

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

**OREGON EMPLOYMENT DEPARTMENT
875 UNION ST NE
SALEM, OR 97311**

**EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0956**

Reversed & Remanded

PROCEDURAL HISTORY: On July 27, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding benefits were not payable to claimant during a school recess period of June 10, 2018 to September 22, 2018 (decision # 94643). Claimant filed a timely request for hearing. On August 29, 2018, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for September 11, 2018. On September 7, 2018, claimant requested that the hearing be postponed and OAH denied the request. On September 11, 2018, ALJ Amesbury convened a hearing, at which time claimant renewed his request that the hearing be postponed, and the ALJ denied the request and conducted the hearing. On September 13, 2018, the ALJ issued Order No. 18-UI-116515, modifying the Department's decision and concluding that benefits were not payable to claimant for the period of June 17, 2018 to June 23, 2018. On October 3, 2018, the Department and claimant each filed an application for review with the Employment Appeals Board (EAB). On November 2, 2018, claimant filed a request to withdraw his application for review. Claimant's request to withdraw is allowed pursuant to OAR 471-041-0098. This matter is therefore being reviewed on the basis of the Department's valid and timely application for review.

EAB considered the Department's written argument to the extent it was based upon evidence in the hearing record.

CONCLUSIONS AND REASONS: This matter should be reversed as unsupported by a complete record, and remanded for additional proceedings consistent with this order.

According to ORS 657.167(1), "[b]enefits based upon service in an instructional, research or principal administrative capacity for an educational institution or institution of higher education" are not payable "for any week of unemployment commencing during the period between two successive academic years or, when an agreement provides instead for a similar period between two regular terms . . . 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 ALJ concluded that claimant was “not eligible to receive the benefits claimed during the recess period.” *See* Order No. 18-UI-116515 at 2. The ALJ found as fact that the recess period at issue was the “summer recess” and that the recess period “began on June 18, 2018 and is scheduled to end on September 22, 2018.” *Id.* The ALJ nevertheless concluded, however, that claimant’s ineligibility period extended only to the weeks claimed, June 17, 2018 through June 23, 2018. *Id.* at 5. We disagree.

The reduction in benefits contemplated under ORS 657.167 applies both to periods between terms and periods between academic years. OAR 471-030-0074(1) defines the “academic year” as “the time frame within 12 months and separated by break periods in which an educational institution . . . ordinarily operates to provide courses of study.” In order for ORS 657.167 to apply, an individual must not have been “unemployed” during the preceding academic year or term, defined as:

- (a) The week prior to the holiday or vacation period when the week(s) claimed commenced during a holiday or vacation period.
- (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.
- (c) The last academic year or term when the week(s) claimed commenced during a recess between non-consecutive academic terms or years when there is a specific agreement providing for services between regular, but not successive terms.

See OAR 471-030-0074(2). Under ORS 657.167, it is therefore necessary to determine the nature of the break period at issue. While the ALJ concluded the break at issue in this case was the “summer recess,” the record fails to support that conclusion. The ALJ inquired as follows:

- Q And can you tell me, um, what is the recess period for, uh, Lane Community College in, uh, or the applicable recess period for Lane Community College for Claimant’s base year?
- A And I just want to clarify. Are you talking about the period between academic years or when the start of the summer recess began?
- Q Well, let’s – why won’t you put them – give me both of them if they’re different.

Transcript at 5. The ALJ did not further inquire with the Department as to the applicable break period, such as whether the weeks claimed commenced during a holiday or vacation period, a customary recess period between terms, a customary recess period between academic years, or whether there was a specific agreement providing for services between regular but not successive terms. As such, the record fails to show what type of recess period was at issue in this case, and fails to establish the operative period for determining whether or not claimant was “unemployed” during the relevant preceding academic year or term. On remand, the ALJ must conduct such an inquiry.¹

¹ We note in reaching this decision that the Department’s witness provided misleading information suggesting the ALJ should narrow the scope of the weeks at issue, testifying that “for the actual recess period that he would be considered denied we would only consider week 25 . . .” and the other weeks “were on a different claim . . . [s]o that would be completely separate

On this record, the ALJ also erred when he concluded that claimant was not eligible for benefits for the week of June 17, 2018 through June 23, 2018. Order No. 18-UI-116515 at 5. The ALJ's conclusion is inconsistent with the finding of fact that the recess period at issue "began on June 18, 2018." *Id.* at 2. Under ORS 657.167(1), the reduction in benefits during school recess period applies only to weeks "commencing" during the relevant recess period. "Commence" means to "begin" or "start." The week of June 17, 2018 did not begin or "commence" during a recess period that began on a subsequent date. Claimant therefore cannot be ineligible for benefits under ORS 657.167 for that week. On remand, the ALJ must inquire into the nature and duration of the recess period at issue in this case for the purpose of determining which of the weeks claimed or at issue "commenced" during the recess period at issue.

Next, the ALJ concluded that claimant was subject to the reduction in benefits because he "had a contract or reasonable assurance that he would be employed after the end of the recess in the same or a similar capacity as the preceding academic year." Order No. 18-UI-116515 at 5. The ALJ wrote that claimant "planned to return to work . . . as he had in previous years," and although "in some years he experienced different work situations at the beginning of the new academic year, those difference occurred in less than one-third of the 15 years he has worked" and that because "claimant has received no information that he would not be permitted to return to work or that any reductions are planned for the coming academic year . . . [t]he evidence is persuasive that claimant has reasonable assurance." *Id.* We disagree.

