

**SAMPLE ACCEPTABLE  
PETITIONER'S OPENING BRIEF  
UNEMPLOYMENT CASE**

(updated August 2015)

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**[Note: The brief must be white bond (20-pound weight)]**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

JOHN DOE,	)	
	)	
Petitioner,	)	EAB No. 00AB0000
	)	
v.	)	CA A000000
	)	
EMPLOYMENT DEPARTMENT	)	
and EDEN COUNTY,	)	
	)	
Respondents.	)	

PETITIONER'S OPENING BRIEF

Judicial Review from the decision of the Employment Appeals Board  
dated February 29, 2000.

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The Employment Appeals Board erred in affirming the hearing decision denying petitioner benefits by ruling:

"Claimant's willful behavior resulted in the loss of a license necessary to perform his work. We conclude that the employer discharged claimant for misconduct connected with work. Claimant is disqualified from receiving unemployment insurance benefits." (Rec 100.)

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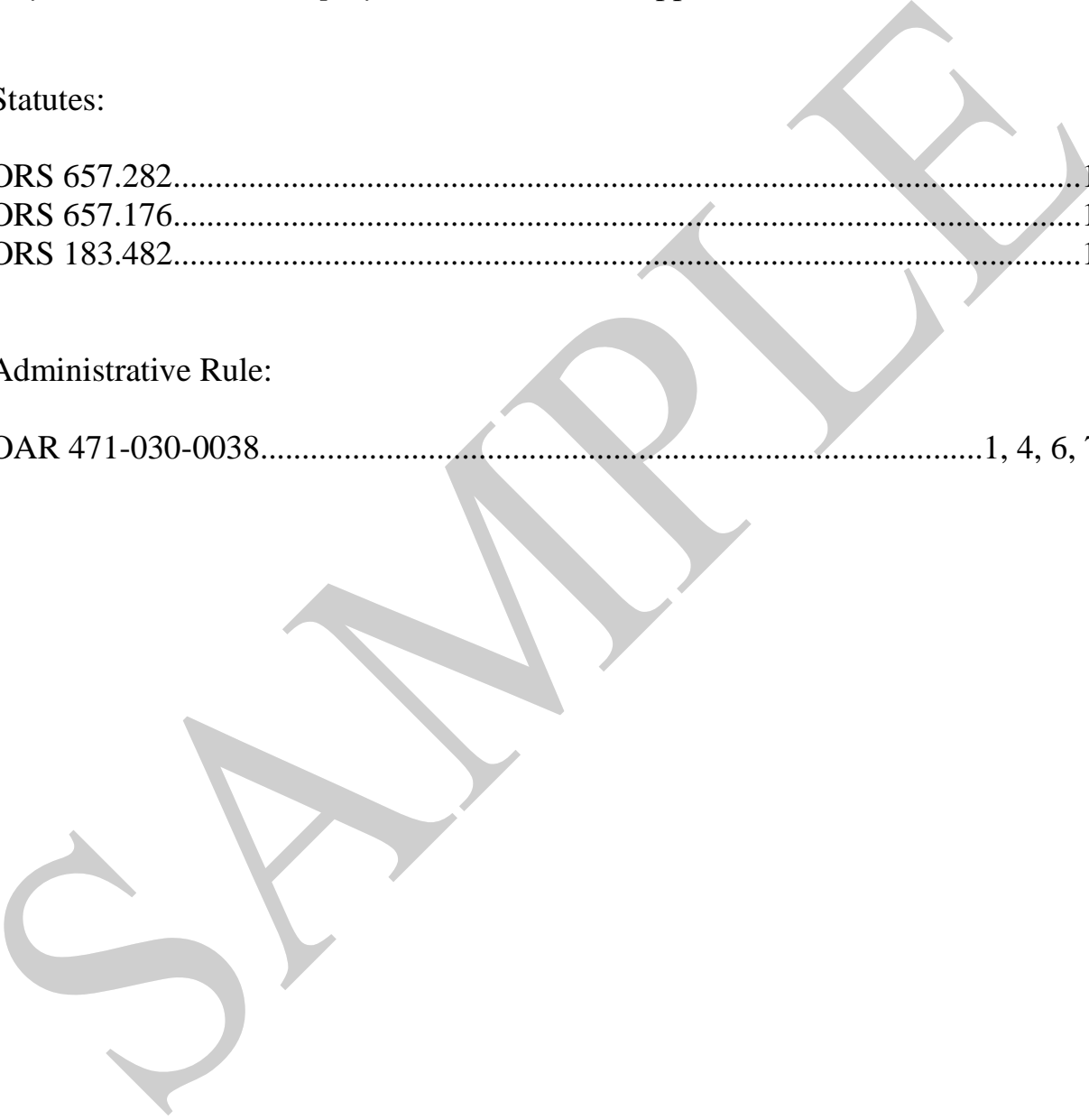
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## **PETITIONER'S BRIEF**

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### **STATEMENT OF THE CASE**

#### **The Nature of the Proceeding and the Relief Sought**

This is a Petition for Review of a decision of the Employment Appeals Board affirming the decision of an Administrative Law Judge decision denying unemployment benefits to petitioner. Petitioner requests that the decision be reversed.

