

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0534

Affirmed
Benefits Are Not Payable

PROCEDURAL HISTORY: On January 15, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding benefits were not payable to claimant during the period between successive academic terms (decision # 145022). Claimant filed a timely request for hearing. On March 10, 2014, ALJ Menegat conducted a hearing, and on March 14, 2014 issued Hearing Decision 14-UI-12559, affirming the Department's decision. On April 3, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's written argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond her reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision. Even if we had considered claimant's new information, our decision would have remained the same for the reasons explained.

FINDINGS OF FACT: (1) On September 9, 2013, claimant was laid off from her full time job as a mail services assistant with Southern Oregon University (SOU), an educational institution.

(2) On October 4, 2013, during the fourth quarter of 2013, claimant filed an initial claim for benefits. An initial claim filed during that quarter has a base year that runs from July 1, 2012 to June 30, 2013. Claimant's sole base year employer was SOU. All of claimant's earnings were for services performed as a mail services assistant. The Department determined that claimant had a valid claim for benefits in the amount of \$336.

(3) In late October, 2013, SOU reemployed claimant as a temporary mail services assistant after the section supervisor went off work due to illness. Claimant was not guaranteed a minimum number of hours and worked on an as needed basis with no definite hours or end date for her employment because her employment depended on the section supervisor's health status.

(4) SOU's winter recess period began on December 16, 2013 and ended on January 3, 2014 (weeks 51-13 through 01-14). During the week prior to the winter recess period, December 8, 2013 through December 14, 2013 (week 50-13), claimant earned \$450 as a temporary mail services assistant. Exhibit 1. When claimant left work at the end of that week, the section supervisor remained ill and claimant was not asked to return her keys to the work area to SOU.

(5) Claimant claimed benefits for the week of December 22, 2013 to December 28, 2013 (week 52-13).

(6) On or about December 29, 2013, claimant inquired of and was told by the acting supervisor that her temporary employment would continue indefinitely based on the section supervisor's health status.

CONCLUSIONS AND REASONS: We agree with the Department and ALJ. Benefits are not payable to claimant for the week December 22, 2013 to December 28, 2013 (week 52-13).

Claimant has applied for unemployment benefits based on nonprofessional services performed for SOU, an institution of higher education, and has claimed benefits for a week that began during SOU's winter break. Accordingly, we begin our inquiry by considering the applicability of ORS 657.221, which provides, in relevant part:

- (1) Benefits based on services performed in other than an instructional, research or principal administrative capacity for an educational institution or institution of higher education shall be payable to an individual in the same amount, on the same terms and subject to the same conditions as benefits payable on the basis of other service subject to this chapter.
- (3) With respect to any services described in subsection (1) of this section, compensation payable on the basis of such services shall be denied to any individual for any week that commences during an established and customary vacation period or holiday recess if such individual performs such services in the period immediately before such vacation period or holiday recess, and there is a reasonable assurance that such individual will perform such services described in ORS 657.167(1)¹ in the period immediately following such vacation or holiday recess.

The provisions of ORS 657.221 apply only when a claimant "was not unemployed as defined by ORS 657.100 in the week immediately preceding the holiday, vacation or recess period." The relevant week in this case is the one immediately preceding the holiday or vacation period. OAR 471-030-0074(1) (January 29, 2007). Under ORS 657.100, an individual is unemployed during any week in which the individual earns less than the individual's weekly benefit amount. In addition, the provisions of ORS 657.221 apply "irrespective of whether or not the individual performed services only during an academic year or in a year-round position." OAR 471-030-0074 (2) (January 29, 2007).

Thus, to the applicability of ORS 657.221, we must determine whether claimant was "not unemployed" during the week immediately preceding the start of SOU's winter break. The relevant week, i.e., the one immediately preceding SOU's winter break, is the week of December 8, 2013 through December 14, 2013 (week 50-13). During week 50-13, claimant earned \$450, an amount more than her weekly benefit

¹ ORS 657.167(1) provides that, subject to certain specified exceptions, benefits "based on service in an instructional, research or principal administrative capacity for an educational institution or institution of higher education" are payable in the same amount, on the same terms and subject to the same conditions as benefits payable based on other service.

amount of \$336. Claimant is, therefore, “not unemployed” and subject to the provisions of ORS 657.221(3).

Under ORS 657.221(3), benefits are not payable to claimant if certain prescribed conditions are met. The first condition that must be met is that the benefits sought must be for a week that began during a customary vacation period, holiday or summer recess observed by the educational institution for which services were performed during the base year. As discussed above, claimant sought benefits for the week of December 22, 2013 through December 28, 2013 (week 50-13), a week that began during SOU’s customary winter break. Therefore, the first condition is satisfied.

The second condition is that claimant must have performed nonprofessional services for one or more educational institutions or institutions of higher learning during the week immediately preceding the recess period. Claimant worked as a temporary mail services assistant for SOU, an institution of higher education, during the week of December 8, 2013, through December 14, 2013 (week 50-13), the week immediately prior to the winter recess period. The second condition is satisfied.

The third condition is that claimant must have had “reasonable assurance” of continuing work in the academic term immediately following the winter break. *See* OAR 471-030-0075 (January 29, 2007). “Reasonable assurance” is “a written contract, written notification or any agreement, express or implied,” that the employee will perform services during the next academic period. OAR 471-030-0075(1). To establish “reasonable assurance” under ORS 657.221(1), the work offered must be 1) in the same or similar capacity, and 2) on economic terms and conditions not “substantially less” than the economic terms and conditions of the work performed during the previous academic term. “Same or similar capacity” refers to the type of services provided: i.e., in a “nonprofessional capacity” as provided by ORS 657.221. OAR 471-030-0075(3). Economic terms and conditions are “substantially less” when the weekly wages are “less than 90% of the gross weekly wage earned in the prior academic year or term,” or “[t]he average number of hours the individual will be working” is less than 90% of the average hours worked in the prior academic year or term. OAR 471-030-0075(2)(a) and (b).

Claimant argued that she did not have reasonable assurance of continuing work after the winter break because her return was not definite. However, the Department had only to show by a preponderance of the evidence that claimant had an implied agreement to perform substantially similar services during the next academic period after the winter break. Claimant was aware of the section supervisor’s continuing health problems, had not been asked to return her keys before the break started and contacted the acting supervisor immediately after the break to confirm her continuing temporary employment. The economic terms and conditions of her work after the break were no less advantageous to claimant than her previous temporary work. As claimant had reasonable assurance of performing services for SOU in the academic term immediately after the winter break, the third condition is satisfied.

The record shows that the prescribed conditions of ORS 657.221 were satisfied with respect to benefits based on claimant’s base-year wages. Accordingly, those benefits are subject to the reduction imposed by that statutory provision, and benefits are not payable for the week of December 22, 2013 through December 28, 2013 (week 52-13).

DECISION: Hearing Decision 14-UI-12559 is affirmed.

Susan Rossiter and Tony Corcoran;
D. E. Larson, not participating.

DATE of Service: May 1, 2014

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 <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.