

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0964

Modified
Ineligible Weeks 25-18 through 34-18

PROCEDURAL HISTORY: On July 10, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not eligible to receive benefits during the period between two academic years, which were weeks 24-18 through 34-18 (decision #63518). Claimant filed a timely request for hearing. On August 20, 2018, ALJ Murdock convened a hearing at which claimant did not appear, and on August 21, 2018 issued Order No. 18-UI-115280, dismissing claimant's request for hearing due to her failure to appear. On August 27, 2018, claimant filed a request to reopen the hearing. On September 17, 2017, ALJ S. Lee conducted a hearing, and on September 25, 2018 issued Order No. 18-UI-117148, granting claimant's request to reopen the hearing and affirming decision #63518. On October 4, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument, but failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and claimant failed to show that factors or circumstances beyond her reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB considered only information received into evidence at the hearing when reaching this decision.

Based on a de novo review of the entire record in this case, and pursuant to ORS 657.275(2), the ALJ's findings, analysis and conclusions with respect to reopening the hearing are **adopted**.

FINDINGS OF FACT: (1) Multnomah Co. School District #1, an educational institution, employed claimant as a substitute para-educator during school years 2016-2017 and 2017-2018. The position of substitute para-educator was an instructional position. In school year 2017-2018, claimant earned at least \$178 from the employer during one week.

(2) The employer expected claimant to communicate with it about work-related matters through an email account and address that it provided to her on its system. Claimant did not use the email account that the employer provided for that or any purpose because her home internet reception was “spotty.” Transcript at 34. Claimant preferred to communicate with the employer through her personal email account or by telephone.

(3) June 11, 2018, during week 24-18, was the last day that students attended school before the summer recess period. The last day of the summer recess was August 24, 2018, during week 34-18.

(4) On June 11, 2018, claimant filed a claim for unemployment insurance benefits. Claimant’s claim was determined valid with a weekly benefit amount of \$178. The base year for claimant’s claim was January 1, 2017 through December 31, 2017. In the base year, claimant worked for three non-educational employers as well as the employer. Claimant worked a total of 368 hours for those non-educational employers and earned a total of \$8,053.81. The third quarter of 2017 was the quarter in which claimant’s earnings were greatest, and they were \$6,617.21. Claimant claimed benefits for the weeks of June 10, 2018 through August 25, 2018 (weeks 24-18 through 34-18).

(5) Sometime after June 11, 2018, the employer notified claimant by an email sent to the email account that it maintained for her on its system of what she needed to do to renew her position as substitute para-educator for school year 2018-2019. Because claimant did not use the email account that the employer provided to her, she did not access this email. Around approximately this same time, claimant was also informed that she was expected to be back to work as a substitute para-educator by August 27, 2018.

(6) On approximately July 1, 2018, the employer sent an email to its substitute employees, including claimant, reminding them that they were required to use the email account that the employer provided to them when communicating about work-related matters. This email also notified substitute employees that the mandatory trainings they needed to take to renew their positions and their employer-provided identification badges for school year 2018-2019 were being offered on August 14 through 16, 2018. Because claimant did not use the email account that the employer provided for her she did not access this email and did not attend the mandatory training. As a result, claimant’s identification badge, which expired on August 21, 2018, was not renewed and claimant was denied access to the employer’s call-in system for available work assignments.

CONCLUSIONS AND REASONS: Claimant was not eligible to receive benefits during the summer recess period between academic years 2017-2018 and 2018-2019, which was weeks 25-18 through 34-18.

ORS 657.1502)(a) and (b) provide that to qualify for benefits an individual must have, among other things, worked in subject employment in the base year with total base year wages of \$1,000 and have total base year wages equal to or in excess of one and one-half times their wages in their highest wage-earning quarter of the base year or have worked a total of 500 hours in subject employment. In the base year for claimant’s unemployment insurance claim, claimant worked for three non-educational employers as well as for the employer, an educational institution, in an instructional capacity. Because claimant worked less than 500 hours for the non-educational employers in the base year and her total base years wage from those employers were not equal to or in excess of one and one-half times the

wages in the third quarter of 2017, which was her highest earning quarter, whether she qualifies for benefits is based on her base year employment with the employer, an educational institution. Special requirements apply when an individual claims benefits based on employment with an educational institution.

ORS 657.167(1) provides that benefits based on service in an instructional capacity for an educational institution 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 ORS chapter 657, except that benefits shall not be paid 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 there is a contract or reasonable assurance that such individual will perform services in any such capacity for any institution in the second of such academic years or terms (emphasis added). An “academic year” is the time frame within 12 months and separated by break periods in which an educational institution ordinarily operates to provide courses of study. OAR 471-030-0074(1) (April 29, 2018). ORS 657.167 is applicable when the individual was not unemployed, as defined by ORS 657.100, during the prior academic year when the weeks claimed commence during a customary recess period between academic years or terms, unless there is a specific agreement providing for services between regular, but not successive terms. OAR 471-030-0074(2) and (2)(b). ORS 657.167 is applicable regardless of whether or not the individual performed services only during the academic year or in a year-round position. OAR 471-030-0074(3).

