

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0685

Reversed
Benefits Are Payable

PROCEDURAL HISTORY: On April 4, 2015, 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 # 73641). Claimant filed a timely request for hearing. On May 18, 2015, ALJ Seideman conducted a hearing, and on May 19, 2015, issued Hearing Decision 15-UI-38724, affirming the Department's decision. On June 5, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Claimant filed an initial claim for benefits June 13, 2014, effective the second quarter of 2014. An initial claim filed during that quarter has a base year that runs from January 1, 2013 through December 31, 2013.

(2) Claimant's base year employers were the University of Oregon (U of O), Oregon State University (OSU) and Lane Community College (LCC), each of which was an educational institution. Claimant worked as an adjunct instructor, on an as-needed basis, for each of her base year employers. The Department determined claimant had a monetarily valid claim for benefits based on her base year wages and that her weekly benefit amount was \$538.

(3) The recess period between the winter and spring terms of the 2014-2015 academic year for U of O, OSU and LCC began March 23, 2015 and ended March 27, 2015.¹ Claimant claimed benefits for the week including March 29 through April 4, 2015 (week 13-15), the week in issue.

(4) Claimant worked for South Seattle College (SSC), a community college and educational institution, as an adjunct instructor, on an as-needed basis, during the 2014-2015 academic year. She taught three classes during the fall term, three classes during the winter term and earned more than \$538 during at

¹ We take official notice of these recess periods, which are contained in Employment Department records under the designation School Recess Periods, May 11, 2015. Any party that objects to our doing so 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(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

least one week of the winter term. Claimant knew she would be part of the adjunct instructor pool for the spring term at SSC, but did not find out until April 4, 2015 that she had been assigned to teach three classes during the spring term. Audio Record ~ 10:15 to 11:00; 13:00 to 19:00. The recess period between the winter and spring terms of the 2014-2015 academic year for SSC began March 25, 2015 and ended April 3, 2015.

CONCLUSIONS AND REASONS: We disagree with the Department and ALJ. Benefits are payable to claimant for the week at issue because it did not commence during the recess period between the winter and spring terms of the 2014-2015 academic year for her base-year employers.

The Department determined claimant had a valid claim for benefits, i.e., was *monetarily* eligible for benefits, based on the total amount of her base year wages from her base-year employers and that her weekly benefit amount was \$538. However, when claims for benefits are based on base-year wages from educational institutions, both ORS 657.167 and ORS 657.221 require a reduction in benefits² under certain prescribed conditions. Claimant seeks benefits based on services performed as an adjunct instructor for U of O, OSU and LCC during her base year. U of O, OSU and LCC are educational institutions as defined in ORS 657.010(6) and (9). Therefore, ORS 657.167 - which applies to services performed for educational institutions by individuals, such as claimant, in an instructional, research or principal administrative capacity - limits when those benefits may be paid, if prescribed conditions are satisfied.

ORS 657.167 provides, in relevant part, as follows:

657.167 Amount and time period for payment of benefits to educational institution employees.

² The unemployment insurance program is a joint federal and state program that was established in 1935 to provide a safety net for workers who become involuntarily unemployed. *See* Federal Unemployment Tax Act (FUTA), 26 USC §§ 3301 to 3311 and *Unemployment Compensation, Federal – State Partnership*, US Department of Labor, Office of Workforce Security, Division of Legislation, April 2005. Benefits are payable based not on need, but on a qualified wage record and re-employability. FUTA did not cover employment in educational institutions until the Employment Security Amendments of 1970 extended limited coverage to employment in higher educational institutions. In 1976, limited coverage was extended to elementary and secondary school employment. Pub L 94-566. The limitation was that benefits based on such employment would not be payable during periods between and within academic terms. *Id.* The policy reason for that reduction in benefits was that the cost of coverage, without the limitations, placed too great a financial burden on “educational employers,” whose sole resource, usually, is tax dollars. Most, if not all, educational employers are “reimbursable employers,” i.e., they are not entitled to “relief of charges,” but must reimburse the Employment Department Trust Fund dollar for dollar for any benefits paid their unemployed workers. *See* ORS 657.471(6).

