

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1069

Reversed
Benefits Payable During the Break Period

PROCEDURAL HISTORY: On August 4, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was denied benefits from July 17 through September 3, 2022, 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 # 84858). Claimant filed a timely request for hearing. On October 5, 2022, ALJ Janzen conducted a hearing, and on October 6, 2022 issued Order No. 22-UI-204486, affirming decision # 84858. On October 21, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On July 17, 2022, claimant filed an initial claim for unemployment insurance benefits. The Department determined that claimant's base year was April 1, 2021 through March 31, 2022, and that her weekly benefit amount was \$619. During her base year, claimant worked for the employer, Beaverton School District # 48J, and Multnomah County School District (MCS), both of which were educational employers. Claimant did not have wages in her base year from any non-educational employers.

(2) Claimant subsequently claimed benefits for the weeks from July 17 through September 3, 2022 (weeks 29-22 through 35-22).

(3) Claimant began working for the employer as a substitute teacher in 2016, and became a certified substitute teacher in 2017. During the 2021-2022 academic year, claimant worked for the employer as a substitute teacher. In particular, claimant worked for the employer as a long-term certified substitute teacher from August 29 through November 22, 2021 and a deployable substitute teacher from November 23, 2021 through June 2022. During that academic year, the employer paid claimant about \$37 per hour as a long-term certified substitute teacher and about \$29 per hour as a deployable substitute teacher. Claimant's highest gross weekly earnings while working for the employer during that academic year were about \$1,480.

(4) During the 2021-2022 academic year, MCSD paid for claimant to receive training in relation to her substitute teacher certification. Claimant did not directly perform work for MCSD.

(5) During the 2021-2022 academic year, the employer did not tell claimant that they intended to bring her back as a substitute teacher in the following academic year. By practice, the employer did not offer annual contracts to any substitute teachers until the beginning of the academic year in which the contract is effective, and did not hire for deployable substitute teachers until October or November of the academic year.

(6) The employer's recess period between the 2021-2022 and 2022-2023 academic years was June 21, 2022 through September 2, 2022.

(7) On or around September 12, 2022, the employer offered claimant a long-term substitute teacher contract for the 2022-2023 academic year, which paid approximately \$39 per hour. Prior to receiving this offer, claimant did not know whether the employer would offer her work for the 2022-2023 academic year.

(8) During a fact-finding interview with a Department representative, claimant "indicated that there was a significant shortage of substitutes in the District currently, suggesting that there should be [a] pretty... strong... probability or likelihood of her obtaining or securing similar work... for the next academic year." Transcript at 10.

CONCLUSIONS AND REASONS: Claimant did not have reasonable assurance of continuing employment during the employer's break period between the 2021-2022 and 2022-2023 academic years. Benefits for any weeks claimed during the period of June 21, 2022 through September 2, 2022 are payable to claimant if she 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.

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:

- (a) The week prior to the holiday or vacation period when the week(s) claimed commenced during a holiday or vacation period.
- (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.
- (c) The last academic year or term when the week(s) claimed commenced during a recess between non-consecutive academic terms or years when there is a specific agreement providing for services between regular, but not successive terms.

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).
- (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:

- (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 order under review correctly concluded that was "not unemployed" for purposes of ORS 657.100 during at least one week of the 2021-2022 academic year because she earned more than her weekly benefit amount during at least one week of the academic year. Order No. 22-UI-204486 at 3. However, the order under review further concluded that claimant had reasonable assurance of performing the same or similar services for the employer in the 2022-2023 academic year as she had performed in the previous academic year, and therefore was ineligible for benefits during the employer's break period. Order No. 22-UI-204486 at 4-5. The record does not support this conclusion.

In order for claimant to have had reasonable assurance of returning to the same or similar work in the following academic year, the employer (or any other educational employer) must have, among other factors, made an offer of such employment during or prior to the break between academic terms.¹ Under OAR 471-030-0075(1)(a), such an offer may be written, oral, or implied. The record does not show that any such offer was made to claimant either during the 2021-2022 academic year or at any point during the break between academic years. Rather, claimant did not learn until September 12, 2022—about a week into the new academic year—that the employer had decided to offer her a contract for that year.

To be clear, the record suggests that claimant reasonably believed that the employer would likely offer her work as a substitute teacher for the 2022-2023 academic year, as she had worked for the employer for several years, and the school district had a shortage of substitute teachers. However, a reasonable belief based on claimant’s own assessment of the circumstances does not equal an offer of employment. Even an implied offer of employment—which OAR 471-030-0075 permits—requires some measure of action on the part of the employer. In this context, the dictionary definition of “imply” means “to express indirectly.”² The record does not show that the employer even indirectly expressed to claimant, prior to the beginning of the 2022-2023 academic year, that any particular work would be available to her during that academic year. Absent such evidence, claimant did not have reasonable assurance during the break between academic years, and therefore was eligible for benefits for any weeks claimed during that period if she is otherwise eligible.

DECISION: Order No. 22-UI-204486 is set aside, as outlined above.

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

DATE of Service: January 5, 2023

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.

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.

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¹ *See, e.g., 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”).

² *See, e.g.,* <https://www.merriam-webster.com/dictionary/imply>

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.

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