

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0799

Reversed & Remanded

PROCEDURAL HISTORY: On October 30, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was denied unemployment insurance benefits from June 14, 2020 through September 12, 2020 during the break between the employer's academic years because claimant was likely to return to work for the employer after the break, and his wages and/or hours with other employer were not sufficient to entitle him to benefits during the break (decision # 94209). Claimant filed a timely request for hearing. On December 1, 2020, ALJ Murdock conducted a hearing, and on December 2, 2020 issued Order No. 20-UI-157120, affirming the Department's decision. On December 21, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

However, the parties may offer new information, such as the new information included with claimant's written argument, into evidence at the remand hearing. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

FINDINGS OF FACT: (1) On June 12, 2020, claimant filed an initial claim for unemployment insurance benefits. The Department established claimant's base year as January 1, 2019 through December 31, 2019.

(2) During claimant's base year, claimant's sole employer was Administrative School District #1 (ASD #1), which was an educational institution. Claimant did not earn any non-school wages during the base year. The Department determined that claimant had a monetarily valid claim with a weekly benefit amount of \$486.00.

(3) ASD #1's break period between the 2019 – 2020 and 2020 – 2021 academic years was June 14, 2020 through September 12, 2020 (weeks 25-20 through 37-20). Claimant claimed benefits for the weeks from June 14, 2020 through September 5, 2020 (weeks 25-20 through 36-20).

(4) During the 2019-2020 academic year, ASD #1 employed claimant as a school bus driver, a non-instructional employee. Claimant typically worked full-time and year-round for the employer. Claimant earned more than \$486 from ASD #1 during at least one week of the 2019-2020 academic year.

(5) On March 13, 2020, claimant's work for the employer ceased due to the COVID-19 pandemic. The employer told claimant that his work would resume two weeks later, which it did not, then in May 2020, which it did not, and then in June 2020, which it did not. Claimant typically worked as a bus driver during the summer break between academic years, but did not do so during the summer break in 2020. Claimant did not return to work after March 13, 2020 through the summer break period due to the COVID-19 pandemic.

(6) Claimant did not have an individual employment contract with ASD #1. However, claimant was a member of a union that had a union contract with ASD #1. On an unknown date in 2020, claimant agreed in writing to return to work as a bus driver for ASD #1 at some time during the 2020-2021 academic year, but was given no assurance that return to work in that capacity would occur. Also on an unknown date in 2020, claimant's union negotiated with the employer that claimant could return to work at reduced hours performing custodial and maintenance work sufficient to maintain his health insurance and other benefits. At an unknown point during the 2020-2021 academic year, claimant returned to work performing some bus driving work and performing some custodial and maintenance work sufficient to maintain his health insurance and other benefits.

(7) As of December 1, 2020, ASD #1 was providing classes to students remotely. As of that date, claimant performed some bus driving work but otherwise continued to perform custodial and maintenance work sufficient to maintain his health insurance and other benefits.

CONCLUSIONS AND REASONS: Order No. 20-UI-157120 is set aside and this matter remanded for further development of the record.

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-157120 found that claimant worked for an educational employer in a non-instructional capacity during claimant's base year, that the weeks claimed commenced during the break between two academic years, and that claimant was not unemployed during the term prior to the break period at issue. Order No. 20-UI-157120 at 1-2. The preponderance of the evidence in the record supports those findings. However, the order also concluded that claimant had reasonable assurance of work during the term following the summer break period, and therefore was not eligible for benefits during the summer break period of claimant's educational employer, ASD #1. Order No. 20-UI-157120 at 4. However, the record was not sufficiently developed to support that conclusion.

OAR 471-030-0075 (April 29, 2018) states:

(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).

* * *

(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.

Broadly, OAR 471-040-0075(3) requires three separate findings in order to conclude that an individual had reasonable assurance of returning to work after the break period: the "agreement" (i.e., offer of work) must not be contingent upon any factors within the employer's control; the totality of the circumstances shows that it is "highly probable" that the individual will have a job following the break; and it is "highly probable" that any contingencies not within the employer's control, and upon which the offer of work was made, will be resolved.

The record shows that the employer offered claimant an opportunity to return to work after the break, that he accepted the offer, and that he ultimately did return to work after the break. Although this evidence is relevant to the determination of whether claimant had reasonable assurance, it is insufficient without further inquiry into all three of the factors required by OAR 471-040-0075(3). For example, the record shows that on March 13, 2020, claimant's work for the employer ceased due to the COVID-19

pandemic. Audio Record at 13:45 to 14:45. It also shows that the employer told claimant that his work would resume two weeks later, which it did not, then in May 2020, which it did not, and then in June 2020, which it did not. Audio Record at 13:45 to 14:45. Also, claimant typically worked as a bus driver during the summer break between academic years, but did not do so during the summer break in 2020 due to the pandemic.

The record should be developed further to explore the circumstances which existed at various points throughout 2020, which made it more or less likely that claimant would have a job to return to at the start of the new academic year. Inquiry should be directed towards the significance, if any, of the employer's decisions to postpone claimant's return to work at various points during March, May and June of 2020, as well as its decision to postpone claimant's return to work during the summer of 2020. Inquiry should also be directed towards the terms of claimant's union contract, if any, which may have affected claimant's return to work during the fall of 2020, such as whether they included contingencies within the employer's control. Similarly, inquiry should be directed towards any agreement claimant's union may have negotiated with the employer to allow claimant to return to work at reduced hours performing custodial and maintenance work sufficient to maintain his health insurance and other benefits.

The record also fails to show what effects, if any, that pandemic-related government mandates on educational institutions had on the employer's need for claimant to return to work. Inquiry should therefore be directed toward any other circumstances regarding pandemic-related government mandates on educational institutions which would contribute to the totality of the circumstances to be considered under OAR 471-030-0075(3)(b). The record should also be developed further to ascertain any contingencies upon which claimant's offer of work was made. To the extent that any such contingencies—such as changing legal requirements resulting from the pandemic—were *not* within the employer's control, inquiry and analysis must also focus on whether it was “highly probable” that those contingencies would be met.

As previously discussed, the evidence in the record demonstrates that the employer's certainty in whether they would reopen in the new academic year—and, by extension, whether claimant would return to work—appeared to waver throughout the summer of 2020. Accordingly, even if the record on remand shows that claimant had reasonable assurance, it must also be developed to show *when* claimant had reasonable assurance. 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”). Thus, based on the evidence in the record, it is, for instance, possible that claimant had reasonable assurance at one point during the summer, lost it, and then regained it. The record on remand should therefore be sufficiently developed to determine during which specific weeks, if any, claimant had reasonable assurance, and when, if at all, he may have lost it.

Finally, the record fails to show whether the economic conditions of any employment offer for the 2020-2021 academic year claimant may have received were considerably less than that of his employment in the 2019-2020 academic year. Although claimant testified, “from March until now...Last year I did 38, almost 39. This year I'm only at like 25...So I've lost roughly over \$10,000,” no follow-up inquiries

were made. Audio Record 23:10 to 23:30. The record needs to be developed to determine whether the employer's work offer met the requirements of OAR 471-030-0075(1)(c).

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether, and when, claimant had reasonable assurance of returning to work after the break period, and whether the economic conditions of any employment offer claimant received met the requirements of OAR 471-030-0075(1)(c), Order No. 20-UI-157120 is reversed, and this matter is remanded.

DECISION: Order No. 20-UI-157120 is set aside, and this matter remanded for further proceedings consistent with this order.

S. Alba and D. P. Hettle.

DATE of Service: January 27, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 20-UI-157120 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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.

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