OAR 471-030-0075 (April 29, 2018) defines “reasonable assurance.” Reasonable assurance requires that there be a written, oral or implied offer of employment for the ensuing academic year or term made by an authorized individual, the offered employment must be in the same or similar capacity as the service performed during the prior academic year and the economic conditions of the offer may not be considerably less than in the first year. OAR 471-030-0075(1)(a)-(c) (April 29, 2018). An individual has reasonable assurance to perform services during the ensuing academic year when the agreement contains no contingencies within the employer’s control, the totality of circumstances shows that it is highly probable that there is job available for the individual in the following academic year and it is highly probable any contingencies not within the employer’s control in the offer of employment will be met. OAR 471-030-0075(3).

Claimant claimed benefits for weeks 24-18 through 34-18, most of which were contemporaneous with the employer’s summer recess period between academic years 2017-2018 and 2018-2019. Claimant worked for the employer in an instructional capacity in academic year 2017-2018 and claimant earned at least her weekly benefit amount during at least one week in that academic year, which is sufficient to establish that she was not unemployed in that school year as defined by ORS 657.100.¹ Accordingly, ORS 657.167 is applicable to claimant’s claims for benefits during the summer recess period if she had a “reasonable assurance” of employment with the employer in academic year 2018-2019.

The employer’s witness testified that the employer sent claimant an email around July 1, 2018 informing her of what she needed to do and how to renew her employment as a substitute para-educator for academic year 2018-2019. Transcript at 37. Claimant also testified that she had been told, presumably

¹ ORS 657.100 provides that an individual is deemed “unemployed” in any week during which the individual performs no work for pay or in any week of less than full-time employment if the remuneration paid or payable is less than the individual’s weekly benefit amount.

by an employer representative sometime during summer of 2018, that she would be back at work for academic year 2018-2019 by August 27, 2018. Transcript at 44. Claimant testified that her employer-issued identification badge had expired on August 21, 2018 and at some point she was locked out of the employer's call-in system for job assignments. However, she did not dispute that the employer had notified her by communications sent to her email address and account on the employer's system about mandatory training she needed to take in August 2018 in order to maintain active status as a substitute para-educator and renew her identification badge. Transcript at 37-38. That claimant did not check her email account for communications from the employer was a matter within her control, rather than the employer's, and it was not an employer-imposed contingency. Claimant's failure to access that email account to obtain information about the employer's offer to her of employment in academic year 2018-2019 does not rescind the assurance that the employer gave to her of substitute para-educator employment in academic year 2018-2019, particularly when the employer required all work-related electronic communications to be sent and received through the system it maintained. Transcript at 36. Because the preponderance of the evidence shows that claimant had "reasonable assurance" of employment in the same instructional capacity in academic year 2018-2019, ORS 657.167 is applicable to claimant's claim and accordingly, benefits are not payable to claimant for any weeks commencing during the summer recess between academic years 2017-2018 and 2018-2019.

In Order No. 18-UI-117148, the ALJ found that the employer's summer recess period was from June 8 through August 24, 201 and affirmed decision # 63518, which concluded that claimant was not eligible to receive benefits for weeks 24-18 through 34-18. Order No. 18-UI-117148 at 2. However, the Department's representative testified that the last day that students attended the employer's schools was June 11, 2018, which would mean that the earliest that summer recess period could start, would be June 12, 2018. Transcript at 11. Claimant's testimony as to the final day of school for students was uncertain, variously stating that it was June 8, June 8 or 9 or June 12. Transcript at 19, 20, 44. Given the certainty of the Department's witness and claimant's equivocation, it is most likely that the summer recess began sometime after June 11, 2018, which at the earliest would be Tuesday, June 12, 2018. However benefit week 24-18 began on Sunday, June 10, 2018. Since ORS 657.167(1) limits the benefits payable to educational employees to claim weeks *commencing* during a summer recess period and benefit week 24-18 commenced before the summer recess began, ORS 657.176(1) does not make claimant ineligible to receive benefits for week 24-18. Rather, the summer recess period during which benefits are not payable to claimant was from week 25-18 through 34-18.

Claimant is not eligible to receive benefits during the summer recess period encompassing the benefit weeks running from June 17, 2018 through August 25, 2018 (weeks 25-18 through 34-18).

DECISION: Order No. 18-UI-117148 is modified, as outlined above.

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

DATE of Service: November 9, 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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