

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1076

Reversed
Benefits Are Payable

PROCEDURAL HISTORY: On July 13, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding benefits were not payable to claimant during the recess period between two academic years (decision # 122518). Claimant filed a timely request for hearing. On August 17, 2015, ALJ Frank conducted a hearing, and on August 20, 2015 issued Hearing Decision 15-UI-43256, affirming the Department's decision. On September 9, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) From August 25, 2014 to June 26, 2015, Serendipity Center, Inc. (SCI), an educational institution, employed claimant in a "non-instructional capacity" as a skills trainer. Audio Record ~ 9:45 to 10:00.

(2) On June 24, 2015, during the second quarter of 2015, claimant filed an initial claim for unemployment insurance benefits. The base year for an initial claim filed during that quarter includes January 1 through December 31, 2014. Claimant's only base year employer was SCI. The Department determined that claimant had a monetarily valid claim for benefits based on his base year wages and that his weekly benefit amount was \$230.

(3) SCI's summer recess period between its 2014-2015 and 2015-2016 academic years began June 18, 2015 and ended September 4, 2015 (weeks 25-15 through 34-15). Claimant claimed benefits for the weeks including June 21 through August 8, 2015 (weeks 25-15 through 31-15), the weeks at issue.

(4) Claimant earned more than \$230 from SCI during at least one week of the 2014-2015 academic year.

(5) The employer never informed claimant that he would be rehired for the 2015-2016 academic year. In June 2015, the employer's human resources manager told claimant that his services would not be needed during the following academic year if enrollment was low, that other employees would be offered employment before claimant and that claimant "could get unemployment benefits." Audio

Record ~ 17:00 to 18:30. As of August 17, 2015, claimant's coworkers had met with the employer's new principal about future work but claimant was not given the same opportunity.

CONCLUSIONS AND REASONS: We disagree with the ALJ. Benefits are payable to claimant for the weeks at issue which commenced during the summer recess period between the 2014-2015 and 2015-2016 academic years.

The Department determined claimant had a valid claim for benefits, i.e., was monetarily eligible for benefits, based on the total amount of his base year wages and that his weekly benefit amount was \$230. However, when claims for benefits are based solely or primarily on base-year wages from an educational institution, both ORS 657.167 and ORS 657.221 require a reduction in those benefits¹ under certain prescribed conditions. Claimant seeks benefits based on services performed for SCI in a “non-instructional capacity” as a skills trainer. SCI is an educational institution as defined in ORS 657.010(6). Therefore, ORS 657.221 - which applies to services performed for educational institutions by individuals, such as claimant, in *other than* an instructional, research or principal administrative capacity - limits when those benefits may be paid, if prescribed conditions are satisfied.

ORS 657.221 provides, in relevant part, as follows:

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

(1) Benefits based on service in other than an instructional, research or principal administrative capacity for an educational institution or institution of higher education shall be payable to an

¹ 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.

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. However,

(a) Benefits shall not be paid on the basis of such services for any week of unemployment that commences during a period between two successive academic years or terms if the individual performs such services in the first academic year or term and there is a reasonable assurance that the individual will perform any such services in the second academic year or term for any institution; except that

(b) If benefits are denied to an individual for any week under paragraph (a) of this subsection and such individual was not offered an opportunity to perform such services for the institution for the second of such academic years or terms, such individual shall be entitled, if otherwise eligible, to payment of benefits for each week for which the individual filed a timely claim for benefits and for which benefits were denied solely by reason of paragraph (a) of this subsection.

(2) With respect to the application of this section, the following shall apply:

(b) In the event the institution does not extend to the individual an offer of work or provide a reasonable assurance the individual is expected to return to work for the institution following the period between the academic years or terms, the separation from work shall be considered an involuntary leaving or layoff.

(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 reasonable assurance that such individual will perform such services or any services described in ORS 657.167 (1) in the period immediately following such vacation period or holiday recess.

The Employment Department adopted a rule, effective January 29, 2007, exempting certain individuals from the reduction in benefits required by ORS 657.221.² That rule, OAR 471-030-0074, provides in relevant part:

(1) ORS...657.221... appl[ies] 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 customary recess period between academic terms or years, the relevant period is the academic year or term immediately prior to the recess period.