The reduction in benefits mandated by the Unemployment Compensation Amendments of 1976 (PL 94-566) applies to specified employment and is based on established criteria in terms that have a precise meaning. Oregon was not required to conform to the federal law in this area but chose to do so to obtain the substantial financial benefits that would result. The choice to engage in this “cooperative federalism” led Oregon to adopt ORS 657.167 and ORS 657.221, among other state provisions, and requires Oregon to interpret them in a manner consistent with federal legislative intent. *See Salem College & Academy, Inc. v. Employment Division*, 298 Or 471, 695 P2d 25 (1985). If found to be out of conformity, Oregon stands to lose all of administrative funding for the unemployment insurance program (e.g., \$48.6 million in federal fiscal year 2004), and its employers would have to pay their full FUTA tax obligation (e.g., an increase of approximately \$471 million over the \$71 million they paid in 2005). *See* Fiscal Impact Statement on SB 447 by the Employment Department, prepared by Robin Kirkpatrick, March 13, 2005.

(1) Benefits based on service in 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, except that benefits shall not be paid based on such services for any week of unemployment commencing during the period between two successive academic years or, when an agreement provides instead for a similar period between two regular terms...if there is a contract or a reasonable assurance that such individual will perform services in any such capacity for any institution in the second of such academic years or terms...

In decision # 73641 and Hearing Decision 15-UI-38724, the Department and ALJ found that claimant claimed benefits for the period March 29 through April 4, 2015. They also found that claimant was employed by SSC during the academic term immediately preceding that week, that the period between SSC's winter and spring academic terms began on March 25 and ended on April 3, 2015 and that claimant had reasonable assurance of continued employment after April 3, 2015. The Department and ALJ then concluded that under ORS 657.167, benefits were not payable to claimant for the week in issue. We disagree.

For non-exempt individuals, ORS 657.167 requires a reduction in benefits only if prescribed conditions are met. The first condition that must be met is that the benefits sought must be for a week that commenced during a customary vacation period, holiday or between-terms recess period observed by the educational institution for which the services were performed during the base year.³ The Department and the ALJ both erred by failing to analyze whether the first condition was met by reference to the between-term recess periods of claimant's base year employers, U of O, OSU and LCC, and looked at the between-term recess period observed by SSC, for which claimant worked during the 2014-2015 winter term. Claimant claimed benefits for the week including March 29 through April 4, 2015 (week 13-15). Because that week did not commence during the between-terms recess period of her base year employers, March 23-27, 2015, the first condition is not satisfied and claimant is not subject to a reduction in benefits under ORS 657.167.

³ ORS 657.167; *Thomas G. Ruckman* (Employment Appeals Board, 12-AB-3220, December 19, 2012). See also, *John P. Ryan* (Employment Appeals Board, 05-AB-1790, February 28, 2006) at § IV; *Monte P. Alderson* (Employment Appeals Board, 05-AB-1805, February 28, 2006)(*affirmed without opinion*, A131757, Court of Appeals of Oregon, August 15, 2007)(*Alderson II*); *Monte P. Alderson* (Employment Appeals Board, 05-AB-1881, February 28, 2006)(*affirmed without opinion*, A131758, Court of Appeals of Oregon, August 15, 2007)(*Alderson III*); *Monte P. Alderson* (Employment Appeals Board, 06-AB-0362, February 28, 2006)(*affirmed without opinion*, A127281, Court of Appeals of Oregon, August 15, 2007)(*Alderson IV*); *Monte P. Alderson* (Employment Appeals Board, 06-AB-1652, November 7, 2006)(*Alderson V*); *Rita F. Hendershot* (Employment Appeals Board, 08-AB-1826, October 7, 2008); *Judith A. Clay* (Employment Appeals Board, 09-AB-3559, November 19, 2009); *Sage A. Silverstein* (Employment Appeals Board, 10-AB-0646, March 29, 2010); *Clifford A. Williams* (Employment Appeals Board, 10-AB-3336, December 3, 2010); *Teresa L. Moore* (Employment Appeals Board, 11-AB-1091 and 11-AB-1092, April 4, 2011); *Thomas G. Ruckman* (Employment Appeals Board, 12-AB-2718, October 17, 2012).

Here, a prescribed condition of ORS 657.167 has not been shown to have been satisfied with respect to benefits based on claimant's base-year wages. Accordingly, those benefits are not subject to the reduction contemplated by that statutory section and benefits are payable to claimant for the week at issue (week 13-15) if claimant is otherwise qualified and eligible under ORS 657.155.

DECISION: Hearing Decision 15-UI-38724 is set aside, as outlined above.

Susan Rossiter and D. P. Hettle, *pro tempore*;
J. S. Cromwell, not participating.

DATE of Service: July 29, 2015

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.

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