

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1014

Modified
Benefits Not Payable Weeks 28-18 through 35-18

PROCEDURAL HISTORY: On August 11, 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 8, 2018 to September 1, 2018 (decision # 84554). Claimant filed a timely request for hearing. On September 26, 2018, ALJ Snyder conducted a hearing at which the employer failed to appear, and on October 4, 2018 issued Order No. 18-UI-117702, modifying decision # 84554, and concluding that claimant's period of ineligibility was limited to July 8, 2018 to August 11, 2018.¹ On October 24, 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) Scappoose School District # 1J, an educational institution, employed claimant during the 2017-2018 academic year as a substitute teacher's aide. Claimant was also employed during the 2017-2018 academic year by the educational institutions, Rainier School District # 13 and School District # 502. The substitute teacher's aide position was an instructional position. During the 2017-2018 academic year, claimant earned at least \$146 from Scappoose School District # 1J during at least one week.

(2) On June 13, 2018, Scappoose School District # 1J sent claimant a letter by email stating, "Following the established 2018-2019 school calendar, we expect that you will perform substitute services for the Scappoose School District in the same or similar capacity as you did prior to such year, term or period,

¹ The ALJ's Order stated that the ALJ "affirmed" decision # 84554. However, decision # 84554 denied benefits from July 8, 2018 through September 1, 2018, while the ALJ denied benefits for a different period, July 8, 2018 through August 11, 2018. Thus, the appropriate disposition of this case would have been "modified," not "affirmed."

as the need for a substitute may arise.” Exhibit 1. The letter also stated that claimant was required to complete any assigned training during the school recess period. Claimant also understood that her name would remain on Scappoose School District # 1J’s substitute call list for the 2018-2019 school year because she worked ten or more days during the 2017-2018 school year for Scappoose School District # 1J.

(3) Scappoose School District # 1J’s break between the 2017-2018 and 2018-2019 academic years began on June 15, 2018 (during week 24-18) and ended on August 31, 2018 (during week 35-18).

(4) On July 11, 2018 (during week 28-18), claimant filed an initial claim for unemployment insurance benefits. The Department determined that claimant had a valid claim with a weekly benefit amount of \$146. The base year was established to be July 1, 2017 through June 30, 2018.

(5) Claimant claimed benefits for the weeks from July 8, 2018 through September 1, 2018 (weeks 28-18 through 35-18), which all commenced during Scappoose School District # 1J’s break between the 2017-2018 and 2018-2019 academic years.

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 July 8, 2018 through September 1, 2018 (weeks 28-18 through 35-18).

Claimant had a valid claim for benefits based on her base year wages from Scappoose School District # 1J (Scappoose SD). However, 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. 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 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's claim for benefits in this case was based upon her services as a substitute teacher's aide for Scappoose SD, an educational institution. The ALJ erroneously found as fact that claimant claimed benefits only for the weeks of July 8, 2018 through August 11, 2018.² However, the Department witness testified that claimant claimed additional weeks through the end of the recess period; all her weeks claimed included the period of July 8, 2018 through September 1, 2018 (weeks 28-18 through 35-18). Audio Record at 10:58 to 12:01. Weeks 28-18 through 35-18 commenced during Scappoose SD's period between academic years, June 15, 2018 through August 31, 2018 (weeks 24-18 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. 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. The record shows that claimant earned more than her weekly benefit amount of \$146 during at least one week of the 2017-2018 academic year. She therefore was not unemployed during the relevant period. 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 Scappoose SD in academic year 2018-2019.

Scappoose SD sent claimant an email at the end of the 2017-2018 school year informing claimant that she would continue as a substitute teacher "in the same or similar capacity" during the 2018-2019 academic year, and reminding claimant of her obligation to complete required training during the recess period. Claimant also knew that she would continue to be listed on the substitute call list because she completed at least ten hours with the Scappoose SD during the 2017-2018 school year. The preponderance of the evidence shows that claimant had "reasonable assurance" of employment in the same instructional capacity in academic year 2018-2019. Therefore, ORS 657.167 is applicable to claimant's claim and benefits are not payable to claimant for any weeks commencing during the summer recess between academic years 2017-2018 and 2018-2019.

Because claimant met the prescribed conditions for ORS 657.176 and 657.221 to apply, claimant's benefits are therefore subject to the reduction contemplated by these statutes. We agree with the ALJ that benefits are not payable to claimant for those weeks that commenced during the summer recess period between Scappoose SD's academic years – weeks 24-18 through 35-18 (June 15, 2018 through August 31, 2018). However, the ALJ concluded that benefits were not payable only for the weeks 28-18 through 32-18 (July 8, 2018 through August 11, 2018). Because claimant claimed benefits for weeks 28-18 through 35-18, the hearing decision at issue is modified to state that claimant is not eligible for benefits for the first effective week of her claim through the end of the recess period, weeks 28-18 through 35-18.

DECISION: Order No. 18-UI-117702 is modified, as outlined above.

² Order No. 18-UI-117702 at 1.

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

DATE of Service: November 21, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.