² 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...657.221 apply irrespective of whether or not the individual performed services only during an academic year or in a year-round position.

The Court of Appeals has interpreted the term “academic year” to refer to the traditional fall through spring school year. *Friedlander v. Employment Division*, 66 Or App 546, 552, 676 P2d 314 (1984). SCI established its summer recess period between the 2014-2015 and 2015-2016 academic years to begin June 21, 2015 and end September 5, 2015. Therefore, that period is SCI’s “customary recess period between academic years” for purposes of applying 657.221 and OAR 471-030-0074(1).

Because claimant seeks benefits for the weeks including June 21 through August 8, 2015, the relevant period under OAR 471-030-0074 is the 2014-2015 academic year. 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 \$230 during at least one week of the 2014-2015 academic year, he is not exempted by OAR 471-030-0074 from the provisions of ORS 657.221.

For non-exempt individuals, ORS 657.221 requires a reduction in benefits if certain 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 summer recess observed by the educational institution for which the services were performed during the base year.³ Claimant claimed benefits for the weeks including June 21 through August 8, 2015 (weeks 25-15 through 31-15), each of which commenced during SCI’s designated summer recess period. Therefore, the first condition is satisfied with respect his claims for those weeks.

The second condition is that claimant must have performed services for one or more educational institutions during the academic year immediately prior to the recess period. Claimant worked a skills trainer for SCI, during the 2014-2015 academic year. Therefore, the second condition is satisfied.

The third condition is that claimant must have had “reasonable assurance” of continuing work in the 2015-2016 academic year. The Department has defined reasonable assurance by rule:

(1) With respect to the application of ORS 657.167 and 657.221, "reasonable assurance" means 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. A finding of reasonable assurance may be based on the totality of circumstances.

³ ORS 657.221.

(3) With respect to (1) of this rule, "same or similar capacity" refers to the type of services provided: i.e., a "professional" capacity as provided by ORS 657.167 or a "nonprofessional" capacity as provided by 657.221.

OAR 471-030-0075. In Hearing Decision 15-UI-43256, after finding that the employer expected claimant to return for the 2015-2016 academic year and that the employer had not notified claimant that his skills would not be needed due to insufficient enrollment, the ALJ concluded that claimant had reasonable assurance of continuing employment was not entitled to benefits during the school summer recess period. We disagree.

The Oregon Court of Appeals has determined that "reasonable assurance" requires some evidence of mutual commitment and assurance between claimant and the employer so that a claimant can be said to have a reasonable expectation of returning to employment in the next academic year. *See, Friedlander v Employment Division*, 66 Or App 546, 676 P2d 314 (1984); *Nickerson v Employment Department*, 250 Or App 352, 280 P3rd 1014 (2012). Here, there was no evidence of any commitment or assurance by SCI such that claimant could reasonably expect to return to work as a skills trainer in the 2015-2016 academic year. Claimant had not been notified of fall employment by August 17, 2015 and there was no implied agreement of continuing work in the fall based on similar circumstances in past years. At the hearing, claimant asserted that the employer's human resources manager notified him that his services would not be needed during the following academic year if enrollment was low, that other employees would be offered employment before claimant and that claimant "could get unemployment benefits." Audio Record ~ 17:00 to 18:30. The employer's HR manager did not refute these assertions. As of August 17, 2015, claimant's coworkers had met with the employer's new principal about work in the fall but claimant was not given the same opportunity. The fact that it was possible claimant might be employed in the fall is not enough to establish reasonable assurance that claimant would return after the recess period. Based upon the totality of the circumstances, we conclude there was no "contract, notification or agreement", express or implied, of employment for claimant after the recess, so there was no reasonable assurance of continued employment in the 2015-2016 academic year, and the third condition is not satisfied.

The prescribed conditions of ORS 657.221 have not been shown to have been satisfied with respect to benefits based on claimant's base-year wages from SCI. Accordingly, those benefits are not subject to the reduction contemplated by ORS 657.221 and benefits are payable during the weeks at issue (weeks 25-15 through 34-15) which commenced during the recess period between SCI's 2014-2015 and 2015-2016 academic years.

DECISION: Hearing Decision 15-UI-43256 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell.

DATE of Service: October 13, 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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