

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-0404**

*Reversed*  
*Eligible Weeks 04-22 through 10-22*

**PROCEDURAL HISTORY:** On February 9, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work and therefore not eligible for unemployment insurance benefits for the weeks from January 23, 2022 through February 5, 2022 (weeks 04-22 through 05-22) and until the reason for denial had ended (decision # 95221). Claimant filed a timely request for hearing. On March 16, 2022, ALJ Kaneshiro conducted a hearing and issued Order No. 22-UI-188912, modifying decision # 95221 by concluding that claimant was not available for work and therefore not eligible for benefits for the weeks from January 23, 2022 through March 12, 2022 (weeks 04-22 through 10-22). On March 24, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) In September 2021, claimant began attending school to obtain his massage therapist license. Claimant attended school from 8:30 a.m. to 5:00 p.m., Friday through Saturday. Claimant invested over \$6,000 into his school-related expenses, which were not refundable.

(2) On January 18, 2022, claimant worked his last day as a sanitation technician for his previous employer.

(3) On January 23, 2022, claimant filed an initial claim for unemployment insurance benefits. At the time claimant filed his initial claim he was unwilling to accept any work that conflicted with his school schedule. Claimant claimed benefits for the weeks from January 23, 2022 through March 12, 2022 (weeks 04-22 through 10-22). These are the weeks at issue. The Department did not pay claimant benefits for the weeks at issue.

(4) During the weeks at issue, claimant sought work as a sanitation technician, a retail clerk, a massage therapist, a sales representative, and a convenience store clerk. The Department determined that claimant's labor market area was Eugene, Springfield and Junction City, Oregon. The Department also determined that in claimant's labor market the customary days and hours that sanitation technician work was performed were Sunday through Saturday, 4:00 a.m. to 12:00 p.m., that the customary days and hours that retail clerk work was performed were Sunday through Saturday, 7:00 a.m. to 11:00 p.m., that

the customary days and hours that massage therapist work was performed were Sunday through Saturday, 9:00 a.m. to 6:00 p.m., that the customary days and hours that convenience store clerk work was performed were Sunday through Saturday, 24 hours a day, and that the customary days and hours that sales representative work was performed were Monday through Friday, 8:00 a.m. to 5:00 p.m.

(5) On February 11, 2022, claimant received decision # 95221. Upon reading decision # 95221 claimant realized that his unwillingness to accept work that would interfere with his class schedule would prevent him from receiving benefits. Claimant decided at that point that he would accept work, even if it conflicted with his class schedule, because it was more important for him to “not be evicted from my apartment, [rather than] try and stay in school[.]” Transcript at 11.

**CONCLUSIONS AND REASONS:** Claimant was available for work during weeks 04-22 through 10-22 and was therefore eligible for benefits for those weeks.

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; and

(c) If the department determines suitable work in the individual’s customary occupation is performed:

(A) During only one shift in their labor market, the individual must be available to work during the days and hours for that work, except the individual may seek other types of suitable work that are normally performed more than one shift in their labor market, and for which they are capable of performing by virtue of experience or training, so long as they are available for at least one shift; or

(B) During more than one shift, the individual must be available to work at least one shift during the week[.]

\* \* \*

(g) For the purposes of [section (3)] of this rule, shift means the normally scheduled hours of the week in which work is performed by an employee during a full-time schedule of hours. Shifts or shiftwork may take various forms, such as day shift, swing shift, night shift, split-shift, and 24-hour shifts. Shifts are typically 5 days per week but can vary based on the occupation and labor market. The Employment Department shall define the customary days and hours the occupation is performed within the labor market of the individual.

\* \* \*

Because the Department did not pay claimant benefits for the weeks at issue, it was claimant's burden to show that he was eligible for benefits for those weeks. *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; 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).