OAR 471-030-0075(1) provides, among other things, that before determining whether an individual has a contract or reasonable assurance, there "must be an offer of employment" that was "made by an individual with authority to offer employment." The record in this case did not specify or suggest what offer was made to claimant, when it was made, whether it constituted "an offer of employment," and whether or not that offer was extended to claimant by someone with the authority to do so, and the ALJ must inquire into those matters before determining that reasonable assurance existed.

The ALJ did not adequately inquire into the existence of contingencies within and outside the employer's control that affect the existence of reasonable assurance. OAR 471-030-0075(3) provides that an individual has "reasonable assurance" 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

from this hearing." Transcript at 7. It is clear that the ALJ was misled by that testimony, stating later in the hearing that "this hearing's only about Week 25" and limiting claimant's opportunity to testify about the full range of the recess period at issue. Transcript at 16. The Department should be prepared at the remand hearing, and any school recess hearing for that matter, to offer testimony not only about the weeks claimed, but also to define the scope of the entire school recess period, the nature of the recess period, and the basis for any underlying decision by the Department whether to deny benefits for only the weeks claimed, or for the entire recess period regardless how many weeks the individual had actually claimed at the time of the contested case hearing.

- (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.

In this case, claimant testified that although he was employed for 15 years, he was a "temp" and there was "definitely uncertainty every single quarter." Transcript at 14. Although the employer did not fire claimant or announce changes to his potential employment conditions prior to the recess at issue, he testified that there was "never a guarantee," and his assignments "can be cancelled at any time, uh, due to different contingencies." Transcript at 17. Claimant testified that he got "[a]t least two documents . . . before every term" that "say that there's no reasonable assurance," that the "document that they propose my assignment on says that it can be cancelled," and that "every single – every document they give us proposing assignments states it can be cancelled." *Id.* at 17, 18, 19. Claimant testified that "it can be cancelled and it has on me been cancelled the eighth day into the term . . . [due to] enrollment or some other problems going on." *Id.* at 17. In recent times, claimant "was bumped out of the class twice, and I was bumped to a lower paying class once, and then I was cancelled at least once," and at one point the employer reduced the number of classes available from nine to seven per term. *Id.* at 17, 18.

Claimant's testimony suggested the presence of a number of contingencies that could affect the probability of claimant being returned to employment after the break period at issue. In addition to the enrollment contingency claimant mentioned, he mentioned a reduction in the number of courses the employer offered and that "every single . . . document" he received permitted the employer the discretion to withdraw his assignments. Those contingencies fall within the category of OAR 471-030-0075(3)(a), contingencies within the employer's control that suggest a lack of reasonable assurance. The ALJ must therefore inquire with the parties about the nature of those contingencies and how they affected whether claimant had reasonable assurance.

OAR 471-030-0075(3)(b) provides that the "totality of circumstances" must show "it is highly probable" that there is a job available for claimant following the recess period. "Totality of circumstances" factors include funding, appropriations, enrollment, whether the course is required or optional, whether the course is taught regularly or sporadically, claimant's seniority, the employer's budgeting and assignment practices, how many offers were made in relation to the number of potential assignments, and the period of student registration. OAR 471-030-0075(3)(b).

The ALJ erroneously focused upon claimant's entire period of employment when examining the totality of circumstances; although that might be the relevant period to examine in cases where the individual's employment terms and conditions have remained constant throughout that entire time, that is not the case here. Here, claimant described that "in recent times" the employer reduced the number of classes offered to him, "bumped" him to a lower paying class, "bumped" him "out" of classes two times, and cancelled his assignment at least once. Claimant also suggested during his testimony that enrollment was down. It is therefore apparent on this record that the terms and conditions under which claimant worked for the employer changed at some point during claimant's 15 years of employment and became less advantageous to him. To determine whether or not it is "highly probable" that there is a job available for him, the ALJ must therefore examine the parties for information about when "in recent times" claimant's assignments were reduced, he was "bumped," or his classes cancelled, rather than focusing on the entire 15 year period.²

During the hearing, the Department's witness testified that the only contingency at issue in this case was "class enrollment." Transcript at 9. For the reasons previously explained, the record shows that was not the case. The Department's witness also testified that class enrollment, because "that's not in the Employer's, um, control," is "not something that we look at." *Id.* The Department's witness was incorrect. OAR 471-030-0075(3)(b) specifically lists enrollment as a "factor" used "to determine the totality of the circumstances." OAR 471-030-0075(3)(c) specifically provides that the reasonable assurance determination depends on it being "highly probable any contingencies not within the employer's control in the offer of employment will be met." Therefore, the fact that a contingency is not within the employer's control does not determine its effect on the reasonable assurance question. The ALJ must develop a record about those contingencies sufficient to support a determination of whether or not it is "highly probable" contingencies not within the employer's control will be met. To determine whether it is "highly probable any contingencies not within the employer's control in the offer of employment will be met," such as enrollment levels being sufficient to support claimant's continued employment," on remand the ALJ must examine the parties about the existence of such factors.

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 benefits were payable to claimant during a school recess period, Order No. 18-UI-116515 is reversed, and this matter is remanded for development of the record.

DECISION: Order No. 18-UI-116515 is set aside, and this matter remanded for further proceedings consistent with this order.

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

² For example, if claimant was bumped or his assignment cancelled occasionally throughout the 15 year period, then the totality of circumstances would suggest reasonable assurance. If claimant was bumped or his assignment cancelled four times within the last year of work, the totality of circumstances might not suggest reasonable assurance of continued employment after the break period at issue.

DATE of Service: November 8, 2018

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-116515 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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