#### **The Nature of the Decision To Be Reviewed**

A final decision made and entered on February 29, 2000 by the Employment Appeals Board.

#### **Statement of the Statutory Basis for Appellate Jurisdiction**

This court has appellate jurisdiction over this matter pursuant to ORS 657.282.

#### **Statement of Appellate Jurisdiction**

The Employment Appeals Board entered its decision on February 29, 2000. The Petition for Judicial Review was filed on March 3, 2000 and an Amended Petition for Judicial Review was filed on March 7, 2000.

### **Questions Presented on Review**

A. Did the Employment Appeals Board err in finding that petitioner's action constituted misconduct under OAR 471-030-0038(3)(c)?

B. Did the Employment Appeals Board err in finding that petitioner willfully failed to maintain his driver's license?

### **Summary of Argument**

The loss of petitioner's driver's license was not misconduct because a driver's license was not necessary to the performance of petitioner's job. For at least five (5) years, petitioner had not driven a county vehicle as part of his job and his performance reviews all accepted this conduct as satisfactory.

Petitioner did not willfully fail to maintain his driver's license, and EAB should have considered whether petitioner was wantonly negligent in not maintaining his driver's license. Under that standard, petitioner had no reason to believe that his conduct would violate the standards of behavior which an employer had a right to expect.

### **Statement of Material Facts**

Petitioner was employed by Eden County (county) as a building official on April 1, 1989. (Tr 7.) As such, he supervised up to 12 employees. (Tr 7.) On April 1, 1993, petitioner's job description was changed to add a requirement of a current, valid driver's license. (Ex 4, pg 3.)

On October 31, 1998, petitioner's driver's license was suspended as the result of a DUII arrest. (Tr 9.) On November 2, 1998, petitioner was instructed to cease driving a county-owned vehicle at any time and to cease driving any personal vehicle on county business. (Ex 4, pg 15.) Petitioner continued to perform his duties with the exception of 12 weeks of Family Medical Leave (Tr 13) and was terminated on November 16, 1999 after a conviction for DUII. (Tr 7, 11.) The rationale given for the termination was:

"At that point, we had a conviction, we had a, you know, rather lengthy history of this kind of being a problem, we have the concerns of having a supervisor with nine field employees that couldn't do supervision, and we had the building expert in Eden County who couldn't leave his office and travel to any location, unless by foot, to be a resource to the taxpayers, the builders, and the employees of this department." (Tr 11.)

The October 31, 1998 matter did not occur while petitioner was driving a county vehicle nor during work hours. (Tr 17.) On July 26, 1995, petitioner had his driver's license suspended and that lasted until September 4, 1996 when he was cleared by his employer to drive again. (Ex 4, pg 22.) He was not disciplined as a result of this suspension (Tr 19) nor were there any warnings given to him that losing his driver's license in the future would jeopardize his employment. (Tr 19-20.)

As to petitioner's October 31, 1998 DUII arrest, he retained his driver's license following a DMV hearing (Tr 26) but the county continued to prohibit him

from driving while working for them. (Tr 26.) This was even after he notified them that he was no longer suspended. (Tr 27.) Indeed, petitioner testified that he had not been required to drive as part of his job for over five years. (Tr 26.) Petitioner testified that at no time in the prior five years had his supervisors ever complained about the level of supervision that he provided (Tr 27) nor that there was any complaint that he was not getting out to do inspections. (Tr 28.) This testimony was uncontradicted.

Petitioner's performance evaluation dated May 5, 1999 was introduced, and it showed that, as to his ability to supervise, he was doing as expected and that his operating the controls of an automobile was as expected. (Ex 4, pg 12.) Likewise, his 1996 performance evaluation (Ex 4, pg 23) and his 1997 performance evaluation (Ex 4, pg 27) all rated his supervision as being as expected, even though the undisputed testimony is that he did not drive as part of his duties.

## **ASSIGNMENT OF ERROR**

### **Preservation of Error**

The Employment Appeals Board erred in affirming the ALJ decision denying petitioner benefits by ruling:

"Claimant's willful behavior resulted in the loss of a license necessary to perform his work. We conclude that the employer discharged claimant for misconduct connected with work. Claimant is disqualified from receiving unemployment insurance benefits."

(Rec 100.)



## Standard of Review

The Court of Appeals reviews findings of the Employment Appeals Board for substantial evidence. ORS 657.282; ORS 183.482(8)(c).

