

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1060

Affirmed
Benefits Not Payable During the School Recess Period

PROCEDURAL HISTORY: On July 19, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was denied unemployment insurance benefits from July 2, 2023 through July 15, 2023 (weeks 27-23 through 28-23), during a school recess period, because he was likely to return to work for the employer after the break, and his wages and/or hours with non-educational employers were not sufficient to entitle him to benefits during the break (decision # 111955). Claimant filed a timely request for hearing. On September 8, 2023, ALJ Ramey conducted a hearing at which the employer failed to appear, and on September 15, 2023, issued Order No. 23-UI-236007, modifying decision # 111955 by concluding that claimant was denied benefits for the period of July 2 through September 9, 2023 (weeks 27-23 through 36-23). On September 20, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant submitted a written argument as a narrative contained in the web form he used to file his September 20, 2023, application for review. Claimant also submitted a written argument in the form of a letter addressed to EAB and in the form of a letter addressed to the Department, which claimant faxed to the Office of Administrative Hearings (OAH), who forwarded the letter to EAB. EAB did not consider the argument forwarded from OAH because claimant did not declare that he provided a copy of his argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). Claimant's arguments in the web form and the letter addressed to EAB contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's arguments in the web form and the letter addressed to EAB to the extent they were based on the record.

FINDINGS OF FACT: (1) During the 2022-2023 academic year, claimant worked for High Desert Education Service District (the employer), in an instructional capacity as a substitute teacher for the

school districts of Bend, La Pine, and Redmond, Oregon. The employer was an education service district established under Oregon law.

(2) The availability of the substitute teacher work claimant performed was unpredictable, as work only became available when a teacher was absent. When such an absence occurred, the employer posted the substitute job on a mobile app, available to be viewed by anyone on their substitute list. The employer then assigned the job on a first-come, first-serve basis to whichever individual on the list inquired about the job posting first. Once the employer assigned a job to a substitute teacher, the job was subject to being withdrawn up to an hour before the substitute teacher's arrival at the school.

(3) Claimant did not have a contract to work for the employer for the 2023-2024 academic year. However, in early May 2023, the employer sent claimant an email asking him to confirm that he wanted to remain on their substitute list and remain able to work the next academic year as a substitute teacher. The employer's email called for a response only if claimant wanted to be taken off the substitute list. Claimant wanted to remain on the substitute list, so he did not respond to the email.

(4) The employer's 2022-2023 academic year ended on June 16, 2023. On that date, claimant stopped working for the employer. The summer recess period began on June 16, 2023, and continued through September 5, 2023.

(5) On July 3, 2023, claimant filed an initial claim for unemployment insurance benefits. The Department determined that claimant had a monetarily valid claim for benefits.

(6) The Department assessed whether claimant had a monetarily valid claim for benefits by considering the wages he earned during his base year. Claimant's base year consisted of the second quarter of 2022, the third quarter of 2022, the fourth quarter of 2022, and the first quarter of 2023. All of the wages claimant earned during his base year were received in return for services he performed as a substitute teacher for the employer. Claimant did not have any wages from non-educational employers in his base year. In the 2022-2023 academic year, claimant had earnings which exceeded his weekly benefit amount during at least one week.

(7) Claimant claimed benefits for the weeks of July 2, 2023, through September 9, 2023 (weeks 27-23 through 36-23). These are the weeks at issue. The Department did not pay claimant benefits for the weeks at issue.

CONCLUSIONS AND REASONS: Benefits for the weeks at issue are not payable because they are based upon services for an educational institution performed by claimant in an instructional capacity, the weeks at issue occurred during a school recess period between academic years, and claimant had reasonable assurance that he would perform services in an instructional capacity in the next academic year.

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.”

Benefits based on such services shall be denied as specified in ORS 657.167(1) and (2) where the individual performing the services for the educational institution is an employee of an education service district established by ORS chapter 334. ORS 657.167(3). Since the employer was an education service district and claimant was their employee who worked in an instructional capacity as a substitute teacher for multiple central Oregon school districts, ORS 657.167(1) and (2) apply to claimant. *See* Oregon Employment Department, UI Benefit Manual § 536 (Rev. 08/02/02) (“Instructional—This category includes anyone teaching students in formal classroom and seminar situations, as well as substitute teachers and people who tutor students in independent research and learning.”). Moreover, per OAR 471-030-0074(4)(b) (effective April 20, 2022), as relevant here, ORS 657.167 applies when the individual claiming benefits was “not unemployed,” as defined by ORS 657.100, during the term prior to the recess period at issue.

In sum, the conditions that must be met for the between-terms school recess denial to apply to claimant are the following: (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.

