

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1195

Affirmed
Benefits Are Not Payable

PROCEDURAL HISTORY: On July 1, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding benefits based on earnings from an educational institution were payable to claimant during the between terms recess period (decision # 95151). The employer filed a timely request for hearing. On August 11, 2016, ALJ Vincent conducted a hearing, and on August 17, 2016 issued Hearing Decision 16-UI-65822, concluding benefits were not payable. On August 22, 2016, claimant filed an application for review with the Employment Appeals Board (EAB). On August 25, 2016, EAB issued Employment Appeals Board Decision 2016-EAB-0980, reversing Hearing Decision 16-UI-65822 and remanding the matter to OAH to complete the record. On September 28, 2016, ALJ Vincent conducted a hearing, and on October 6, 2016 issued Hearing Decision 16-UI-68684, again concluding that benefits were not payable during the between terms recess period. On October 24, 2016, claimant filed a request for hearing on Hearing Decision 16-UI-68684 with EAB.

EAB considered claimant's arguments when reaching this decision.

FINDINGS OF FACT: (1) Claimant filed an initial claim for benefits effective the second quarter of 2016. An initial claim filed during that quarter has a base year that runs from January 1, 2015 to December 31, 2015.

(2) Claimant's base year employer was Salem Keizer Public School District 24J (SKSD). Claimant's earnings were for services performed as a part-time instructional assistant. The Department determined that claimant had a valid claim for benefits based on his base year wages from SKSD in the amount of \$133. Claimant earned more than \$133 from SKSD during one week of the 2015-2016 academic year.

(3) The school recess period at issue began June 16, 2016 and ended September 2, 2016. Claimant seeks benefits for weeks commencing on June 19, 2016 (week 25-16).

(4) On September 3, 2015, claimant began working for SKSD. He worked throughout the 2015-2016 academic year as a special programs instructional assistant three hours per week at Weddle Elementary School and became a permanent employee during that academic year.

(5) On May 16, 2016, SKSD's human resources classified staffing specialist notified claimant in writing that he had been placed on the administrative transfer list for reasons other than his work performance. The notice stated, in pertinent part:

the number of positions at a school or location may vary form year to year due to budget decisions, enrollment shifts, and/or program changes. If a school/program has more staff members assigned to it than it has positions, the principal/supervisor must . . . determine which individual(s) are to be transferred. * * * The District will make every effort to assign you to a specific location for 2016-17. If there are not enough vacant positions, you will be placed in a position currently held by someone with less seniority than you. If there is no one with less seniority, you may be identified for layoff. This does not, however, preclude you from applying for positions which are listed in the usual vacancy listing procedure.

Exhibit 2, May 16, 2016 letter. On May 26, 2016, however, SKSD's director of employee relations issued a letter addressed to claimant titled "Employment Status Verification." The letter stated:

2015-16 End Date

Your end date for the 2015-16 school year is 6/14/2016

2016-17 Start Date

Your employment status with Salem-Keizer School District for the 2016-17 school year is indicated below:

We look forward to your return to perform services in the same or similar capacity on 9/1/2016

Hours vary from year to year. Verify number of work hours for 2016-17 with your supervisor.

Exhibit 1, May 26, 2016 Employment Status Notification (emphasis in original). Claimant signed the notification letter on May 31, 2016.

(6) At the end of the 2015-2016 school year, claimant's principal at Weddle Elementary School told claimant he would be contacted by human resources with information about his new assignment. Audio recording at 28:15. The principal told claimant that SKSD would find an assignment for him. At the beginning of July 2016, claimant's supervisor encouraged claimant to apply for vacant positions and that, if offered a position with fewer than three hours per day he would have to take it.

(7) On July 26, 2016, SKSD's human resources classified staffing specialist sent claimant a letter titled "**NOTICE OF NEW ASSIGNMENT.**" Exhibit 2, July 26, 2016 Notice (emphasis in original). The letter stated:

The purpose of this letter is to confirm that your assignment for the 2016-17 school year has changed from a Special Programs Instructional Assistant 2 – LRC at Weddle Elementary School to a permanent 3 hour Special Programs Instructional Assistant 2 – LRC at Bush Elementary School.

You are scheduled to report to work on September 1, 2016. Your supervisor will be [the] Principal.

