longer working for the employer. The Department subsequently investigated the work separation, and on October 27, 2023, issued decision # 74443, concluding that claimant was discharged for a disqualifying act under the Department's drug, cannabis, and alcohol adjudication policy and disqualified from receiving benefits effective September 3, 2023. The Department based the overpayment assessed in decision # 193646 on the conclusion that claimant had not been eligible for benefits for the weeks at issue due to the disqualification imposed by decision # 74443.

(7) Claimant filed a timely request for hearing on decision # 74443, but failed to appear at the hearing on that decision, and his request for hearing therefore was dismissed. Claimant filed a timely request to reopen the hearing on decision # 74443, but that request was determined at hearing as being without good cause.

CONCLUSIONS AND REASONS: Claimant was overpaid benefits for the weeks at issue due to an error not caused by claimant's false statement, and is liable to repay those benefits via deduction from future benefits. Claimant did not make a willful misrepresentation of fact in order to obtain benefits, and therefore is not liable for a monetary penalty or penalty disqualification from future benefits.

¹ 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.

² EAB has taken notice of these facts, which are within EAB's specialized knowledge. OAR 471-041-0090(1). 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.

ORS 657.315(1) provides, in relevant part, that an individual who has been overpaid benefits because of an error not caused by the individual's false statement, misrepresentation of a material fact or failure to disclose a material fact, or because an initial decision to pay benefits is subsequently reversed by a decision finding the individual is not eligible for the benefits, is liable to have the amount deducted from any future benefits otherwise payable to the individual under this chapter for any week or weeks within five years following the week in which the decision establishing the erroneous payment became final.

The record shows that claimant was not entitled to the benefits he received for the weeks at issue, and that he therefore was overpaid \$1,594 in benefits. This overpayment was assessed because claimant's work separation during week 36-23 was not properly recorded, causing the Department to pay benefits for that week and the subsequent weeks at issue without first adjudicating the work separation. When the Department later learned of the work separation, it adjudicated that matter and determined that claimant was discharged for a disqualifying act under the Department's drug, cannabis, and alcohol adjudication policy, disqualifying him from benefits for the weeks at issue. Although claimant filed a timely request for hearing on decision # 74443 (the discharge decision), he failed to appear at the hearing, and his request to reopen that hearing was, as affirmed here, denied. *See* Order No. 24-UI-257171 at 4. As a result of the denial of claimant's request to reopen the hearing on decision # 74443, that decision's conclusion that claimant was disqualified from benefits effective September 3, 2023, is binding as a matter of law. Because the record does not show that claimant earned at least four times his weekly benefit amount (a total of \$1,352) after the week in which the discharge occurred but prior to the last week at issue,³ the disqualification imposed by decision # 74443 applies to all of the weeks at issue, and claimant therefore was not eligible for benefits for any of those weeks.

While the record shows that claimant failed to properly report the separation when he claimed benefits for the week (week 36-23) in which the separation had occurred, it does not show either that he made a willful misrepresentation of facts to obtain benefits, or that his failure to disclose a material fact (i.e., the fact that he had been discharged from work) was the proximate cause of the overpayment. Claimant's uncontroverted testimony indicated that he specifically informed the Department representative during their call on September 8, 2023, that he had been discharged from work. *See* Order No. 24-UI-257175, Transcript at 40. The comment that the Department representative entered regarding the conversation with claimant that day supports claimant's testimony. That comment stated that claimant's employer "was" Albertsons, indicating the past tense, and noted that claimant's tenure with the employer ran from July 17, 2023, through September 8, 2023.⁴ This evidence shows that claimant made a good-faith effort to timely report the separation and, conversely, gives no indication that claimant attempted to conceal the separation from the Department. As such, the overpayment was not the result of claimant's willful misrepresentation of facts, and claimant is not liable for a monetary penalty or penalty disqualification.

Likewise, although claimant failed to report the separation when he claimed week 36-23 on September 11, 2023, this failure in reporting was not the proximate cause of the overpayment. As noted above, claimant *did* report the separation during his call to the Department on September 8, 2023. For reasons unknown, the representative to whom claimant spoke did not correctly record or process this information. Had the representative done so, the Department would have flagged claimant's claim for

³ *See* ORS 657.176(2).

⁴ While the record contains some dispute as to whether claimant's separation occurred on September 6 or 8, 2023, the difference is not material for purposes of this decision.

the following week and, once the week had been claimed, adjudicated the work separation to determine claimant's eligibility before paying claimant benefits for week 36-23 or any subsequent week. Because the Department had both the knowledge of claimant's separation from work during week 36-23 and the ability to properly adjudicate the work separation prior to paying claimant benefits for the weeks at issue, but failed to act accordingly due to the error of the representative to whom claimant spoke, the resulting overpayment was proximately caused by agency error. As such, claimant was overpaid benefits because of an error not caused by his false statement, misrepresentation of a material fact or failure to disclose a material fact, and claimant is liable, under ORS 657.315, to repay the overpaid benefits by deduction from any future unemployment benefits otherwise payable to him for any week or weeks within five years following the week in which the decision establishing the erroneous payment became final.

DECISION: Order No. 24-UI-257171 is affirmed. Order No. 24-UI-257175 is modified, as clarified herein.

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

DATE of Service: July 26, 2024

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.

NOTE: The Department may defer recovery or completely waive the overpaid amount if certain standards are met. To make a request for Waiver of Overpayment Recovery, call 503-947-1995 or email OED_Overpayment_unit@employ.oregon.gov. You must submit waiver applications that correspond to the program for which you were overpaid benefits. **If you were overpaid benefits under both state and federal benefits programs, you will need to file two separate waiver applications.** To access a State UI Overpayment Waiver application go online to <https://unemployment.oregon.gov/waivers> and click the link for "State UI Overpayment Waiver". To access a Federal Program Overpayment Waiver application go online to <https://unemployment.oregon.gov/waivers> and click the link for "Federal Program Overpayment Waiver".

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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 الاستئناف 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.

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