## ARGUMENT

### A. **Petitioner's loss of his driver's license was not misconduct.**

ORS 657.176(2)(a) requires disqualification of benefits if an employee is discharged for misconduct. Misconduct is not defined in the statute but the Employment Department has adopted OAR 471-030-0038(3)(c), which provides:

"The willful or wantonly negligent failure to maintain a license, certification or other similar authority necessary to the performance of the occupation involved is misconduct, so long as such failure is reasonably attributable to the individual."

In this case, petitioner admits that the failure to maintain a driver's license is attributable to him. However, he contends that the evidence shows that a driver's license was not necessary to the performance of his occupation. The evidence is undisputed that for over five years, petitioner had not operated a county vehicle as part of his job and that he had essentially worked in the office. The few times he had to go out to a job site were with building inspectors to assist them and that only happened twice in the last 10 years. (Tr 29.) In the last five or six years, petitioner was out of the office for no more than one-half hour per day. (Tr 30.)

Between July 26, 1995 and September 4, 1996, a period of 406 days, petitioner was prohibited from driving as part of his duties. During that time, he

continued to perform his supervisory and building official duties as expected by his employer. No discipline resulted from this, even through the "requirement" of a driver's license was in existence, and no warning was given to petitioner that another suspension would result in any discipline, much less termination of his job.

From November 2, 1998 until his termination, petitioner was prohibited from driving while on duty, even though he got his driver's license reinstated. Petitioner's performance evaluation dated May 5, 1999 set out that he was supervising his employees as expected and was doing his duties as expected.

In contradiction to all of the evidence, employer presented testimony only from its director of human resources and risk management who testified that it was necessary for petitioner to drive as part of his supervisory duties and as part of his building official duties.

The issue then in this case was whether a driver's license was really necessary in the adequate performance of petitioner's occupation. On one hand, the court has undisputed testimony of petitioner and performance evaluations of employer which show that employer considered petitioner to be doing his job as expected without driving and even during times when his driver's license was suspended. On the other hand, the court has the unsupported assumptions of employer's director of human resources that driving was necessary to supervise and to perform building official duties. This testimony is completely contradicted by

the performance evaluations, which consistently rated petitioner as performing as expected in his supervisory and other official roles.

The standard of review in this case is whether the order is supported by substantial evidence in the record. "Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding." ORS 183.482(8)(c). Petitioner contends that no reasonable person could make a finding that a driver's license was necessary in the performance of his occupation given the fact that the county deemed his work to be as expected when he did not have a driver's license and when, for over five years, he did not drive a county vehicle in the performance of his duties.

**B. Petitioner did not willfully fail to maintain his driver's license.**

In order to conclude that a failure to maintain a license is grounds for disqualification, EAB must find that petitioner's conduct was either willful or wantonly negligent. OAR 471-030-0038(3)(c). In this case, EAB found that petitioner willfully failed to maintain his driver's license and based that finding on the fact that petitioner intentionally ingested intoxicants and operated a motor vehicle.

Unlike this court's decision in *Weyerhaeuser Co. v. Employment Div.*, 107 Or App 505, 812 P2d 44 (1991), cited by EAB, petitioner did not willfully create a situation that made it impossible for him to maintain his driver's license. He

successfully fought and prevailed in his DMV hearing and had his driving rights reinstated. There is no evidence from which a fact finder could conclude that it was impossible for him to prevail in his criminal case. Likewise, as set out in the first portion of this argument, petitioner was never put on notice that a failure to maintain a driver's license would result in any discipline, much less termination.

EAB should have reviewed this matter to determine if petitioner was "wantonly negligent" in failing to maintain his driver's license. OAR 471-030-0038(1)(b) provides:

"As used in this rule, 'wantonly negligent' means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee."

Given that employer did not discipline petitioner in any fashion following his 1995/96 suspension and the fact that petitioner had not drive a county vehicle in over five years, he could not have known that his conduct in driving while under the influence of alcohol on October 31, 1998 would result in a violation of the standards of behavior that employer has a right to expect of him because driving was not something that employer actually expected of him.

## CONCLUSION

In conclusion, this court should set aside the order of the Employment Appeals Board.

Respectfully submitted,

\_\_\_\_\_**SIGN HERE**\_\_\_\_\_

Michael A. Lawyer, OSB #000000  
Of Attorneys for Petitioner

SAMPLE

**EXCERPT OF RECORD**

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Appeals Board Decision (Rec 35).....ER 1-3

**(The Judgment is the only required doc to be included in the ER, other docs are at your discretion).**

SAMPLE

ER-1

SAMPLE

EO: 200  
BYE: 201439

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

024  
DS 005.00

**EMPLOYMENT APPEALS BOARD DECISION**

*Request for Reconsideration Denied*

**PROCEDURAL HISTORY:** On September 12, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant committed a disqualifying act. Claimant filed a timely request for hearing. On October 28, 2014, ALJ Murdock conducted a hearing, and on October 31, 2014 issued Hearing Decision affirming the Department's decision. On November 17, 2014, claimant filed an application for review with the Employment Appeals Board (EAB). On November 17, 2014, claimant submitted a written argument to EAB. On December 4, 2014, EAB issued Appeals Board Decision in which it affirmed the hearing decision under review. On December 8, 2014, claimant filed a request for reconsideration.

