

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0091

Reversed
Benefits Not Payable Weeks 24-19 through 33-19

PROCEDURAL HISTORY: On August 15, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not eligible for benefits during the break between two academic years because she was likely to return to work for an educational employer after the break (decision # 132219). Claimant filed a timely request for hearing. On September 17, 2019, ALJ R. Frank conducted a hearing, and on September 25, 2019, issued Order No. 19-UI-137048, concluding claimant did not have reasonable assurance of continuing work in the same or a similar capacity for an educational employer after the break, and therefore was eligible for benefits for any weeks claimed during the July 21, 2019 through August 17, 2019 break period. On October 16, 2019, ALJ R. Frank issued Order No. 19-UI-138197, amending Order No. 19-UI-137048 to “reflect a change in the statutory provisions being applied,” but otherwise leaving its conclusion unchanged.¹ On November 5, 2019, the Department filed an application for review of Order No. 19-UI-138197 with the Employment Appeals Board (EAB).

On December 10, 2019, EAB issued Employment Appeals Board Decision 2019-EAB-1048, reversing Order No. 19-UI-138197 and remanding the case to the Office of Administrative Hearings (OAH). On January 7, 2020, ALJ Frank conducted a second hearing, and on January 9, 2020, issued Order No. 20-UI-142385, again concluding claimant did not have reasonable assurance of continuing work in the same or a similar capacity after the break between two academic years, and therefore was eligible for benefits for the period July 21, 2019 through August 17, 2019 (weeks 30-19 through 33-19).

¹ Order No. 19-UI-138197 at 1 to 4.

On January 29, 2020, the Department filed an application for review of Order No. 20-UI-142385 with EAB. With its application for review, the Department filed a written argument. EAB considered the Department's argument when reaching this decision.

FINDINGS OF FACT: (1) Claimant filed an initial claim for unemployment insurance benefits on July 26, 2019, which was the third quarter of 2019. An initial claim filed during that quarter has a base year that begins on April 1, 2018 and ends on March 31, 2019.

(2) During claimant's base year, claimant worked for Open Schools Inc. (OSI) and Multnomah County School District # 1 (MCSD), each of which was an educational institution. Claimant did not earn any non-school wages during the base year. The Department determined claimant had a monetarily valid claim for benefits, based on claimant's total base year wages, with a weekly benefit amount of \$648.

(3) Claimant worked for OSI as a full-time associate principal of instruction and curriculum during the 2018-2019 academic year. Claimant's position was a year-round, administrative position. Claimant earned \$1,653.85 per week, or \$86,000 per year ($1653.85 \times 52 = \$86,000$), from OSI during the 2018-2019 academic year.

(4) OSI discharged claimant from her associate principal position on May 23, 2019.

(5) The recess period between the 2018-2019 and 2019-2020 academic years for OSI began June 9, 2019 and ended August 16, 2019 (weeks 24-19 through 33-19).

(6) In early July 2019, claimant received a written offer of employment as a teacher from Centennial School District (CSD), at a salary of approximately \$87,000 per year. That job offer was conditioned on claimant providing CSD with "fingerprint clearance," "transcripts," and "verification from all of her previous employers" and then signing the agreement, all of which conditions claimant fulfilled by August 21, 2019. Audio Record (January 7, 2020 hearing) at 13:00 to 14:00.

(7) Claimant claimed and received waiting week credit or benefits for the weeks including July 21, 2019 through August 10, 2019 (weeks 30-19 through 32-19).²

CONCLUSION AND REASONS: Benefits based on claimant's base year wages from her educational employers are not payable to claimant during the break period between OSI's successive academic years.

The Department determined claimant had a valid claim for benefits, i.e., was *monetarily* eligible, based on the total amount of her base year wages, and that her weekly benefit amount was \$648. However, when claims for benefits are based solely on base-year wages from one or more educational institutions, both ORS 657.167 and ORS 657.221 require a reduction in those benefits under certain prescribed conditions. Claimant seeks benefits based on services performed for OSI as a full-time, year-round

² EAB has taken notice of these facts, which are contained in Employment Department records. Any party that objects to our taking notice of this information must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the noticed facts will remain in the record.

associate principal during the 2018-2019 academic year.³ OSI is an educational institution as defined in ORS 657.010(6). Therefore, ORS 657.167, which applies to services performed for educational institutions by individuals, such as claimant, in an instructional, research or principal administrative capacity, limits when those benefits may be paid if prescribed conditions are satisfied.

ORS 657.167(1) and (2) prohibit benefits based upon services for an educational institution performed in an instructional, research or principal administrative capacity from being paid “for any week of unemployment commencing during the period between two successive academic years” or 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.” In sum, the conditions that must be met for the between-terms school recess denial to apply to claimant are that: (1) the weeks claimed must commence during a period between two academic terms; (2) claimant must not have been “unemployed” during the term prior to the recess period at issue; and (3) there is reasonable assurance of work, also in an instructional, research or principal administrative capacity, during the term following the recess period at issue.

