

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-0594

Modified
Week 25-13 Not Subject to Reduction

PROCEDURAL HISTORY: On August 7, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding benefits were not payable to claimant for the weeks June 16 through August 6, 2013, during the recess period between two academic years (decision # 85607). Claimant filed a timely request for hearing. On September 11, 2013, ALJ Lohuis conducted a hearing, and on September 20, 2013 issued Hearing Decision 13-UI-01132, concluding benefits were not payable to claimant for the weeks June 16 through August 24, 2013 (weeks 25-13 through 34-13). On October 7, 2013, claimant filed an application for review with the Employment Appeals Board (EAB). On November 23, 2013, EAB issued Appeals Board Decision 2013-EAB-2097, reversing Hearing Decision 13-UI-01132 and remanding the case for additional information. On January 9, 2014, ALJ Lohuis conducted a second hearing, and on March 21, 2014 issued Hearing Decision 14-UI-13189, again concluding benefits were not payable to claimant for the weeks June 16 through August 24, 2013 (weeks 25-13 through 34-13).

Claimant's written arguments contained information that was not part of the hearing record. 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.

FINDINGS OF FACT: (1) Claimant filed an initial claim for benefits on January 2, 2013, during the first quarter of 2013. A claim filed during that quarter has a base year that runs from October 2, 2011 to September 29, 2012. The Department determined claimant had a valid claim for weekly benefits in the amount of \$174.

(2) Claimant's base year employers were Douglas Education Service District (DESD), School District No 9 (SD9) and North Central Education Service District (NCESD). Claimant performed work for those employers during his base year as a substitute teacher within school districts, which are

educational institutions, that had summer recess periods between the 2012-2013 and 2013-2014 academic years as follows:

<u>Educational Institution</u>		<u>Recess Period</u>
a. Douglas County School District 04 (Roseburg)	(DESD)	June 13 through August 30
b. Douglas County School District 15 (Days Creek)	(DESD)	June 12 through August 30
c. Douglas County School District 21 (Camas Valley)	(DESD)	June 06 through August 23
d. Douglas County School District 70 (Riddle)	(DESD)	June 17 through August 30
e. Glendale School District 77 (Glendale)	(DESD)	June 17 through August 30
f. Oakland School District 1 (Oakland)	(DESD)	June 17 through August 30
g. South Umpqua School District 19 (South Umpqua)	(DESD)	June 13 through August 30
h. Sutherlin School District 130 (Sutherlin)	(DESD)	June 10 through August 30
i. Winston Dillard School District 116 (Winston Dillard)	(DESD)	June 13 through August 30
j. Yoncalla School District 52 (Yoncalla)	(DESD)	June 13 through August 30
k. Fossil School District 21 (Fossil)	(NCESD)	June 06 through August 23
l. Mitchell School District 55 (Mitchell)	(NCESD)	June 10 through August 23
m. Spray School District 1 (Spray)	(NCESD)	May 27 through August 21
n. Eagle Point High School	(SD9)	June 11 through August 30

(3) Claimant claimed benefits for the weeks June 16 through August 24, 2013 (weeks 25-13 through 34-13).

(4) During the 2012-2013 academic year, claimant performed professional services as a substitute teacher on an on call, as needed basis for one or more of the listed educational institutions and earned more than \$174 during at least one week of that academic year. Claimant was eligible to perform professional services as a substitute teacher an on-call, as needed basis for one or more of the listed educational institutions during the 2013-2014 academic year and acknowledged that he was a “preferred substitute teacher” for at least one school within Douglas County School District 04 (Roseburg) for the 2013-2014 academic year. Exhibit 4.

CONCLUSIONS AND REASONS: We agree with the ALJ that benefits are not payable for the weeks including June 23, 2013 through August 24, 2013 (weeks 26-13 through 34-13). We conditionally agree that benefits are payable for the week including June 16 through 22, 2013 (week 25-13).

