

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0574

Reversed
Benefits Payable During the Break Period

PROCEDURAL HISTORY: On November 30, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant's educational wages were not disqualified from being considered in determining claimant's weekly benefit amount during the break between academic years because the employer's work offer did not establish job availability due to COVID-19 (decision # 73540). The employer filed a timely request for hearing. On June 17, 2021, ALJ Wyatt conducted a hearing at which claimant failed to appear, and on June 25, 2021, issued Order No. 21-UI-169435, reversing decision # 73540 and concluding that claimant was not eligible to receive benefits during the break between academic years because he had reasonable assurance of returning to the same work after the break. On July 14, 2021, the Department filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The Department 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 the Department'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).

FINDINGS OF FACT: (1) On July 7, 2020, claimant filed an initial claim for unemployment insurance benefits. The base year for that claim was April 1, 2019 through March 31, 2020. The Department established that claimant's weekly benefit amount was \$494.

(2) One of claimant's base year employers was Neah Kah Nie School District No. 56 (NSD No. 56), an educational institution. Claimant worked for NSD No. 56 in an instructional capacity as a special education assistant. During at least one week of the 2019-2020 academic year, claimant earned more than \$494 from NSD No. 56.

(3) NSD No. 56 established the break between the 2019-2020 and 2020-2021 academic years to be June 12, 2020 through September 8, 2020.

(4) Prior to the end of the 2019-2020 school year, the employer sent to claimant a "Notification of Scheduled Recess Period" which stated:

"Employment with Neah Kah Nie School District 56 calls for several customary vacations or recess periods during the school year. Following each of these periods as established by the 2020-2021 school calendar, attached, we expect that you will perform services in the same or similar capacity for Neah Kah Nie School District 56 as you did prior to such year or period. Please complete and return this verification of receipt by May 28, 2020. This notification is not intended to create a contract of employment or to alter an existing contract of employment if any."

Audio Record at 15:20 to 15:55.

(5) On June 9, 2020, claimant signed a document that verified that he had received the employer's "Notification of Scheduled Recess Period." Audio Record at 16:30 to 17:10.

(6) Claimant claimed benefits for each of the weeks including July 12, 2020 through July 18, 2020 and July 26, 2020 through August 1, 2020 (weeks 29-20 and 31-20).

(7) Claimant returned to work for the employer as a special education assistant shortly after the break period ended on September 8, 2020 because the return of employees to work was delayed by local wildfires.

CONCLUSIONS AND REASONS: Claimant did not have reasonable assurance of continuing employment during the employer's break period between the 2019-2020 and 2020-2021 academic years. Benefits for any weeks claimed during the period June 12, 2020 through September 8, 2020 are payable to claimant if claimant is otherwise eligible.

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. 21-UI-169435 concluded that claimant worked for an educational employer in an 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. 21-UI-169435 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, NSD No. 56. Order No. 21-UI-169435 at 3. However, the record does not support that conclusion.

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

(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:

* * *

(F) Offers that allow an employer to retract at their discretion.

* * *

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

* * *

Here, the "Notification of Scheduled Recess Period" the employer mailed to claimant prior to the end of the 2019-2020 school year notified him that following the employer's customary recess periods during their 2020-2021 school year, the employer "expect[ed]" him to perform services in the same or similar capacity as he did prior to such year or period. However, the notice did not provide claimant with reasonable assurance of continuing employment during the ensuing academic year. The notice emphasized that it was "not intended to create a contract of employment." When questioned by the ALJ about that language, the employer's witness verified that the notification was not intended to be an employment contract, but, rather, a standard letter their unemployment agent asked the employer to send to their classified employees at the end of the 2019-2020 school year. Audio Record at 15:55 to 16:30; 17:10 to 17:50. Accordingly, even though claimant and the employer may have expected claimant to return to work on or about September 8, 2020, by stating, "[t]his notification is not intended to create a contract of employment," the notification contained a contingency within the employer's control allowing the employer to retract, at their discretion, any perceived offer to return to work on September 8, 2020. Moreover, the notification was silent about the economic conditions of the employer's offer or expectation following claimant's return to work. For those reasons, under OAR 471-030-0075(1)(c) and (3)(a)(F), claimant did not have reasonable assurance of continuing work during the term following the recess period.

Although claimant returned to work for the employer shortly after the break period ended on September 8, 2020, the relevant period for determining if and when claimant had reasonable assurance of returning to work during the term following the break period was during the break period. *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").

For the reasons stated, claimant did not have reasonable assurance of continuing employment following the break between academic periods of NSD No. 56. Accordingly, benefits for any weeks claimed by claimant during the break that are based upon claimant's educational institution earnings are payable to him, provided that he is otherwise eligible for benefits.

DECISION: Order No. 21-UI-169435 is set aside, as outlined above.

D. Hettle and A. Steger-Bentz;
S. Alba, not participating.

DATE of Service: August 19, 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 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

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.

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