

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0985

Reversed
Not Ineligible

PROCEDURAL HISTORY: On August 9, 2018, the Oregon Employment Department (the Department) served two notices of two administrative decisions, decision # 145327 and decision # 150500, both of which concluded claimant had reasonable assurance of continuing work following a period between academic years, and denied claimant benefits for the period of June 10, 2018 through September 22, 2018, the period between Lane Community College's 2017-2018 and 2018-2019 academic years. Claimant filed timely requests for hearing on both decisions. On September 12, 2018, ALJ S. Lee conducted a consolidated hearing, and on September 20, 2018 issued Order No. 18-UI-116919, modifying decision # 150500 to allow benefits for the weeks of August 26, 2018 through September 1, 2018, and Order No. 18-UI-116920, affirming decision # 145327. On October 10, 2018, claimant filed applications for review of both decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Order Nos. 18-UI-116919 and 18-UI-116920. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2018-EAB-0984 and 2018-EAB-0985).

FINDINGS OF FACT: (1) On July 14, 2017, claimant filed an initial claim for unemployment insurance benefits. Her base year for that claim was April 1, 2016 to March 31, 2017. After that benefit year expired, claimant filed on July 23, 2018 another initial claim for unemployment insurance benefits. Her base year for that claim was April 1, 2017 through March 31, 2018.

(2) All of claimant's base year earnings for both claims were based upon wages from an institution of higher education. She earned at least her weekly benefit amount under both claims based upon earnings from an institution of higher education during one week of academic year 2017-2018.

(3) During the 2017-2018 academic year, claimant worked as an adjunct instructor and advisor for Lane Community College. Claimant had worked for the same institution in that capacity since 2010.

(4) The period between academic years at Lane Community College was June 15, 2018 through September 21, 2018 (weeks 24-18 through 38-18). Claimant claimed benefits for the weeks of July 25, 2018 through September 1, 2018 (weeks 30-18 through 35-18).

(5) Over an eight-year period, claimant regularly worked for Lane Community College teaching classes during the employer's Spring and Fall terms, and most Winter terms. Prior to the recess period between the 2017-2018 and 2018-2019 academic years, the employer let claimant know during the Spring term how many classes it looked like the department would offer in the next Fall term. The employer did not customarily make any commitments to claimant as far as how many classes she would be assigned to teach. Notwithstanding, claimant consistently received teaching assignments for previous Fall terms.¹

(6) During the Spring 2018 term, the employer's enrollment was down and the employer was offering fewer classes in claimant's Department. Claimant's department offered fewer classes of the sort claimant taught. The employer hired a new full time professor to teach the same sort of classes claimant taught, and claimant was told that her department was moving away from assigning adjunct instructors to teach classes. No one told claimant that she would or would not have any class assignments in the Fall term, but the classes the employer offered that claimant ordinarily would teach were assigned to the employer's new full time professor. As far as claimant was informed, it was very unlikely she would teach in the Fall, and, as far as she knew, her adjunct teaching job had ended after the Spring 2018 term.

(7) On August 24, 2018, the dean of claimant's department sent an email to claimant stating, "As I'm sure you're aware, enrollment challenges have significantly impacted the number of sections the Department can offer. Consequently, if you were anticipating teaching for us this fall, I'm afraid we do not have any sections that we can offer you." Exhibit 1.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant is eligible for benefits during the period between academic years, June 10, 2018 through September 22, 2018.

The Department determined claimant had valid claims for benefits based on her base year wages from Lane Community College. However, when claims for benefits are based on base-year wages from educational institutions or institutions of higher education, ORS 657.167 limits when those benefits may be paid.

ORS 657.167(1) provides for a denial of benefits based on service in an instructional capacity for an educational institution or institution of higher education during an academic recess period if the individual performed such services in the first academic year "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 benefit denial is in effect for any week commencing during the recess period, providing the individual "performs such services in the period immediately before such vacation period or holiday recess, and there is reasonable assurance that such individual will

¹ Claimant testified that she did not teach classes during the 2017-2018 academic year's Winter term, but the ALJ did not ask the parties to explain the reason claimant did not teach that term. Ordinarily the ALJ's failure to inquire would require remand to determine whether claimant's lack of teaching assignments during one term of the 2017-2018 academic year was significant for purposes of determining whether claimant had reasonable assurance of continuing work after the relevant period between academic years. Because we have found in claimant's favor on other grounds, however, we need not remand for that inquiry.

perform such services . . . in the period immediately following such vacation period or holiday recess.” ORS 657.167(2).

