

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1121

Affirmed
Benefits Are Not Payable

PROCEDURAL HISTORY: On January 14, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not eligible for benefits during the recess period between two academic terms (decision # 91224). Claimant filed a timely request for hearing. On March 7, 2014, the Office of Administrative Hearings (OAH) issued notice of a hearing scheduled for March 24, 2014. On March 24, 2014, ALJ Seideman conducted a hearing at which claimant failed to appear, and on March 26, 2014, issued Hearing Decision 14-UI-13427, dismissing claimant's request for hearing for that reason. On April 7, 2014, claimant filed a timely request to reopen the hearing record. On June 2, 2014, ALJ Holmes-Swanson conducted a hearing, at which claimant appeared and testified, and on June 11, 2014, issued Hearing Decision 14-UI-19383, concluding claimant showed good cause to reopen the hearing record, cancelling Hearing Decision 14-UI-13427, but affirming the Department's decision that claimant was not eligible for benefits during the recess period between two academic terms. On June 30, 2014, claimant filed an application for review of Hearing Decision 14-UI-19383 with the Employment Appeals Board.

No adversely affected party requested review of that portion of Hearing Decision 14-UI-19383 concluding claimant showed good cause to reopen the hearing record and cancelling Hearing Decision 14-UI-13427 for that reason. Consequently, we did not review that determination.

FINDINGS OF FACT: (1) Claimant filed an initial claim for benefits on March 19, 2013, during the first quarter of 2013. A claim filed during that quarter has a base year that runs from October 1, 2011 to September 30, 2012.

(2) Claimant's sole base year employer was Mt. Hood Community College (MHCC), an educational institution. The Department determined claimant had a valid claim for weekly benefits in the amount of \$524.

(3) Claimant worked for MHCC as vice president for student services, a position that ended in July 2013. On September 3, 2013, claimant accepted the position of vice president for student services with

Klamath Community College (KCC), a position that was scheduled to begin on January 6, 2014. However, as part of his agreement with KCC, claimant agreed to and attended a multi-day conference in Texas with KCC employees one week in November 2013, during KCC's fall term. KCC paid claimant more than his weekly benefit amount of \$524 for the week in which he attended the Texas conference. Transcript at 13-14.

(4) The MHCC winter recess period between the 2013 fall term and 2014 winter term began December 16, 2013 and ended January 3, 2014. Claimant claimed, and the Department denied, benefits for the weeks including December 22, 2013 to January 4, 2014 (weeks 52-13 and 01-14), the weeks in issue.

CONCLUSIONS AND REASONS: We agree with the ALJ. Benefits based upon claimant's base year wages from MHCC are not payable for the benefit weeks claimed, each of which commenced during the winter recess period between its academic terms.

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.

(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.

Because claimant seeks benefits for the weeks including December 22, 2013 to January 4, 2014 (weeks 52-13 and 01-14) that commenced during a customary recess period between academic terms, the relevant period is the 2013 fall term. ORS 657.100 provides that an individual is unemployed in any week in which the individual earns less than his (or her) weekly benefits amount. Because claimant earned more than his weekly benefit amount of \$524 during at least one week of 2013 fall term, when he was attending the Texas conference for KCC in November, 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. Community colleges are educational institutions as defined by ORS 657.010(6).² Because claimant performed services in a "principal administrative capacity for an educational institution", ORS 657.167 limits when those benefits may be paid, if the prescribed conditions are satisfied.

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

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 recess period observed by the educational institution for which services were performed during the base year.³ Here, claimant sought benefits for weeks 52-13 and 01-14. Those weeks commenced during the winter recess period between academic terms for MHCC, December 16, 2013 to January 4, 2014. The first condition is satisfied.

The second condition is that claimant must have performed services for one or more educational institutions during the academic term immediately prior to week 52-13. Because claimant performed services for KCC during the 2013 fall term, 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 recess period.⁴ In order to establish “reasonable assurance” under ORS 657.167(1), the work offered must be 1) reflected in a written contract, written notification, or any agreement, express or implied, 2) in the same or similar capacity, and 3) 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 657.221.⁵ Economic terms and conditions are “substantially less” when the weekly wages or average number of hours is “substantially less”.⁶ Whether the economic terms and conditions are “substantially less” is determined according to state law, and not subject to federal conformity requirements.⁷

Claimant had reasonable assurance of continued employment in KCC’s 2014 winter term. Claimant worked for KCC in a professional capacity, either as the incoming vice president for student services or as a “consultant” as claimant described it, during the 2013 fall term. Transcript at 19. He had a contract to perform services in a professional capacity as KCC’s vice president for student services in the 2014 winter term. Because his contract for the winter term was to perform professional services full-time, the economic terms and conditions of his employment during that term were not “substantially less” than those of the part-time work performed for KCC during the 2013 fall term. Accordingly, claimant had reasonable assurance of continuing work under ORS 657.167(1).

³ ORS 657.167.

⁴ See OAR 471-030-0075 (January 29, 2007).

⁵ OAR 471-030-0075(3). For further discussion of these terms, see *Unemployment Insurance Program Letter* (UIPL) No. 04-87. OAR 471-030-0075(3). For further discussion of these terms, see *Unemployment Insurance Program Letter* (UIPL) No. 04-87.

⁶ OAR 471-030-0075(2). For further discussion of these terms, see *Unemployment Insurance Program Letter* (UIPL) No. 04-87.

⁷ 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)).

The record shows that the prescribed conditions of ORS 657.167 are satisfied with respect to benefits based on claimant's base-year wages from MHCC during the benefit weeks claimed (weeks 52-13 to 01-14). Accordingly, those benefits are subject to the reduction contemplated by that statutory provision.

DECISION: Hearing Decision 14-UI-19383 is affirmed.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: July 31, 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 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 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.

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