Id. Claimant's new assignment included a wage increase.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant is subject to the between terms denial of benefits, and benefits based on his earnings as a school employee are, therefore, not payable during the summer recess period between the 2015-2016 and 2016-2017 academic years.

ORS 657.167 provides that unemployment insurance benefits payable to an otherwise qualified individual may be reduced during school recess periods if the benefits are based on wages from services performed for an educational institution. The reduction in benefits only applies when the individual was not "unemployed," as that term is defined at ORS 657.100, in the period immediately preceding the recess. OAR 471-030-0074(1) (January 29, 2007). 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 seeks benefits for weeks beginning June 19, 2016, the relevant period is the 2015-2016 academic year of SKSD. Claimant earned more than his \$133 weekly benefit amount in at least one week during the 2015-2016 academic year at issue. Therefore, claimant was not unemployed in the period immediately preceding the recess period at issue, and he is not exempted by OAR 471-030-0074(1) from the reduction in benefits.

For non-exempt individuals, ORS 657.167 requires a reduction in benefits based on services performed for educational institutions under certain prescribed conditions. Claimant seeks benefits based on wages earned while performing services for SKSD. SKSD, a school district, is an educational institution as defined by ORS 657.010(6). Therefore, ORS 657.167 limits when benefits may be paid to claimant during the recess period if three 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 services were performed during the base year. Here, claimant sought benefits beginning the week of June 19, 2016, which commenced during SKSD's recess period. Therefore, ORS 657.167 applies, and the first condition is satisfied with respect to his claims for weeks commencing during the recess period.

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 performed services as an instructional assistant for SKSD, an educational institution, during the 2015-2016 academic year. The second condition is satisfied.

The third condition is that claimant must have had “reasonable assurance” of continuing work in the 2016-2017 academic year. “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.

OAR 471-030-0075(1). In other words, in order to establish that an individual had reasonable assurance, the totality of circumstances must establish that (1) the individual had express or implied notice that he will perform services immediately following the recess; (2) the services after the recess are in the same or similar capacity as before the recess; and (3) the economic terms and conditions of the service after the recess were not substantially less than before the recess.

Claimant argued that he did not have express or implied notice that SKSD had work for him after the recess period, based on the May 16th administrative transfer letter that notified claimant he was subject to transfer to a different school after the recess period, and "may be identified for layoff" in the event no vacant positions or positions filled by individuals with less seniority were available for him. If the May 16th letter was the only evidence in the record concerning the parties' intent to return claimant to work after the recess period, we would likely agree with claimant that he did not have express or implied notice that he would perform services after the recess. However, the record also shows that within approximately two weeks of May 16th, SKSD gave claimant an "employment status notification" letter stating that SKSD "look[ed] forward to your return to perform services in the same or similar capacity on 9/1/2016."¹ By the end of the 2015-2016 academic year claimant's principal at Weddle Elementary School had also orally notified him that SKSD would place him in an assignment, and that human resources would contact him with information about his new assignment. Therefore, although claimant's continued employment after the recess period was called into question in mid-May 2016, by the time the 2015-2016 academic year ended, SKSD had provided claimant with express written notification that he would be returned to service after the recess period.

We note that SKSD did not give claimant express notice of his job title or the location of his employment after the recess period until July 26, 2016, approximately six weeks after the recess period began. Although the Oregon Court of Appeals in *Nickerson v. Employment Dept.*, 250 Or App 352, 280 P3d 1014 (2012) held that reasonable assurance cannot be established retroactively, this case is distinguishable. In *Nickerson*, claimant was laid off work at the beginning of the recess period; five months later the layoff was rescinded and claimant was instructed to return to work the following week. EAB held that claimant retroactively had reasonable assurance based on the rescinded layoff and the Court reversed, holding that reasonable assurance is not retroactive. Unlike the situation in *Nickerson*, however, SKSD expressly informed the claimant in this case, weeks prior to the recess period, that he would be returning to work in the same or similar capacity, albeit at another school, after the recess period. Claimant therefore had reasonable assurance of employment in the next year at the time the

¹ Claimant testified that, although he signed the May 26, 2016 notification, he may have skimmed it rather than reading it, did not receive a copy of it, and might have assumed it was the same as the May 16th letter. Audio recording at ~ 25:45. Claimant admitted, however, that he did sign the letter and did not dispute the May 26th letter's contents.

recess commenced. Although SKSD did not provide claimant with all the details of his post-recess period assignment until the recess had commenced, OAR 471-030-0075 does not require it to do so provided claimant otherwise had the notice specified in that rule.