ORS 657.167 only applies, however, when the individual was not unemployed, as that term is defined by ORS 657.100, during the relevant period in the preceding academic year or term. *See* OAR 471-030-0074(2). ORS 657.100 provides that an individual is “unemployed” if there are no earnings, or the earnings are less than the individual’s weekly benefit amount. When the weeks claimed commenced during a customary period between academic years, the relevant period is the prior academic year. OAR 471-030-0074(2)(b). The provisions apply regardless whether the individual performed services during an academic year or in a year-round position. OAR 471-030-0074(3).

Claimant’s claims for benefits in this case were based upon her services as an instructor for Lane Community College, an institution of higher education. Claimant sought benefits for the weeks of July 25, 2018 through September 1, 2018 (weeks 30-18 through 35-18), which commenced during Lane Community College’s period between academic years, June 15, 2018 through September 21, 2018 (weeks 24-18 through 38-18). The relevant period under OAR 471-030-0074(2) for determining whether claimant was “not unemployed” is therefore the 2017-2018 academic year. The record shows that claimant earned more than her weekly benefits amount on both claims during at least one week of the 2017-2018 academic year. She therefore was not unemployed during the relevant period.

For claimant to be denied benefits during the period between two academic years in these cases, claimant must have had “a contract or reasonable assurance” of continuing work in the 2018-2019 academic year. The Department argued that claimant had reasonable assurance in this case because she had regular employment with Lane Community College since 2010, and the only factor affecting whether she would return after the break between the 2017-2018 and 2018-2019 academic years was enrollment levels, which was both the same condition that always affected her continued employment, and beyond the employer’s reasonable control. Audio recording ~ 21:00-26:00.

The ALJ agreed with the Department. Citing to the fact that claimant had worked for the employer for a number of years, she’d never received an “official announcement” about continued employment in the fall term, and “[n]o one in authority had told claimant that she would not be teaching during the Fall 2018 term,” the ALJ reasoned that “[w]hile claimant believed it might be possible that she would not, due to decreased enrollment and the hiring of a full-time professor, no one had told claimant she would not be working the same capacity. Claimant knew that her being offered sections was dependent on enrollment, which is not a factor within the employer’s control.” Orders No. 18-UI-116919 and 18-UI-116920 at 6. Citing to *Friedlander v. Employment Division*, a 1984 Oregon appellate court decision, the ALJ concluded that “[t]he contingency of student enrollment does not remove reasonable assurance.” *Id.*; *Friedlander v. Employment Division*, 66 Or. App. 546, 676 P.2d 314 (1984).

As a preliminary matter, the ALJ’s reliance upon the *Friedlander* case to determine whether student enrollment does or does not “remove reasonable assurance” is misplaced. *Friedlander* is factually distinguishable from the current matter. In *Friedlander* claimant had “initiated the advertisement of his classes . . . in the University’s catalogue,” discussed with the university his continued employment, had a “mutual commitment” with the university to be employed on the same basis as he had in previous years, had sufficient enrollment in each prior university term for his classes to be held, been informed by the community college he also worked for “orally and by letter of its intent to employ him in the fall

term,” and his classes had always drawn sufficient enrollment to be held during past terms. Under those circumstances, the court concluded that it was reasonable to expect that Friedlander’s classes would be sufficiently enrolled in the future term, which therefore supported a determination that he had reasonable assurance even though his classes in the upcoming academic year were contingent on enrollment. *Friedlander*, 66 Or. App. at 553-554, 676 P.2d at 319. In this case, claimant had no such assurances.

Moreover, the *Friedlander* court noted that the statutory language “reasonable assurance,” set forth in ORS 657.167, “has been defined by the Employment Division in OAR 471-30-075 [*sic*],” and the court relied upon the Department’s definition of “reasonable assurance” when reaching its decision in that case. *Friedlander*, 66 Or. App. at 552, 676 P.2d at 318. The Court’s decision was therefore based upon the Department’s definition of “reasonable assurance,” not upon its own interpretation of the term. Since 1984, the Department has redefined OAR 471-030-0075 six times, most recently in April 2018; it is therefore the Department’s current and markedly different definition of reasonable assurance that controls, and not the 1984 decision that was based on a previous definition.

