

**EMPLOYMENT APPEALS BOARD DECISION**  
**2020-EAB-0805**

*Modified*  
*Benefits Payable for Weeks 25-20 through 34-20*  
*Benefits Not Payable for Weeks 35-20 and 36-20*

**PROCEDURAL HISTORY:** On October 29, 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 5, 2020 during the break between academic years because claimant was likely to return to work after the break (decision # 105711). Claimant filed a timely request for hearing. On December 1, 2020, ALJ Frank conducted a hearing, and on December 4, 2020 issued Order No. 20-UI-157243, affirming the Department's decision. On December 23, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

**EVIDENTIARY MATTER:** EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence consists of claimant's written argument and emails from the employer on July 31, 2020 and August 19, 2020, and have been marked as EAB Exhibit 1, with copies provided to the parties with this decision. The hearing record shows that claimant reported to the Department that she received an offer of work for the 2020-2021 academic year on an unknown date in August of 2020. Audio Record at 14:15 to 14:45. The documents marked as EAB Exhibit 1, show, more likely than not, that the offer was made on or about August 19, 2020. Accordingly, those documents are necessary to complete the record in this case and are admitted under OAR 471-041-0090(1)(a) for that reason. Any party that objects to our admitting EAB Exhibit 1 into the record 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 exhibit will remain in the record.

**FINDINGS OF FACT:** (1) On June 19, 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 worked for two employers. One of the employers, Administrative School District # 1 (ASD # 1), was an educational institution. The other employer was not an educational institution, but claimant's wages from that employer alone were insufficient to establish a monetarily valid claim. The Department determined that claimant had a monetarily valid claim based on wages from both employers with a weekly benefit amount of \$304.

(3) ASD # 1's break period between the 2019-2020 and 2020-2021 academic years was June 14, 2020 through September 5, 2020 (weeks 25-20 through 36-20). Claimant claimed and was paid benefits for the weeks June 14, 2020 through August 22, 2020 (weeks 25-20 through 34-20).

(4) During the 2019-2020 academic year, ASD # 1 employed claimant as an educational assistant for in-person learning, an instructional employee. Claimant typically worked for the employer year-round, 32.5 hours per week, for approximately \$22 per hour. During the summer months, claimant typically worked as an in-person educational assistant working with special education students. Claimant earned more than \$304 from ASD # 1 during at least one week of the 2019-2020 academic year.

(5) In March during the 2019-2020 academic year, claimant's work for the employer ceased due to the COVID-19 pandemic. The employer also cancelled claimant's summer work for that reason. In July 2020, the employer delayed the start of the 2020-2021 academic year more than once due to "changing Covid-19 circumstances" and tentatively scheduled it to begin on September 14, 2020. EAB Exhibit 1 at 1. On or about August 19, 2020, the employer notified claimant that she would return to work for the fall term when it was scheduled to begin.

(6) On September 9, 2020, claimant returned to work for the employer working 32.5 hours per week at her regular wage.

**CONCLUSIONS AND REASONS:** Benefits based on claimant's base year wages from both employers are payable to claimant for the weeks including June 14, 2020 through August 22, 2020 (weeks 25-20 through 34-20). Benefits are not payable to claimant for the weeks including August 23, 2020 through September 5, 2020 (weeks 35-20 and 36-20).

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 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.

Order No. 20-UI-157243 found that claimant worked for an educational employer in an instructional capacity during claimant's base year, claimed weeks that commenced during the break between two academic years, and was not unemployed during the term prior to the break period at issue. Order No. 20-UI-157243 at 1-3. 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 ASD # 1's summer break period. Order No. 20-UI-157243 at 5. However, the record supports that conclusion only in part.

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

\* \* \*

(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.

OAR 471-040-0075(3) requires three separate findings to conclude that an individual had reasonable assurance of returning to work after the break period: the "agreement" (i.e., the offer of work) must not be contingent upon any factors within the employer's control; the totality of the circumstances must show that it is "highly probable" that the individual will have a job following the break; and, it must be "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 between the 2019-2020 and 2020-2021 academic years, that she accepted the offer, and that she ultimately did return to work after the break. Although this evidence is relevant to the determination of whether claimant had reasonable assurance, it alone is insufficient to show claimant had reasonable assurance that she would perform services during the 2020-2021 academic year. Further inquiry into all three of the factors required by OAR 471-040-0075(3) is necessary.

Although ASD # 1 offered claimant an opportunity to return to work after the break, which she accepted, neither the employer nor the Department provided evidence regarding when that offer was made. 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"). Claimant asserted that the offer was made in "late August" of 2020, without specifying a date, and neither the employer nor the Department disputed that evidence. EAB Exhibit 1 at 1. Viewing EAB Exhibit 1 as a whole, more likely than not, the employer's offer to claimant to return to work in September was made on August 19, 2020, when the employer held a town hall to inform school district parents about ASD # 1's plans to return to school.

Applying *Nickerson* to the facts developed in this case, the record shows that claimant more likely than not was qualified for benefits based upon her base year earnings until Wednesday, August 19, 2020, the date upon which ASD # 1 likely extended her a new offer of employment. Although the Department typically determines an individual's eligibility for benefits on a week-to-week basis, there is no law under which the Department may find an individual both eligible and ineligible for benefits within a single week. The *Nickerson* court also determined that there is no law under which benefits "earned (in the sense of having been qualified for)" during the first part of the week may be retroactively "declared to be unearned" due to claimant's changed circumstances later in the week, namely, her receipt of a mid-week job offer. In other words, having begun the week without reasonable assurance, claimant cannot later have been determined to have had reasonable assurance during that same week.

Here, the Department had the burden to prove by a preponderance of the evidence that benefits were not payable to claimant during the entire summer break period. See, *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976) (where the Department has paid benefits it has the burden to prove benefits should not have been paid). Because *Nickerson* would preclude claimant from being denied

benefits for any weeks for which she did not have reasonable assurance, benefits are payable to her for each of the weeks from 25-20 through 34-20. Conversely, claimant had reasonable assurance during weeks 35-20 and 36-20 of the summer break period and benefits are not payable to claimant for those weeks.

In sum, benefits are payable to claimant under ORS 657.167 for weeks 25-20 through 34-20. Benefits are not payable to claimant under ORS 657.167 for weeks 35-20 and 36-20.

**DECISION:** Order No. 20-UI-157243 is modified, as outlined above.

S. Alba and D. P. Hettle.

**DATE of Service:** January 29, 2021

**NOTE:** This decision modifies 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](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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



# 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 الاستئناف 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.

**Employment Appeals Board - 875 Union Street NE | Salem, OR 97311**  
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711  
[www.Oregon.gov/Employ/eab](http://www.Oregon.gov/Employ/eab)

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