

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0848

Modified
Benefits Allowed in Part (Week 25-18)
Benefits Denied in Part (Beginning Week 26-18)

PROCEDURAL HISTORY: On July 9, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding benefits were not payable to claimant during the entire period between Oregon State University's 2017-2018 and 2018-2019 academic years (decision # 70540). Claimant filed a timely request for hearing. On August 7, 2018, ALJ Frank conducted a hearing, and on August 9, 2018 issued Order No. 18-UI-114681, concluding that benefits were payable during the period in question because claimant did not have reasonable assurance of working for an educational employer during the 2018-2019 academic year in the same or a similar capacity as she previously worked. On August 28, 2018, the Department filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the Department's written argument to the extent it was based on the hearing record.

FINDINGS OF FACT: (1) Claimant filed an initial claim for benefits February 16, 2018, effective the first quarter of 2018. An initial claim filed during that quarter has a base year that runs from October 1, 2016 through September 30, 2017.

(2) Claimant's only base year employer was Oregon State University (OSU), an educational institution. The Department determined claimant had a monetarily valid claim for benefits based on her total base year wages and that her weekly benefit amount was \$499.

(3) The recess period between the 2017-2018 and 2018-2019 academic years for OSU began June 17, 2018 and ended September 22, 2018 (weeks 25-18 through 38-18). Claimant claimed benefits for the weeks including June 17 through July 7, 2018 (weeks 25-18 through 27-18), the weeks in issue.

(4) Claimant worked for OSU as a full-time administrative program assistant during the 2017-2018 academic year. Claimant's position was year-round and paid an hourly wage of \$21.10. Claimant earned more than \$499 from OSU during at least one week of the 2017-2018 academic year. However, on February 15, 2018, the employer discharged claimant from her employment. Claimant appealed her discharge through her union under the applicable collective bargaining agreement.

(5) Claimant prevailed in her appeal, and on June 27, 2018, the employer offered, and claimant accepted, a position as a full-time office assistant to begin on July 9, 2018. Claimant's new position was year-round and paid an hourly wage of \$20.15.

(6) On July 9, 2018, claimant began work for the employer in her new position of office assistant.

CONCLUSIONS AND REASONS: We agree with the ALJ in part. Benefits are payable to claimant for week claimed week 25-18 but are not payable to claimant for claimed weeks 26-18 and 27-18 and any weeks claimed thereafter through September 22, 2018, the end of the recess period.

The Department determined claimant had a valid claim for benefits, i.e., was *monetarily* eligible, based on the total amount of her base year wages and that her weekly benefit amount was \$499. 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 benefits under certain prescribed conditions. Claimant seeks benefits based on services performed for OSU as a full-time, year-round administrative program assistant during the 2018-2019 academic year. OSU 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 Ineligibility for benefits of certain educational institution personnel.

(1) Benefits based on services performed in other than 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. 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.

The Employment Department adopted a rule, effective April 29, 2018, exempting certain individuals from the reduction in benefits required by ORS 657.221. That rule, OAR 471-030-0074, provides in relevant part:

* * *

(2) ORS...657.221 appl[ies] only when the individual claiming benefits was not unemployed as defined by ORS 657.100 during the relevant period in the preceding academic year or term. The relevant period is:

* * * (b) The prior academic year or term when the week(s) claimed commenced during a customary recess period between academic terms or years, unless there is a specific agreement providing for services between regular, but not successive terms.

* * *

(3) The provisions of ... ORS 657.221 apply regardless 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). OSU established its summer recess period between the 2017-2018 and 2018-2019 academic years to begin June 17, 2018 and end September 22, 2018. Therefore, the period June 17 through September 22, 2018 is OSU’s “customary recess period between academic terms or years” for purposes of applying 657.221 and OAR 471-030-0074(2).

Because claimant seeks benefits for the period of June 17 through July 7, 2018, during the customary recess period between academic years at OSU, the relevant period under OAR 471-030-0074 is the 2017-2018 academic year. ORS 657.100 provides that an individual is unemployed in any week in which the individual earns less than her weekly benefit amount. Because claimant earned more than her weekly benefit amount of \$499 during at least one week of the 2017-2018 academic year, she 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. Claimant claimed

benefits for the weeks including June 17 through July 7, 2018 (weeks 25-18 through 27-18), each of which commenced during OSU's designated summer recess period. Therefore, the first condition is satisfied with respect her 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 as a full-time year-round administrative program assistant for OSU during the 2017-2018 academic year. Therefore, the second condition is satisfied.

