

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0798

Reversed & Remanded

PROCEDURAL HISTORY: On July 10, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not eligible for benefits during the period between two academic years because she had reasonable assurance of performing the same or similar services in the next academic year (decision # 110218). Claimant filed a timely request for hearing. On August 7, 2018, ALJ R. Frank conducted a hearing, and on August 10, 2018 issued Order No. 18-UI-114720, concluding claimant did not have reasonable assurance and therefore was eligible for benefits. On August 15, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the written arguments submitted by the employer and Oregon Employment Department when reaching this decision.

CONCLUSIONS AND REASONS: We disagree with the ALJ that the record supports a finding as to claimant's eligibility for benefits in this case, and this matter should therefore be remanded to the Office of Administrative Hearings (OAH).

ORS 657.167 provides, in part, for between and within term reduction of benefits based on instructional services performed for an educational institution, providing that "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." OAR 471-030-0075 (April 29, 2018) states:

- (1) The following must be present before determining whether an individual has a contract or reasonable assurance:
 - (a) There must be an offer of employment, which can be written, oral, or implied. The offer must be made by an individual with authority to offer employment.
 - (b) The offer of employment during the ensuing academic year or term must be in the same or similar capacity as the service performed during the prior academic year

or term. The term '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 ORS 657.221.

(c) The economic conditions of the offer may not be considerably less in the following academic year, term or remainder of a term than the employment in the first year or term. The term 'considerably less' means the employee will not earn at least 90% of the amount, excluding employer paid benefits, than the employee earned in the first academic year or term, or in a corresponding term if the employee does not regularly work successive terms (i.e. the employee works spring term each year).

(2) An individual has a contract to perform services during the ensuing academic year, term, or remainder of a term when there is an enforceable, non-contingent agreement that provides for compensation for an entire academic year or on an annual basis.

(3) An individual has reasonable assurance to perform services during the ensuing academic year, term, or remainder of a term when:

(a) The agreement contains no contingencies within the employer's control. Contingencies within the employer's control include, but are not limited to, the following:

(A) Course Programming;

(B) Decisions on how to allocate available funding;

(C) Final course offerings;

(D) Program changes;

(E) Facility availability; and

(F) Offers that allow an employer to retract at their discretion.

(b) The totality of circumstances shows it is highly probable there is a job available for the individual in the following academic year or term. Factors to determine the totality of the circumstances include, but are not limited to:

(A) Funding, including appropriations;

(B) Enrollment;

(C) The nature of the course (required or options, taught regularly or sporadically);

- (D) The employee's seniority;
 - (E) Budgeting and assignment practices of the school;
 - (F) The number of offers made in relation to the number of potential teaching assignments; and
 - (G) The period of student registration.
- (c) It is highly probable any contingencies not within the employer's control in the offer of employment will be met.
- (4) An individual who voluntarily leaves work for good cause, as defined under OAR 471-030-0038, does not have reasonable assurance with the employer from whom the person left work.
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The ALJ concluded in Order No. 18-UI-114720 that claimant did not have reasonable assurance of working in the same or similar capacity following the recess period, and was therefore eligible for benefits, because "claimant effectively quit work with South Lane School District #45J3 immediately prior to the recess period; she did so with good cause and in order to accept other work", and "[a] voluntary leaving of work to accept an offer of other work" under the circumstances of this case was "with good cause" and "negates reasonable assurance." Order No. 18-UI-114720 at 4-5. We agree with the ALJ that claimant's voluntary quit from South Lane School District #45J3 would, in fact, "negate[] reasonable assurance" with respect to South Lane School District #45J3.

In its written argument, however, the Oregon Employment Department argued that the ALJ nevertheless erred in concluding claimant should be eligible for benefits during the summer recess period because claimant had employment with more than one educational institution. The Department argued, in part:

[I]n this case claimant worked for two educational institutions in the 2017-2018 academic year; Douglas County School District and South Lane School District. * * * The new employer [Douglas County School District] is an educational institution . . . and the position was in the same capacity as defined in ORS 657.167 with wages that would be at least 90% of what she earned in the 2017-2018 academic year. [] The voluntary quit with good cause from her substitute position does not remove reasonable assurance with any employer other than the one she voluntarily quit. As this claimant has a new offer of employment from an employer other than South Lane School District, she still has reasonable assurance of educational employment in the same or similar capacity in the upcoming academic year. The ALJ erred when they did not consider the new offer of employment in the decision. Both federal and state interpretations of these provisions are clear the reasonable assurance does not have to be with the same employer they worked for in the prior period.

We agree with the Department that claimant's new employment must be considered when determining whether or not she had reasonable assurance. However, the Department asked that EAB dispose of this case by reversing the OAH order and denying the use of educational wages during the break between

academic years. We agree with the Department that Order No. 18-UI-114720 is not supported by the record in this case and should be set aside. However, we disagree with the Department that the record as to claimant's new employment was sufficiently developed to support any disposition in this case absent a full and fair inquiry as to whether or not claimant had reasonable assurance based upon her employment with the new employer (Douglas County School District).

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether or not claimant had reasonable assurance based upon her new employment, Order No. 18-UI-114720 is set aside, and this matter is remanded for development of the record.

DECISION: Order No. 18-UI-114720 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: September 21, 2018

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-114720 or return this matter to EAB. Only a timely application for review of the subsequent Order will cause this matter to return to EAB.

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