The Employment Department adopted a rule, effective January 29, 2007, exempting certain individuals from the reduction in benefits required by ORS 657.167 and ORS 657.221.¹ That rule provides in relevant part:

(1) ORS 657.167 and 657.221 apply only when the individual claiming benefits was not unemployed as defined by ORS 657.100 in the period immediately preceding the holiday vacation or recess period. Where the week(s) claimed commenced during a holiday or vacation period, the relevant period is the week immediately prior to the holiday or vacation period. Where the week(s) claimed commenced during a customary recess period between academic terms or years, the relevant period is the academic year or term immediately prior to the recess period.

¹ OAR 471-030-0074 (January 29, 2007). See also ORS 657.100(1); *Hutchinson v. Employment Division*, 126 Or App 717 (1994) and *Salem-Keizer School District #24J v. Employment Department*, 137 Or App 320 (1995).

(2) The provisions of ORS 657.167 and 657.221 apply irrespective of whether or not the individual performed services only during an academic year or in a year-round position.

Claimant seeks benefits for the weeks of June 16 through August 24, 2013 (weeks 25-13 through 34-13). The relevant period under his claim is the 2012-2013 academic year.² ORS 657.100 provides that an individual is unemployed in any week in which the individual earns less than his weekly benefit amount. Because claimant earned more than his weekly benefit amount of \$174 during at least one week of the 2012-2013 academic year, he is not exempt from the provisions of ORS 657.167 or ORS 657.221.

For non-exempt individuals, ORS 657.167 and ORS 657.221 require a reduction in benefits based on services performed for educational institutions under certain prescribed conditions. Claimant seeks benefits based on wages earned while performing professional services as a substitute teacher for SD9 and school districts within DESD and NCESD. Although educational service districts are not educational institutions³, claimant performed services for the Roseburg, Days Creek, Camas Valley, Riddle, Glendale, Oakland, South Umpqua, Sutherlin, Winston Dillard, Yoncalla, Fossil, Mitchell and Spray school districts while in the employ of DESD and NCESD. School districts are educational institutions as defined by ORS 657.010(6) and (9).⁴ Consequently, ORS 657.167 would limit benefits based on those services if the prescribed conditions are satisfied.

The first condition that must be met before ORS 657.167 may be applied is that the benefits sought must be for a week that commenced during a customary vacation period, holiday or summer recess observed by the educational institution for which the services were performed during the base year.⁵ In Hearing Decision 14-UI-13189, after finding that the recess periods for the Glendale, Oakland and Riddle school districts commenced on June 17, 2013, the ALJ concluded that weeks 25-13 through 34-13, for which claimant sought benefits, all “commenced during the summer recess periods observed by all the institutions at which claimant worked” during his base year. Hearing Decision 14-UI-13189 at 3, 5-6. However, week 25-13 *commenced* on June 16, 2013, prior to the start of the summer recess periods for Glendale, Oakland and Riddle. Consequently, under ORS 657.167, week 25-13 is not subject to the between-terms reduction. *If* the Department determines that claimant earned sufficient wage credits while performing services for Glendale, Oakland and Riddle to qualify for benefits for that week, benefits might be payable to claimant for that week alone. With respect to weeks 26-13 through 34-13, the first condition is satisfied.

The second condition that must be satisfied before ORS 657.167 may be applied is that claimant must have performed services for one or more educational institutions during the academic year immediately prior to week 25-13. Claimant performed services as a substitute teacher for several member school districts while in the employ of DESD during the 2012-2013 academic year. Exhibit 101 at 5. Because claimant performed services for educational institutions during the 2012-2013 academic year, the second condition is satisfied.

² *Friedlander v. Employment Division*, 66 Or App 546, 676 P2d 314 (1984).

³ *McIntyre v. Employment Division*, 41 Or App 189, 598 P2d 313 (1979) (ESDs are not educational institutions).

⁴ Formerly ORS 657.010(16). See *Richard E. Hunt* (Employment Appeals Board, 05-AB-1742, January 31, 2006).

⁵ ORS 657.167.