There is no dispute that the work offered for the 2016-2017 academic year was in the same or similar capacity as claimant's work in the 2015-2016 academic year. "Same or similar capacity" means the type of services provided, like "professional" services or "nonprofessional" services. OAR 471-030-0075. Claimant worked in a "professional" capacity as an instructional assistant in the first year, and was returned to the same position, albeit at a different school, the second year. We therefore conclude that the work was in the same or similar capacity.

Claimant also disputed whether the economic terms and conditions were "substantially less" in the second academic year than they had been in the first academic year. Wages and hours are considered "substantially less" only if they are "less than 90%" of the wages or hours during the prior academic year. OAR 471-030-0075(2). Claimant testified that he was told his hours might be reduced from three per day to one per day, or might increase, depending on his new assignment. *See* Audio recording at ~ 32:15; Claimant's August 22, 2016 written argument at 7. Claimant argued that because his hours might be reduced after the recess period, the economic terms and conditions after the break were substantially less.

We disagree for three reasons which, considered individually or in the aggregate, compel the conclusion that the economic terms of employment in the 2016-2017 academic year were not substantially less than those under which claimant worked in the 2015-2016 academic year. First, the possibility that claimant's hours might vary was, at all relevant times, merely a possibility, and not an actual condition of employment after the recess period as required under OAR 471-030-0075(2)(a), which provides that a gross weekly wage is substantially less if the "wage offered *is* less," and OAR 471-030-0075(2)(b) provides that hours are substantially less if the hours claimant "*will be* working *is* less," in the present tense.² Second, among the available assignments for which he was eligible or for which he applied, many required claimant to work more than three hours per day, and would therefore increase the economic terms and conditions, suggesting that while the economic terms and conditions were subject to change, they were not necessarily subject to a reduction.³ The record also lacks evidence suggesting that claimant was subject to any reduction in wages.

Third, although it was not made express in the record, we infer from SKSD's May 26th advisory that "[h]ours vary form year to year" on the "employment status notification" form that a variation in hours was a standard condition of employment. In other words, it appears likely that the possibility existed *every* year that claimant's hours might differ from year to year. Because that condition was likely a normal condition of employment with SKSD, the possibility of a fluctuation, even a reduction, in hours did not necessarily represent a change or reduction in the normal economic terms and conditions associated with permanent part-time instructional assistants at SKSD.⁴ For those reasons, individually

² Emphasis added.

³ *See e.g.* Claimant's August 22, 2016 written argument at 7.

⁴ We liken the employment terms in this case, to the extent we can infer them from the evidence available in the record, to those of an employee whose employment from year to year depends upon funding or student enrollment levels. In such

or considered together, we therefore conclude that the economic terms and conditions of work offered in the 2016-2017 academic year were not substantially less than those that existed in the 2015-2016 academic year.

Having concluded that claimant had express written notification that his services in the same or similar capacity, with economic terms and conditions not substantially less than before, it appears more likely than not that claimant had "reasonable assurance." The three prescribed conditions of ORS 657.167 have been shown to have been satisfied with respect to benefits based on claimant's base-year wages. Those benefits are therefore subject to the between terms reduction in ORS 657.167, and benefits are not payable to claimant for the weeks that commenced during the recess period between SKSD's 2015-2016 and 2016-2017 academic years.

DECISION: Hearing Decision 16-UI-68684 is affirmed.

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

DATE of Service: November 4, 2016

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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cases, as here, the quantity of continued employment from year to year is conditional, but because the conditions precedent to employment remain constant from year to year (even if the actual quantity of work is subject to change), the economic terms and conditions of employment from year to year are generally not considered substantially less. Although the claimant in the immediate case had just completed his first year of employment, SKSD noted in its May 26, 2016 letter to claimant that "hours vary from year to year." Based on the notation, and although claimant had not previously or personally experienced a fluctuation in available hours due to the short term of his previous employment, we infer that a possibility of fluctuating hours from year to year was a normal condition associated with claimant's position, and the possibility did not present claimant with a reduction in the economic terms and conditions of his position.