Turning to the Department’s current definition of reasonable assurance, OAR 471-030-0075 (April 29, 2018) provides, in relevant part, that an individual has “reasonable assurance” when:

(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.

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(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.

Under the Department's rule, the first condition that must be met for reasonable assurance to exist is that there be a "written, oral, or implied" offer of employment that "must be made by an individual with authority to offer employment." An "offer" is something that is customarily defined as "to present for acceptance or rejection," "tender," "was *offered* a job," or to "propose, suggest."² There is no evidence of a written or oral offer of employment in this case, just the suggestion of an implied offer based upon claimant's previous years of work. The existence of an "implied" offer based on past patterns or practice must logically rely upon the anticipated conditions of the 2018-2019 academic year being the same or similar to those in prior years. In this case, however, the conditions were markedly different.

Claimant knew that enrollment was down, her department was offering fewer classes of the type she taught, the employer had hired a full time instructor to teach classes claimant otherwise might have been assigned to teach, and the employer was moving away from its earlier practices of using adjunct instructors like claimant to teach classes. It was commonly understood to claimant and among those in her department that it was very unlikely that she would teach in the Fall term of the 2018-2019 academic year, and her adjunct teaching job had ended. Although the employer had, in previous years, told claimant how many classes her department expected to offer in the Fall term, the employer did not do that before the academic year break at issue.

Under those circumstances, we cannot infer the existence of an "implied" offer of employment, much less an implied offer based upon the markedly different conditions of employment in 2017-2018 academic year as compared to the 2018-2019 academic year. The conclusion that claimant likely did not have an implied offer of continued employment in the 2018-2019 academic year is supported by the August 24, 2018 email from the dean of claimant's department, which stated, "*if* you were anticipating teaching for us this fall . . ." the employer could not offer claimant employment. (Emphasis added.) The email did not state that the employer had in fact extended an actual or implied offer of employment to claimant, and did not suggest that she had, prior to receiving the email, reason to believe she should have been anticipating teaching in the Fall term.

Even if we inferred the existence of an implied offer of employment based upon similarities between the conditions under which claimant was employed in 2017-2018 and might have been employed in 2018-2019, our conclusion would remain the same. First, for reasonable assurance to exist, there must be "no contingencies within the employer's control." OAR 471-030-0075(3)(a). In this case, there were several contingencies within the employer's control, including the employer's decision to hire a full time instructor, fund that position, assign classes to the full time instructor instead of adjuncts, move away from assigning classes to adjuncts at all, and reduce the overall number of classes offered within claimant's department. Second, for reasonable assurance to exist, the "totality of the circumstances" must show that "it is highly probable there is a job available for the individual in the following academic year or term." OAR 471-030-0075(3)(b). In this case, the factors previously mentioned suggested that it was highly improbable there would be a job for claimant in the following academic year. Finally, for reasonable assurance to exist, it must be "highly probable any contingencies not within the employer's

² See <https://www.merriam-webster.com/dictionary/offer>.

control in the offer of employment will be met.” OAR 471-030-0075(3)(c).³ Contingencies not within the employer’s control could include things like enrollment, the economy, and student lending practices. In this case, given the reduction in enrollment cited in this record, the other factors previously cited, and the prevailing belief that it would take significant changes to enrollment, the economy, student loans, and other contingencies outside the employer’s control before claimant would be assigned classes in the Fall term, it was highly improbable that those contingencies would be met such that claimant would be assigned classes in the 2018-2019 academic year.

For the reasons explained herein, claimant did not have reasonable assurance of continued employment after the break between the 2017-2018 and 2018-2019 academic years. She is therefore not subject to a denial of benefits during that break based upon her earnings from an institution of higher education. If she is otherwise eligible and not disqualified, benefits are payable to claimant for the weeks she has claimed during the period between academic years at Lane Community College, June 15, 2018 through September 21, 2018 (weeks 24-18 through 38-18).

DECISION: Order No. 18-UI-116919 is modified, and Order No. 18-UI-116920 is set aside, as outlined above.⁴

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

DATE of Service: November 16, 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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³ The Department’s witness implied that contingencies not within the employer’s control should be disregarded as unimportant to the reasonable assurance analysis. Audio recording ~ 21:00-26:00. However OAR 471-030-0075(3)(c) specifically requires that those contingencies be considered when determining whether there was reasonable assurance of continued employment in any given case.

⁴ These decisions reverse orders that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.