The last condition that must be satisfied is that claimant must have had “reasonable assurance” of continuing work in the 2013-2014 academic year.⁶ In order to establish “reasonable assurance” under ORS 657.167(2), 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 year. “Same or similar capacity” refers to the type of services provided: i.e., either a “professional” capacity as provided by ORS 657.167 or a “nonprofessional” capacity as provided by ORS 657.221.⁷ Economic terms and conditions are “substantially less” when the weekly wages or average number of hours is “substantially less”.⁸ Whether the economic terms and conditions are “substantially less” is determined according to state law, and not subject to federal conformity requirements.⁹

Claimant had “reasonable assurance” of continuing work in the 2013-2014 academic year.¹⁰ The Department has defined reasonable assurance by rule to mean “a written contract, written notification or any agreement, express or implied, that the employee will perform services immediately following the academic year, term, vacation period or holiday recess which is in the same or similar capacity unless the economic terms and conditions of the employment in the second year or period are substantially less than the employment in the first year or period.”¹¹ Claimant essentially acknowledged that he had “reasonable assurance” under the rule when he acknowledged to the school superintendent for Roseburg Public Schools, a member of the DESD, in July 2013 that he understood he was still a “preferred substitute teacher” for at least one school within that district.¹² Although claimant argued that he lacked reasonable assurance because he was excluded from substitute teaching by a number of district schools for the 2013-2014 academic year, because of the general uncertainty as to the number of hours that a substitute will work, Oregon law does not consider an offer to substitute teach in the next year for even one school to be an offer of substantially less work than substitute teaching in the prior year. *See Johnson v. Employment Division*, 59 Or App 626, 651 P2d 1365 (1982)(discussing *Mallon v. Employment Division*, 41 Or App 479, 599 P2d 1164 (1979)). Because claimant understood he had an offer of work in the same or a similar capacity as his work during the 2012-2013 academic year, and the work offered was not substantially less than the work he had in the previous year, claimant had reasonable assurance of continuing work during the 2013-2014 academic year.¹³ Under ORS 657.167,

⁶ See OAR 471-030-0075 (January 29, 2007).

⁷ OAR 471-030-0075(3). For further discussion of these terms, see *Unemployment Insurance Program Letter* (UIPL) No. 04-87.

⁸ OAR 471-030-0075(2). For further discussion of these terms, see *Unemployment Insurance Program Letter* (UIPL) No. 04-87.

⁹ See *UIPL No. 04-87; Johnson v. Employment Division*, 59 Or App 626, 651 P2d 1365 (1982) (discussing *Mallon v. Employment Division*, 41 Or App 479, 599 P2d 1164 (1979)).

¹⁰ ORS 657.167(1).

¹¹ OAR 471-030-0075 (January 29, 2007).

¹² Exhibit 4.

¹³ Claimant also argued that he did not have reasonable assurance because in order for him work as a substitute teacher for DESD during the 2013-2014 academic year, he had to execute a uniformly required release of liability to use its necessary

claimant is, therefore, subject to the between terms reduction in benefits for any weeks claimed that commenced during the applicable recess periods.

The prescribed conditions of ORS 657.167 have been shown to have been satisfied with respect to benefits based on claimant's base-year wages from for weeks 26-13 through 34-13. Accordingly, those benefits are subject to the reduction contemplated by ORS 657.167, and are not payable for those weeks which commenced during the recess period between the 2012-2013 and 2013-2014 academic years of the relevant educational institutions. Conversely, those conditions have not been shown to have been satisfied with respect to the benefits claimed for week 25-13. Accordingly, those benefits are not subject to reduction and are payable, provided claimant earned sufficient wage credits while performing services for Glendale, Oakland and Riddle to qualify for benefits for that week.

DECISION: Hearing Decision 14-UI-13189 is modified, as outlined above.

Tony Corcoran and J.S. Cromwell, *pro tempore*;
Susan Rossiter and D.E. Larson, not participating.

DATE of Service: May 21, 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.

computerized substitute scheduling service, which he refused to do for fear of compromising employment discrimination claims he had pending against DESD. However, OAR 471-030-0075(4) provides that reasonable assurance cannot be ended or abated by any unilateral action of an individual and claimant's refusal to execute a uniformly required annual release of liability in order use a necessary substitute scheduling system constituted unilateral action on his part which did not end or abate his reasonable assurance under the cited rule.