

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0898

Modified
Benefits Payable Week 27-18
Benefits Not Payable Weeks 28-18 to 37-18

PROCEDURAL HISTORY: On July 26, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding benefits were not payable to claimant during the recess period between the 2017-2018 and 2018-2019 academic years (decision # 122340). Claimant filed a timely request for hearing. On August 27, 2018, ALJ Snyder conducted a hearing, and on September 4, 2018, issued Order No. 18-UI-116012, concluding claimant was eligible for benefits for the week including July 1 through July 7, 2018, but was ineligible for benefits only for the week including July 8 through July 14, 2018. On September 17, 2018, the Department filed an application for review of Order No. 18-UI-116012 with the Employment Appeals Board (EAB).

EAB considered the Department's written argument when reaching this decision. In that argument, the Department asserted that the ALJ “erred in [the ALJ’s order] by not including the full summer recess period . . .” because “[s]chool recess decisions are not a weekly eligibility determination but rather a determination on the claimant’s use of base year wages from an educational institution . . . for each recess period. . . . If an individual is found to be ineligible for one week of the summer recess they would remain ineligible for the rest of the recess period.”

While we agree with the Department’s assertion, we point out that the ALJ questioned the Department’s witness at hearing as follows:

ALJ: “And just to confirm, the decision denied benefits from July 1st through July 14th, but the decision should have only denied benefits from July 8th through July 14th, is that correct . . . ?

[Department Witness]: Yes, that is correct.”

Transcript at 7. The Department's witness could have made the Department's argument on review at that point in this proceeding.

FINDINGS OF FACT: (1) Claimant filed an initial claim for benefits on July 2, 2018, effective the third quarter of 2018. The base year for a claim filed during that quarter includes April 1, 2017 to March 31, 2018.

(2) Claimant's only base year employer was Oregon State University (OSU). The Department determined that claimant had a valid claim for unemployment insurance benefits based on her base year wages from OSU, which is an educational institution for purposes of unemployment insurance. The Department determined that claimant's weekly benefit amount was \$507.

(3) The recess period between the 2017-2018 and 2018-2019 academic years for OSU began on June 16, 2018 and ended September 15, 2018 (weeks 25-18 through 37-18). Claimant claimed benefits for the weeks including July 1 through July 14, 2018 (weeks 27-18 through 28-18).

(4) Claimant earned more than \$507 from OSU during at least one week of the 2017-2018 academic year.

(5) Claimant worked for OSU as a full-time, year round faculty research assistant during the 2017-2018 academic year. On May 18, 2018, the employer sent claimant a letter indicating that her position would end on June 30, 2018 and that she would not receive a subsequent appointment. However, on July 10, 2018, the employer offered, and claimant accepted, an offer of full time employment as a full-time year round faculty research assistant beginning on July 16, 2018 and continuing through the 2018-2019 academic year.

CONCLUSIONS AND REASONS: We agree with the ALJ in part. Benefits are payable to claimant for the week ending July 7, 2018 (week 27-18) and are not payable for the week ending July 14, 2018 (week 28-18). However, benefits also are not payable to claimant for any weeks claimed during the weeks including July 15 through September 15, 2018 (weeks 29-18 through 37-18) which encompass the entirety of the remaining recess period at issue.

In decision # 122340, the Department concluded that claimant, as an employee of an educational institution and despite claiming benefits for only two weeks of its summer recess period, was ineligible for benefits during the entirety of the summer recess period at issue because she had reasonable assurance of continuing employment during the subsequent academic year. In Order No. 18-UI-116012, the ALJ modified the Department's decision and concluded that claimant was ineligible for benefits for only the second of the two weeks claimed. Order No. 18-UI-116012 at 3-4. While we agree with the ALJ that benefits are payable to claimant for the first of the two weeks claimed, we agree with the Department that benefits are not payable to claimant for any weeks subsequently claimed during the remainder of summer recess period at issue.

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 from OSU, and that her weekly benefit amount was \$507. However, when claims for benefits are based solely 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 faculty research assistant. OSU is an educational institution as defined in ORS 657.010(6). 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.

(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 . . . if such individual performs such services in the first of such academic years or terms and 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 . . .

The Employment Department adopted a rule exempting certain individuals from the reduction in benefits required by ORS 657.167. That rule provides, in relevant part:

School Employees.

...

(2) ORS 657.167... appl[ies] 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...

(3) The provisions of ORS 657.167... apply regardless of whether or not the individual performed services only during an academic year or in a year-round position.

OAR 471-030-0074 (April 29, 2018).

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 16, 2018 and end September 15, 2018. Therefore, that period is OSU’s “customary recess period between academic years” for purposes of applying ORS 657.167 and OAR 471-030-0074.

Because claimant sought benefits for the period of July 1 through July 14, 2018, during the customary recess period between academic years at OSU, the relevant period under OAR 471-030-0074 for determining whether claimant was “not unemployed” during the preceding academic year 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 (or his) weekly benefit amount. Claimant earned \$41,964 from her full-time year round position of faculty research assistant which ended on June 30, 2018. Transcript at 8. We infer from that fact that claimant earned approximately \$807 per week, including any weeks that fell within the academic year ($\$41,964/52 \text{ weeks} = \807 per week). Because claimant earned more than her weekly benefit amount of \$507 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 657.167.

For non-exempt individuals, ORS 657.167 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 July 1 through July 14, 2018 (weeks 27-18 through 28-18), 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 faculty research assistant for OSU, during the 2017-2018 academic year. Therefore, the second condition is satisfied.

The third condition is that claimant must have had "a contract or reasonable assurance" of continuing work in the 2018-2019 academic year. The Department has defined "contract" or "reasonable assurance", in relevant part, as follows:

- (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)....

OAR 471-030-0075 (April 29, 2018).

Claimant worked as a full-time year-round faculty research assistant for OSU during the 2017-2018 academic year. However, it was undisputed that on May 18, 2018, the employer notified claimant that her position would end on June 30, 2018. Exhibit 1 at 4. It was also undisputed that on July 10, 2018, the employer offered, and claimant accepted, a written offer of full time employment as a full-time year round faculty research assistant beginning on July 16, 2018 and continuing through the 2018-2019 academic year from an individual with authority to offer employment, and that the economic conditions of the new offer were greater than those of the prior year. Exhibit 1 at 6; Transcript at 8. Accordingly, during OSU's summer recess period beginning with the week July 8 through July 14, 2018 (week 28-18) and ending with the week September 9 through 15, 2018 (week 37-18), claimant had a contract for or reasonable assurance of continuing employment through the end of the 2018-2019 academic year. For those weeks, the third condition was satisfied.

The prescribed conditions of ORS 657.167 have been shown to have been satisfied with respect to benefits based on claimant's base-year wages. Accordingly, with the exception of week 27-18, those benefits are subject to the reduction contemplated by that statutory section and are not payable for any claimed weeks that commenced between July 8 and September 15, 2018 during the recess period between OSU's 2017-2018 and 2018-2019 academic years.

DECISION: Order No. 18-UI-116012 is modified, as outlined above.

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

DATE of Service: October 23, 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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