Order No. 20-UI-142385 found and concluded that claimant sought benefits for a period between two academic years and was not unemployed during the term prior to the recess period, and the preponderance of the evidence in the hearing record supports those conclusions. Order No. 20-UI-142385 at 2, 3. However, the order also concluded that claimant did not have reasonable assurance of working “in the same or similar capacity” following the recess period, and therefore was eligible for benefits, because claimant’s associate principal job with OSI and her job as a teacher with CSD were “different jobs” with “different sets of duties.” Order No. 20-UI-142385 at 5.

In its written argument, the Department asserted that the order erred in concluding claimant should be eligible for benefits during the summer recess period because claimant, in fact, had reasonable assurance of working in the same or similar capacity following the recess period. The Department stated:

The [order] erred in [concluding] claimant did not have an offer of work [in] the same or similar [capacity] because the claimant’s job duties were different. OAR 471-030-0075(1)(b) states same or similar work refers to the type of services performed, whether in a ‘professional’ capacity as provided by ORS 657.167 or a ‘nonprofessional’ capacity as provided by ORS 657.221. Claimant worked as an associate principal at an educational institution in the 2018-2019 academic year. An associate principal would fall under professional capacity (ORS 657.167). Claimant did not have reasonable assurance to this position; however she received an offer of new employment for a teaching position with an educational institution for the 2019-2020 academic year. Teaching would also fall under professional capacity (ORS 657.167). The claimant [had] worked in a professional capacity and [then] received an offer of work in a professional capacity.

Department’s Written Argument at 1. Both the plain language of the applicable administrative rule and the record support the Department’s position that reasonable assurance was not abated by claimant

³ Although MCSD was a base year employer and claimant’s claim was in part based upon that employment, the nature of claimant’s work for MCSD was not developed and will not be addressed further.

receiving an offer of work as a teacher rather than as an associate principal because, although the jobs may have been “different” with “different sets of duties,” each position involved work in an instructional, research or principal administrative capacity, i.e., in a “professional capacity” under ORS 657.167 and OAR 471-030-0075(1)(b) (April 29, 2018).

The Department also argued that EAB should reverse Order No. 20-UI-142385 and deny claimant benefits based on the use of her educational wages during the break between the applicable academic years. Department’s Written Argument at 1. The record as to claimant’s new employment supports the Department’s position in that respect, too, because it was sufficiently developed to show that claimant received her offer of new employment during early July 2019, prior to the weeks claimed, and that claimant had “reasonable assurance” based upon that employment under OAR 471-030-0075.

In this regard, OAR 471-030-0075 states, in relevant part:

Contract or reasonable assurance defined.

(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.

(b) The offer of employment during the ensuing academic year or term must be in the same or similar capacity as the service performed during the prior academic year or term. The term ‘same or similar capacity’ refers to the type of services provided: i.e., a ‘professional’ capacity as provided by ORS 657.167 or a ‘nonprofessional’ capacity as provided by ORS 657.221.

(c) *The economic conditions of the offer may not be considerably less in the following academic year, term or remainder of a term than the employment in the first year or term.* The term ‘considerably less’ means the employee will not earn at least 90% of the amount, excluding employer paid benefits, than the employee earned in the first academic year or term, or in a corresponding term if the employee does not regularly work successive terms (i.e. the employee works spring term each year).

(2) An individual has a contract to perform services during the ensuing academic year, term, or remainder of a term when there is an enforceable, non-contingent agreement that provides for compensation for an entire academic year or on an annual basis.

(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.* (Italics added)

***"

Here, the record shows that claimant had a written offer of employment as a teacher for CSD for the 2019-2020 academic year that, on this record, was contingent only upon matters in claimant's control, like providing CSD with "fingerprint clearance," "transcripts," and "verification from all of her previous employers" and then signing the offer. Viewed objectively, when the offer was made, it was highly probable that those conditions would be met, and in fact, were met by claimant by August 21, 2019, when she signed the offer and the agreement became enforceable. Claimant did not assert or show that the offer contained any additional contingencies that were within the employer's discretion or control. The record also shows that the economic conditions of the offer for the 2019-2020 academic year,

\$87,000 per year, were “not considerably less,” and in fact were greater than the economic conditions of her employment in the prior academic year, \$86,000. For all of these reasons, more likely than not, under OAR 471-030-0075 claimant had reasonable assurance of continued educational employment after the recess period between the 2018-2019 and 2019-2020 academic years.

Because claimant had reasonable assurance of continued employment, benefits based on her earnings for one or more educational institution are not payable to claimant during the break between the 2018-2019 and 2019-2020 academic years, or the period June 9, 2019 through August 16, 2019 (weeks 24-19 through 33-19).

DECISION: Order No. 20-UI-142385 is set aside, as outlined above.

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

DATE of Service: March 6, 2020

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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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyong ito.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນໍາຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນໍາສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

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Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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