**CONCLUSION AND REASONS:** Under OAR 471-041-015(1) (October 29, 2006), a party may request that EAB reconsider a decision to correct an error of fact or law, or to explain any unexplained inconsistency with a Department rule or practice, or an officially stated Department position. In his request for reconsideration, claimant asserted that EAB made the following errors of fact or law in Appeals Board Decision (1) it accepted misinformation provided by the employer regarding the alcohol test the employer administered to claimant; (2) it did not consider the proper procedure for administering a saliva test for alcohol; (3) it did not take into account claimant's pre-diabetic health condition; (4) it failed to consider claimant's written argument; and (5) it incorrectly asserted that claimant had, in his written argument, claimed that the test the employer administered was unlawful because it did not take place in a "special category laboratory." We consider each of these arguments in turn.

In support of his contentions that EAB erroneously accepted information from the employer regarding the alcohol test administered to claimant and that it erroneously failed to consider the appropriate procedure for administering a saliva test for alcohol, claimant submitted an exhibit entitled "ALCO

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EAB Decision 7

Screen - 2-Minute Saliva Test for Blood Alcohol" (marked as EAB Exhibit 1).<sup>1</sup> This exhibit was not offered at the October 28, 2014 hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), EAB may consider new information only if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. Claimant offered no reason why the exhibit or any of the information contained in it was not presented at the hearing. Claimant's assertion that he is pre-diabetic is also new information; no evidence or testimony on this matter was presented at the hearing, and claimant provided no explanation why it was not. Accordingly, we will not consider claimant's pre-diabetic status and will not admit EAB Exhibit 1 into the record.

In regard to his November 17 written argument, claimant asserted that although the "first version" of his argument did not contain certification that it was sent to the other party as required by OAR 471-041-0090(2)(a), he sent another copy of his written argument on November 17 with the required certification. Claimant submitted a copy of this "second" written argument (marked as EAB Exhibit 2).<sup>2</sup> According to claimant, EAB should now consider this "second" argument since he has complied with the requirements of the applicable rule. In Appeals Board Decision \_\_\_\_\_, however, we addressed the issues raised by claimant's November 17 argument, even though we acknowledged that he failed to certify that he had sent a copy of the argument to the other parties. Accordingly, EAB Exhibit 2 is not relevant or material to our decision and will not be admitted under OAR 471-041-0090(2)(a).

Finally, we agree with claimant that we were mistaken when we concluded that claimant argued the alcohol test administered to him was unlawful because it did not occur in a "special category" laboratory." Claimant never made such an argument. We conclude that our error was a harmless one, however; claimant has shown no reason why this mistake prejudiced his rights or interests and we can think of none.

For the reasons stated above, claimant failed to show that EAB made any error of fact or law in Appeals Board Decision \_\_\_\_\_. The request for reconsideration is denied.

**DECISION:** Claimant's request for reconsideration is denied. Appeals Board Decision \_\_\_\_\_ remains undisturbed.

**DATE OF SERVICE:**

**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 website at [court.oregon.gov](http://court.oregon.gov). Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On

<sup>1</sup> A copy of EAB Exhibit 1 is included with this decision.

<sup>2</sup> A copy of EAB Exhibit 2 is included with this decision.



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EAB Decision

the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

**CERTIFICATION OF COMPLIANCE  
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS**

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 1,838 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(d)(ii) and 5.05(4)(g).

**SIGN HERE**

Michael A. Lawyer, OSB No. 000000  
Attorney for Petitioner

## PROOF OF SERVICE

I certify that on the 3rd day of April, 2000 the original foregoing Petitioner's Brief was deposited in the United States Post Office at Anycity, Oregon, with first class postage prepaid thereon addressed to:

Appellate Court Administrator  
Appellate Courts Records Section Records Section  
1163 State Street  
Salem OR 97301-2563

I further certify that on the 3rd day of April, 2000 two (2) copies of the foregoing Petitioner's Brief were deposited in the United States Post Office at Anycity, Oregon, with first class postage prepaid thereon addressed to:

Philip Attorney  
Department of Justice  
[address]

Reginald Barrister  
Attorney General  
Attorney for Respondent Eden County

**SIGN HERE**\_\_\_\_\_

Michael Lawyer, OSB No. 000000  
Of Attorneys for Petitioner