

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0764

Reversed
Benefits Payable – Weeks 25-20 through 33-20

PROCEDURAL HISTORY: On October 23, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not eligible for unemployment insurance benefits from June 14, 2020 through August 15, 2020 during a school recess period because he was likely to return to work after the break (decision # 155803). The employer filed a timely request for hearing. On November 24, 2020, ALJ Frank conducted a hearing, and on November 25, 2020 issued Order No. 20-UI-156930, modifying the Department's decision by concluding claimant was not eligible for benefits from May 10, 2020 through August 29, 2020. On December 2, 2020, the employer filed an application for review with the Employment Appeals Board (EAB). On December 3, 2020, claimant also submitted an application for review with EAB.

WRITTEN ARGUMENT: Claimant and the employer's written arguments each contained information that was not part of the hearing record, and did not show that factors or circumstances beyond that party's reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) On June 22, 2020, claimant filed an initial claim for unemployment insurance benefits. The base year for that claim was January 1, 2019 through December 31, 2019. Claimant's weekly benefit amount was established at \$457.

(2) One of claimant's base year employers was Pacific Northwest College of Art (PNCA), an educational institution, where claimant worked in a non-instructional capacity as a year-round receptionist. During the 2019-2020 academic year, claimant earned more than \$457 from PNCA during more than one week.

(3) PNCA's break between the 2019-2020 and 2020-2021 academic years was May 10, 2020 through August 29, 2020.

(4) On June 3, 2020, PNCA notified claimant by mail that due to the “economic impact of COVID-19” the employer was “implementing measures to ensure the financial stability of the college,” which included placing claimant on a “temporary, unpaid leave of absence, effective beginning June 21, 2020.” Exhibit 1. The notice also stated, “This furlough is expected to last through August 15, 2020. However, it is important to note that we reserve the right to change this date based on our business needs.” Exhibit 1. The notice from PNCA also reminded claimant that his employment was “at-will” and stated that “nothing in this notice . . . is intended as an express or implied contract.” Exhibit 1.

(5) Claimant claimed benefits for each of the weeks including June 14, 2020 through August 15, 2020 (weeks 25-20 through 33-20). These are the weeks at issue.

CONCLUSIONS AND REASONS: Claimant did not have reasonable assurance of continuing employment during the weeks at issue, and benefits for those weeks are payable to claimant if claimant is otherwise eligible.

ORS 657.221(1)(a) prohibits benefits based upon services for an educational institution performed by a non-educational employee from being paid “for any week of unemployment that commences during a period between two” terms “if the individual performs such services in the first academic term” and “there is a reasonable assurance that the individual will perform any such services in the second” term. That law applies when the individual claiming benefits “was not unemployed,” as defined at ORS 657.100, during the academic term prior to the term break, regardless whether claimant’s position observed between-term recess periods. In sum, the conditions that must be met for the between-terms school recess denial to apply to claimant are these: (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 during the term following the recess period at issue. The provisions of ORS 657.221 apply regardless of whether or not the individual performed services only during an academic year or in a year-round position. OAR 471-030-0074(4) (January 5, 2020).

Order No. 20-UI-156930 concluded that claimant worked for an educational employer in a non-instructional capacity during claimant’s base year, the weeks claimed commenced during a period between two academic years, and that claimant was not unemployed during the term prior to the recess period at issue. Order No. 20-UI-156930 at 3. The preponderance of the evidence in the record supports those conclusions. However, the order also concluded that claimant had reasonable assurance of work during the term following the recess period, and therefore was not eligible for benefits during the period between two academic years of claimant’s educational employer, PNCA. Order No. 20-UI-156930 at 5. However, the record does not support that conclusion.

OAR 471-030-0075 (April 29, 2018) provides the requirements to determine whether an individual has a contract or reasonable assurance:

* * *

(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:

* * *

(B) Decisions on how to allocate available funding;

* * *

(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;

* * *

(E) Budgeting and assignment practices of the school;

* * *

(c) It is highly probable any contingencies not within the employer's control in the offer of employment will be met.

* * *

Here, the furlough letter the employer mailed to claimant on June 3, 2020 notified him that although the furlough due to COVID-19 was "expected to last through August 15, 2020," the employer "reserve[d] the right to change this date based on our business needs." The notice also emphasized that claimant's employment was "at-will" and that "nothing in this notice . . . is intended as an express or implied contract." Accordingly, even though both claimant and the employer may have expected claimant to return to work on or about August 15, 2020, the furlough notice expressly contained contingencies within the employer's control. "Business needs" more likely than not included decisions on how to allocate funding and facility availability. By stating that nothing in the notice was intended to create a contract, and that claimant's employment was at-will, the notice contained a contingency allowing the PNCA to retract the offer to return to work on August 15, 2020 at their discretion. For these reasons, under OAR 471-030-0075(3), claimant did not have reasonable assurance that he would be allowed to perform services during the academic year or term following the recess period.

Although the order under review found and concluded that claimant in fact returned to work after the furlough period, the relevant time period for determining reasonable assurance is during the break between academic years. Order No. 20-UI-156930 at 2, 5. *See, Nickerson v. Employment Department,*

250 Or App 352, 280 P3d 1014 (2012) (school recess law “uses the present tense: a claimant is disqualified during recess periods in which ‘there *is* a reasonable assurance’ of employment in the next year”; there is no provision in the law “allowing the department to deny benefits that, having been earned (in the sense of having been qualified for), are later declared to be unearned due to changed circumstances”). Moreover, the record contains no evidence that the specified contingencies were in any way removed during the furlough.

Claimant did not have reasonable assurance of continuing employment during the weeks of 25-20 through 33-20, and benefits for those weeks are payable to claimant if he is otherwise eligible for benefits.

DECISION: Order No. 20-UI-156930 is set aside, as outlined above.

S. Alba and D. P. Hettle.

DATE of Service: January 8, 2021

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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 desisyon.

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 ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

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.

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