

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0993**

*Modified*  
*Benefits Not Payable Weeks 23-18 through 35-18*

**PROCEDURAL HISTORY:** On August 27, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not eligible for benefits based upon earnings from an educational institution from July 29, 2018 to September 1, 2018 (decision # 122053). Claimant filed a timely request for hearing. On September 26, 2018, ALJ Janzen conducted a hearing, and on September 28, 2018 issued Order No. 18-UI-117396, modifying decision # 122053 and concluding that claimant's period of ineligibility was limited to July 15, 2018 to August 11, 2018.<sup>1</sup> On October 15, 2018, the Department filed an application for review with the Employment Appeals Board (EAB).

EAB considered the Department's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) On July 16, 2018, claimant filed an initial claim for unemployment insurance benefits. The base year for that claim was April 1, 2017 through March 31, 2018. Claimant's weekly benefit amount was \$146.

(2) Claimant's only base year employer was the Islamic School of Portland, an educational institution, where claimant worked as a pre-school teacher. During the 2017-2018 academic year, claimant earned more than \$146 from the Islamic School during at least one week.

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<sup>1</sup> The ALJ's Order stated that the ALJ "affirmed" decision # 122053. However, decision # 122053 denied benefits from July 29, 2018 through September 1, 2018, while the ALJ denied benefits for a different period, July 15, 2018 through August 11, 2018. Thus, the appropriate disposition of this case would have been "modified," not "affirmed."

(3) The Islamic School's break between the 2017-2018 and 2018-2019 academic years was May 31, 2018 through August 28, 2018. Claimant claimed benefits for weeks commencing during that break period, July 15, 2018 through August 25, 2018.

(4) The Islamic School notified claimant at the end of the 2017-2018 academic year that she would teach pre-school again in the 2018-2019 academic year provided there was sufficient student enrollment. Claimant had taught pre-school at the Islamic School since 2016, and enrollment had been sufficient during that time. There were no other contingencies affecting whether claimant would continue working for the Islamic School in the 2018-2019 academic year.

(5) The Islamic School ultimately did not have sufficient enrollment to support claimant teaching pre-school in the 2018-2019 academic year. On September 4, 2018, the Islamic School offered claimant a position teaching a different class, and claimant accepted it.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that benefits based upon claimant's earnings from an educational institution are not payable; however, the appropriate period of ineligibility is May 31, 2018 through August 28, 2018 (weeks 23-18 through 35-18).

Claimant had a valid claim for benefits based on her base year wages from the Islamic School. However, when claims for benefits are based on base-year wages from instructional work for an educational institution, ORS 657.167(1) provides for a denial of benefits based on service in an instructional capacity for an educational institution 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 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 claim for benefits in this case was based upon her services as an instruction for the Islamic School, an educational institution. Claimant sought benefits for the weeks of July 15, 2018 through August 25, 2018, which commenced during the Islamic School's period between academic years, May 31, 2018 through August 28, 2018 (weeks 23-18 through 35-18). 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 benefit amount 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. 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. \* \* \*
  - (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. \* \* \*
  - (c) It is highly probable any contingencies not within the employer’s control in the offer of employment will be met.

It appears in this case that claimant had an oral or implied offer of employment in the 2018-2019 academic year that was contingent only upon student enrollment levels. There is nothing in this record suggesting that the individual who extended claimant the offer lacked the authority to do so. It appears that the conditions under which the Islamic School offered claimant employment did not include any contingencies within the Islamic School’s control, and, assuming there was sufficient enrollment, it was highly probable that there would be a job available for claimant following the break between academic years. The only remaining question is whether it was “highly probable” that contingencies not within the employer’s control, such as enrollment, would be met. There is little detail in the record of this case regarding the employer’s enrollment or enrollment trends from which a prediction about the probability of the enrollment contingency being met could be reached. The only information available is that from 2016 through 2018 the enrollment contingency was met. There is nothing suggesting that conditions were different in the 2018-2019 academic year, such that the enrollment contingency would not be met for the first time in two years. It therefore appears on the basis of information available that it was highly probable that the enrollment contingency would be met. For those reasons, it is more likely than not that claimant had reasonable assurance of continued employment after the academic year break.

Because claimant had reasonable assurance of continued employment, benefits based on her earnings as an instructor for an educational institution are not payable to claimant during the break between the 2017-2018 and 2018-2019 academic years, May 31, 2018 through August 28, 2018 (weeks 23-18 through 35-18).

**DECISION:** Order No. 18-UI-117396 is modified, as outlined above.

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

**DATE of Service:** November 19, 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](http://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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