

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-0132**

*Reversed*  
*Benefits Payable During the Break Period*

**PROCEDURAL HISTORY:** On November 9, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was denied unemployment insurance benefits for the period of July 12, 2020 through September 26, 2020, a school recess period, because she was likely to return to work for the employer after the break, and her wages and/or hours with other employers were not sufficient to entitle her to benefits during the break (decision # 62644). Claimant filed a timely request for hearing. On January 6, 2022, ALJ Murdock conducted a hearing, and on January 7, 2022 issued Order No. 22-UI-183593, affirming decision # 62644. On January 21, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) On July 19, 2020, claimant filed an initial claim for unemployment insurance benefits, effective July 12, 2020. The Department established claimant's base year as the second quarter of 2019 through the first quarter of 2020, and determined that claimant's weekly benefit amount was \$292.

(2) During claimant's base year, claimant worked for Central Linn School District 552 C, which was an educational institution. Claimant did not earn any non-educational wages during the base year.

(3) Claimant claimed benefits for the weeks including July 12, 2020 through September 19, 2020 (weeks 29-20 through 38-20). These are the weeks at issue. The Department did not pay claimant benefits for the week of July 12, 2020 through July 18, 2020 (week 29-20), but did pay claimant benefits for all of the other weeks at issue.

(4) Claimant began working for the employer as an educational assistant in 1999, and continued to work for the employer in that role through the end of the 2019–2020 academic year. During the 2019–2020 academic year, claimant worked approximately 30 to 35 hours per week. The employer paid claimant about \$16 per hour for her work Mondays through Thursdays, and \$20 per hour for work in a separate program on Fridays. In March 2020, the employer temporarily transitioned claimant to remote work due to the COVID-19 pandemic. Claimant worked from home for the remainder of the academic year.

(5) The employer's recess period between the 2019–2020 and 2020–2021 academic years was from June 11, 2020 through September 21, 2020 (weeks 24-20 through 39-20).

(6) At the end of most academic years, the employer would typically issue a "Notification of Scheduled Term/Recess Periods" letter to claimant and other employees, notifying employees that the employer expected that the employees would perform services in the same or similar capacity in the following school year as they had in the school year that was ending; and that being offered such work was contingent upon "revenue sources." Exhibit 1 at 3. Because of uncertainty that resulted from the COVID-19 pandemic, the employer did not issue a similar notification to claimant or their other employees at the end of the 2019–2020 academic year. At that time, the principal of claimant's school told claimant and other employees that the employer was "unsure about how things were gonna look the following school year," and that they "hoped that we were all returned, but due to budgets, and due to COVID," the employer was uncertain about whether claimant or other employees would return. Transcript at 14.

(7) During the last week of August 2020, claimant and other employees returned to their school for their "in-service day," in which the employees trained and prepared for the following school year. Transcript at 16. At that time, the principal of claimant's school "had [the employees] think that [they] had hope" that they would be able to return to work for the following academic year. Transcript at 16. Nevertheless, the employees of the school were uncertain about their return to work, both because of the ongoing pandemic and the wildfires that were affecting the area at the time.

(8) In September 2020, claimant returned to work at the school. Claimant worked approximately 35 hours per week during the 2020–2021 academic year, earning a slightly higher rate of pay than she had been paid the previous year.

**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 July 12, 2020 through September 19, 2020 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.

ORS 657.100 provides that an individual is "unemployed" if there are no earnings, or the earnings are less than the individual's weekly benefit amount. OAR 471-030-0074(3) (January 5, 2020) provides:

(3) ORS 657.167 and 657.221 apply when the individual claiming benefits was not unemployed, as defined by ORS 657.100, during the relevant period in the preceding academic year or term. The relevant period is:

\* \* \*

(b) The prior academic year or term when the week(s) claimed commenced during a customary recess period between academic terms or years, unless there is a specific agreement providing for services between regular, but not successive terms.

\* \* \*

The provisions of ORS 657.167 and 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).

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.

\* \* \*

The employer typically issued a "Notification of Scheduled Term/Recess Periods" letter to claimant at the end of each academic year, notifying her that they expected her to return to work in the following academic year. The employer did not issue such a notification to claimant at the end of the 2019–2020 academic year because of the uncertainties created by the COVID-19 pandemic. The order under review concluded that despite the absence of the typical notification letter at the end of the school year, claimant had reasonable assurance of returning to work the following academic year because "claimant was told that the employer hoped she would return to work, implying that the employer intended for her to return"; and that "given claimant's length of employment with the employer and the fact that the

employer had accommodated for the pandemic with remote work in the final months of the 2019–2020 school year,” it was “highly likely” that claimant would return to work in the following academic year. Order No. 22-UI-183593 at 4. The record does not support these conclusions.

As a preliminary matter, it is not clear from the record that the employer made claimant an “offer” of employment at the end of the 2019–2020 academic year. OAR 471-040-0075(1)(a) requires that, for a claimant to have reasonable assurance of a return to work in the following academic term or year, there must be an offer of employment, which can be written, oral, or implied. The employer gave claimant neither a written nor an oral offer of work at the end of the academic year, and the record supports the conclusion that, more likely than not, they did not make an implied offer, either. The *Merriam-Webster Dictionary* defines “imply,” the infinitive of “implied,” to mean “to express indirectly.”<sup>1</sup> The employer did not participate in the hearing, and as such no representative was present to testify as to what claimant’s principal meant when she expressed “hope” that claimant would be able to return in the following academic year. Given the broad uncertainty that the pandemic introduced into nearly all aspects of daily life, however, the most reasonable inference to draw from the principal’s statement is not that she was expressing “intent” for claimant to return to work, but instead that she wished that future circumstances would allow for claimant’s return to work. Such a statement, if stated explicitly, would not have constituted an offer of work.

Even assuming that the above statement *did* constitute an implied offer of work, however, the record does not support the conclusion that, under OAR 471-030-0075(3)(b), the totality of circumstances showed it was highly probable there was a job available for claimant in the following academic year. The order under review concluded otherwise, citing claimant’s length of tenure with the employer and the employer’s accommodation of employees with remote work during the end of the 2019–2020 academic year as evidence that claimant was likely to return to work the following academic year. While that evidence did weigh in favor of the likelihood of claimant’s return to work, it was not sufficient to show that, at the time of the break between academic terms,<sup>2</sup> claimant was highly likely to return to work. As discussed above, the pandemic introduced into daily life a broad measure of uncertainty, making it nearly impossible to accurately assess when pre-pandemic processes and procedures would resume, if ever. The wildfires affecting the area made such predictions harder still. In light of these factors, the totality of the circumstances did not show it was highly probable there was a job available for claimant in the following the academic year. Moreover, even if the principal’s statement did constitute an implied offer of work, under OAR 471-030-0075(3)(a)(F), the record supports the conclusion that the principal was expressly retaining their ability to retract any offer made at their discretion and, as a result, the “offer” was made with the intent of retaining contingencies within the employer’s control and therefore did not constitute reasonable assurances.

For the above reasons, claimant did not have reasonable assurance of continuing employment following the break between academic years. Accordingly, benefits for any weeks claimed by claimant during the

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<sup>1</sup> <https://www.merriam-webster.com/dictionary/implied>

<sup>2</sup> *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”).

break period that are based upon claimant's educational wages are payable to her, provided that she is otherwise eligible for benefits during that period.

**DECISION:** Order No. 22-UI-183593 is set aside, as outlined above.

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

**DATE of Service:** March 4, 2022

**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](https://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.

**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.

**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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

**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.

**Employment Appeals Board - 875 Union Street NE | Salem, OR 97311**  
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711  
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