The third condition that must be satisfied is that claimant must have had "reasonable assurance" of continuing work in the 2018-2019 academic year; in order to establish "reasonable assurance", (1) there must have been an offer of employment, written, oral, or implied and the offer must have been made by an individual with authority to offer employment, (2) the work offered must have been 1) "in the same or similar capacity", and 3) the economic conditions of the offer must not have been "considerably less" than the economic terms and conditions of the work performed during the previous academic year. *See* OAR 471-030-0075 (April 29, 2018). "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. *Id.* Economic terms and conditions are "considerably less" when 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. *Id.*

In Order No. 18-UI-114681, after finding that on February 15, 2018, the employer discharged claimant from her employment as an administrative assistant but that on June 27, 2018, it offered her a different job as an office assistant which she accepted and began on July 9, 2018, the ALJ concluded that claimant did not have "reasonable assurance" of continuing work with the employer during the 2018-2019 academic year and was eligible for benefits during the entire summer recess period because even after she was offered the new position in June, it was not in the same or a similar capacity as her previous job as it "involved a different job title, pay grade and duties." Order No. 18-UI-114681 at 1, 2, 4. We disagree, in part.

We agree that from the date of her discharge in February until June 27, 2018, claimant did not have reasonable assurance of continuing work because up until that date she had no offer of employment, written, oral, or implied that would extend into the 2018-2019 academic year, and in fact had expressly been told that no additional work would be forthcoming. For that reason, benefits were payable to claimant up until the week of the employer's June 27 offer. However, after that date, claimant had a firm offer of employment that ostensibly was made by an individual with authority to offer employment because it was made under provisions of a collective bargaining agreement. The ALJ's conclusion that even with that firm offer of employment, claimant lacked "reasonable assurance" of continuing employment because the new position was not "similar" as it "involved a different job title, pay grade and duties" is not supported by the record and the applicable rules.

It is necessary to distinguish the meaning and application of OAR 471-030-0075 (2) and (3) in determining whether claimant had "reasonable assurance" of continuing work even after the employer's June 27, 2018 offer of reemployment. 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. OAR 471-030-0075 (1)(b). Here, both the prior position and the position

offered on June 27 were positions in a non-professional capacity – the former as an administrative program assistant and the latter as an office assistant. Accordingly, both positions were in the same or a similar capacity and the requirements of OAR 471-030-0075 (1)(b) were satisfied.

Although, as the ALJ found, the two positions “involved a different job title, pay grade and duties”, the issue to be examined in determining reasonable assurance was whether the economic conditions of the subsequent offer of employment were “considerably less” than the economic conditions of the prior employment. Under the applicable rule, the term “considerably less” means that in the subsequent position, the employee will not earn at least 90% of the amount, excluding employer paid benefits, than the employee earned in the prior position. OAR 471-030-0075 (1)(c). Here, both the prior and subsequent positions were full-time and year round. And, although the subsequent position paid \$20.15 per hour whereas the prior position paid \$21.10 per hour, the wage of the subsequent position was more than 95% of the wage of the prior position. ($\$20.15/\$21.10 = .955$). Accordingly, the economic conditions of the subsequent position were not “considerably less” than the economic conditions of the prior position and the requirements of OAR 471-030-0075 (1)(c) were satisfied.

In sum, the prescribed conditions of 657.221 have been shown to have been satisfied with respect to benefits based on claimant’s base-year wages for the weeks including June 27, 2018 and thereafter. Accordingly, benefits claimed during those weeks are subject to the reduction contemplated by that statutory section and are not payable for the weeks beginning June 24 through July 7, 2018 (week 26-18). However, benefits are payable for the claimed week including June 17 through June 23, 2018 (week 25-18).

DECISION: Order No. 18-UI-114681 is modified, as outlined above.

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

DATE of Service: October 1, 2018

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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