The order under review concluded that claimant was not available for work during the weeks at issue because each of the various types of work that he sought had customary hours that conflicted with his class schedule. Order No. 22-UI-188912 at 3. Furthermore, the order under review determined that although claimant testified that he was willing to quit school after receiving decision # 95221, it was more likely than not that claimant would not have quit school to accept work because he had already invested \$6,000 into his schooling, which was non-refundable. Order No. 22-UI-188912 at 3. The record evidence does not support these conclusions.

As an initial matter, the record shows that claimant was available for work during the weeks from February 13, 2022 through March 12, 2022 (weeks 07-10 through 10-10). The record shows that after claimant received and read decision # 95221 on February 11, 2022, he decided that he would be willing to accept all work opportunities going forward regardless of whether any such opportunity conflicted with his school schedule. While claimant's change of heart would have potentially caused him to lose his \$6,000 schooling investment, claimant's testimony that he was willing to make this financial sacrifice in order to potentially receive benefits and avoid eviction from his apartment was credible. The record therefor establishes that claimant was available for work during weeks 07-10 through 10-10 for this reason alone.

However, notwithstanding his availability for work during weeks 07-10 through 10-10 prompted by his change of heart, the record also shows that claimant was otherwise available for work during all the weeks at issue. Temporary OAR 471-030-0036(3)(g) defines the term "shift" as "the normally scheduled hours of the week in which work is performed . . . during a full-time schedule of hours," and notes that "[s]hifts are typically 5 days per week[.]" The record shows that with the exception of sales representative work – which is customarily performed in claimant's labor market from 8:00 a.m. to 5:00 p.m., but *only* Monday through Friday – during the weeks at issue claimant could have performed a full-time schedule of hours, 5 days per week, for all of the other types of work he sought and without having such work interfere with his class schedule.

For example, claimant could have performed a full-time schedule of hours as a sanitation technician, 5 days per week, by being willing to accept a 4:00 a.m. to 12:00 p.m. shift, Sunday through Thursday of

each week. Such a work schedule would have fallen within the customary days and hours for sanitation technician work in claimant's labor market and would have constituted full-time work. In addition, such a work schedule would have complied with the requirement found in Temporary OAR 471-030-0036(3)(c)(A) that where work in the individual's customary occupation is performed during more than one shift, as defined in Temporary OAR 471-030-0036(3)(g), the individual must be available to work at least one shift during the week.<sup>1</sup>

Finally, this interpretation of the provisions of Temporary OAR 471-030-0036(3) is logical given the intent behind the temporary rules for availability as articulated in the temporary rule itself. In particular, a primary intent reflected in the temporary availability rules was to lower the availability burden on claimant's by "assist[ing] people whose availability to work continues to be impacted by [COVID-19]." See "Need for the Rule(s)," Temporary Administrative Order ED 4-2021. In light of this intent and the flexibility it was designed to provide, it stands to reason that an individual such as claimant, who sought – and was available to perform – full-time work during the weeks at issue as a sanitation technician, a retail clerk, a massage therapist, and/or a convenience store clerk, would be deemed available for work during those weeks. To the extent claimant was not available to perform sales representative work because of the conflict it would have created with his class schedule, it would be illogical to find him unavailable during the weeks at issue given the stated intent behind Temporary OAR 471-030-0036(3), and under the circumstances of this case.

Because the record shows that claimant was available for work during weeks 04-10 through 10-10, claimant is eligible for benefits for those weeks.

**DECISION:** Order No. 22-UI-188912 is set aside, as outlined above.

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

**DATE of Service:** June 7, 2022

**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](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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<sup>1</sup> Similarly, the record shows that during the weeks at issue claimant could have performed full-time work as a retail clerk, a massage therapist, and/or a convenience store clerk by working 5 days a week from Sunday through Thursday. Such a work schedule would not have interfered with his Friday and Saturday class schedule, would have been consistent with the normal days and hours for each of these types of work, and otherwise would have complied with the requirements of Temporary OAR 471-030-0036(3)(c).

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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 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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