

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-0155**

*Reversed*  
*Ineligible Weeks 46-21 and 48-21*

**PROCEDURAL HISTORY:** On December 8, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work from November 14, 2021 through November 20, 2021 (week 46-21) and was therefore not eligible to receive unemployment insurance benefits for that week and until the reason for the denial had ended (decision # 142140). Claimant filed a timely request for hearing. On January 18, 2021, ALJ Wardlow conducted a hearing, and on January 19, 2022 issued Order No. 22-UI-184387, reversing decision # 142140 by concluding that claimant was available for work from November 14, 2021 through November 20, 2021 (week 46-21) and November 28, 2021 through December 4, 2021 (week 48-21), and was therefore eligible to receive benefits for those weeks. On January 24, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Prior to October 13, 2021 and continuing throughout the time period relevant to this decision, Central School Dist #13J employed claimant as a kindergarten teacher.

(2) The employer, in compliance with a state mandate, required claimant to either get vaccinated against COVID-19 or receive an exception on the basis of medical or religious grounds. Claimant requested a religious exception, which the employer granted. The accommodation the employer offered claimant in connection with the exception was to wear a KN95 mask at all times and to be tested for COVID-19 on a weekly basis.

(3) On October 13, 2021, claimant informed the employer that she objected to the accommodations they offered because she believed they went against her sincerely held religious beliefs. Claimant proposed that the employer instead allow claimant to wear a clear face shield and perform COVID-19 “screening versus testing.” Transcript at 11. Unlike COVID-19 testing, which involved the internal application of a “Q-tip,” and which claimant believed was “very invasive,” COVID-19 screening involved temperature taking and reviewing a checklist of common systems. Transcript at 15.

(4) On October 15, 2021, the employer declined claimant's proposed accommodations and informed her that if she was not willing to wear a KN95 mask and get tested for COVID-19 on a weekly basis, her only remaining options would be to take an unpaid leave of absence, resign, or be terminated. Claimant elected to accept the unpaid leave of absence.

(5) On October 19, 2021, claimant began her unpaid leave of absence.

(6) On November 24, 2021, claimant filed an initial claim for unemployment insurance benefits. Claimant claimed benefits for the weeks of November 14, 2021 through November 20, 2021 (week 46-21) and November 28, 2021 through December 4, 2021 (week 48-21). These are the weeks at issue. The Department did not pay claimant benefits for the weeks at issue.

(7) During the weeks at issue, claimant sought work in the education field. The Department determined that claimant's labor market area was Dallas, Independence, Monmouth and Salem, and that education work was customarily performed from Monday through Friday, from 7:00 a.m. to 5:00 p.m. in claimant's labor market. During the weeks at issue, most employers in the education field required their employees to either be vaccinated or to have an approved exception based on religious or medical grounds.

**CONCLUSIONS AND REASONS:** Claimant was not available for work during the weeks at issue.

To be eligible to receive benefits, unemployed individuals must be available for work during each week claimed as defined by OAR 471-030-0036(3) (December 8, 2019); ORS 657.155(1)(c). However, during a state of emergency declared by the Governor under ORS 401.165, or a public health emergency declared under ORS 433.441, the Department may waive, otherwise limit, or modify the requirements of OAR 471-030-0036. OAR 471-030-0071 (effective September 13, 2020). Temporary OAR 471-030-0036(3) (September 26, 2021 through March 24, 2022) provides that a person shall be considered available for work if, at a minimum, the individual is:

(a) Willing to work full time, part time, and accept temporary work opportunities, unless such part time or temporary opportunities would substantially interfere with return to the individual's regular employment; and

(b) Capable of accepting and reporting for suitable work opportunities within the labor market in which work is being sought, including temporary and part time opportunities[.]

\* \* \*

However, Temporary OAR 471-030-0036(3)(h)(A) also provides, in pertinent part, that "an individual is not available for work in any week claimed if . . . [t]he individual turns down an offer of or misses scheduled, suitable work[.]"

Claimant did not receive benefits for weeks 46-21 and 48-21, and therefore had the burden to prove that she should have been paid benefits for those weeks. *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; by logical extension of that principle, where benefits have not been paid claimant

has the burden to prove that the Department should have paid benefits). Claimant did not meet her burden here.

The order under review concluded that although claimant's unwillingness to wear a mask or be tested for COVID-19 made her incapable of reporting for her kindergarten teaching work with the employer, because this same unwillingness was the result of her sincerely held religious beliefs, it therefore followed that claimant's kindergarten teaching work with the employer was not "suitable" work. Order No. 22-UI-184387 at 4-5. Based on this reasoning, the order under review concluded that, for purposes of Temporary OAR 471-030-0036(3), claimant was available for work during the weeks at issue. Order No. 22-UI-184387 at 5. However, contrary to the order under review's conclusion, the record shows that claimant's kindergarten teaching work with the employer was suitable work, notwithstanding her unwillingness to wear a mask or be tested weekly for COVID-19 resulting from her religious beliefs.

ORS 657.190 provides a non-exhaustive list of factors that should be considered in determining whether any work is suitable for an individual. Per that statutory section, relevant factors to consider include "the degree of risk involved to the health, safety and morals of the individual." In making this suitability inquiry, the focus of the work suitability determination should be directed to whether the work *itself* was suitable for claimant during the weeks at issue. In this regard, the record shows that the employer was offering claimant work as a kindergarten teacher and that such work did not involve an unreasonable degree of risk to claimant's health, safety, or morals, regardless of claimant's religious beliefs. Furthermore, it can be inferred from the record that the kindergarten teacher work offered by the employer aligned exactly with claimant's prior training, experience and earnings, and that there were otherwise no issues involving the distance of the employer's work from claimant's residence. Thus, the preponderance of the evidence shows that claimant's kindergarten teacher work with the employer constituted suitable work.

The record shows that the employer approved claimant's request for a religious exception to their COVID-19 vaccination requirement and offered claimant continued work as a kindergarten teacher. By so doing, the employer offered claimant suitable work during the two weeks at issue. By turning down the employer's offer of suitable work during the weeks at issue, claimant was not available for work during either of those weeks per Temporary OAR 471-030-0036(3)(h)(A). Because claimant was not available for work during the weeks at issue, claimant was not eligible for benefits during those weeks.

**DECISION:** Order No. 22-UI-184387 is set aside, as outlined above.

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

**DATE of Service:** March 9, 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.

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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

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## 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.

**Employment Appeals Board - 875 Union Street NE | Salem, OR 97311**  
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