The first condition is met because the weeks at issue are the weeks of July 2, 2023, through September 9, 2023 (weeks 27-23 through 36-23), which commenced during the school recess period of June 16, 2023, through September 5, 2023. The second condition is met as well. Under ORS 657.100(1), an individual is not “unemployed” if, in any week, their earnings exceed their weekly benefit amount. The record shows that in the 2022-2023 academic year, claimant earned more than his weekly benefit amount during at least one week.

As to the third condition, that is, whether claimant had reasonable assurance of returning to work during the 2023-2024 academic year, OAR 471-030-0075 (April 29, 2018), in pertinent part, states as follows:

- (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 record shows that claimant's circumstances satisfy the elements of OAR 471-030-0075(1). As to OAR 471-030-0075(1)(a), the employer's email asking claimant to confirm that he wanted to remain on their substitute list was an implied offer of employment as a substitute teacher for the 2023-2024 academic year. In claimant's written argument, claimant argued that the employer's "substitute list does not constitute a formal agreement, and I haven't received a copy of it or made any agreements regarding it." Written Argument Letter at 3. However, there need not be a formal agreement to establish reasonable assurance in the substitute teaching context. The Oregon Court of Appeals has held that a written notice from an employer to an individual expressing an intent to employ them as a substitute in the next academic year is sufficient. *See Slominski v. Employment Division*, 77 Or. App. 142, 147 (1985) (holding that a form letter notifying the claimant of intent to re-employ them as a substitute teacher for the next academic year suffices and reasonable assurance does not require "a mutual commitment to future employment"); *see also Johnson v. Employment Division*, 59 Or. App. 626, 628, 632 (1982) (reasonable assurance present where claimant mailed form letter that school district intended to employ him on the same basis as a substitute teacher for the ensuing academic year). Here, the employer's email confirmed that claimant remained on their substitute list because it called for a response if claimant wanted to be taken off the list. Claimant did not respond because he wished to stay on the list. Like the form letters giving notice of substitute teacher employment in the next academic year in *Slominski* and *Johnson*, the employer's email in this case was sufficient to establish an implied offer of employment as a substitute teacher for the 2023-2024 academic year.

As to subpart (1)(b) of the rule, the implied offer of employment the employer conveyed via the email was for claimant to work as a substitute teacher in the 2023-2024 academic year, just as he had in the 2022-2023 academic year. Thus, the offer of substitute teacher work in the 2023-2024 academic year was for work in the same or similar capacity. In claimant's written argument, claimant asserted this provision was not met, stating "as of today 09/20/2023 I have not returned to work in a similar capacity" and advising that he was earning less as a substitute in 2023-2024 compared to the 2022-2023 academic year. Written Argument Letter at 1, 3. Although, as of the date he drafted his written argument, claimant may have received fewer substitute teaching assignments compared to the 2022-2023 academic year, per OAR 471-030-0075(1)(b), the term "same or similar capacity" simply refers to the type of services provided, i.e., whether it is in an "instructional, research or principal administrative capacity" as stated in ORS 657.167. Here, the offer was for substitute teacher work for 2023-2024, which is instructional in nature, and therefore in the same capacity as the instructional work claimant performed as a substitute teacher in 2022-2023.

Subpart (1)(c) of the rule requires that the economic conditions of the offer not be considerably less in the following academic year. In his written argument, claimant argued that the economic conditions of the employer's implied offer of substitute work was considerably less for the 2023-2024 academic year, asserting that "my current pay has decreased to 88% of what I received last year." Written Argument Letter at 3. Under the rule, however, the economic conditions of the offer of substitute teacher work for the 2023-2024 academic year were not "considerably less" than that of the 2022-2023 academic year. The employer's email contained no information suggesting that the offer of substitute teaching work for

2023-2024 would differ in terms of its economic conditions from 2022-2023. The email implicitly offered the substitute teaching work subject to the same economic conditions that governed the 2022-2023 academic year: that the work would only become available when a teacher was absent and was subject to whether claimant inquired about the job posting before someone else. The record does not contain evidence of claimant's rate of pay for the substitute teacher work in either academic year. Claimant did not assert that his rate of pay per substitute teaching assignment changed from the 2022-2023 academic year to the 2023-2024 academic year. It is therefore reasonable to conclude that it remained the same from one academic year to the next. Although, as of the date he drafted his written argument, claimant may have received fewer substitute teaching assignments compared to the 2022-2023 academic year, the Oregon Court of Appeals has held that the fluctuating nature of substitute teacher work does not operate to negate whether a claimant has reasonable assurance of work during the ensuing academic year. *Slominski*, 77 Or. App. at 146 ("The nature of substitute teaching is that the teacher does not know before the beginning of the school year how many days he actually will work. Despite that uncertainty as to the quantity of work, substitute teaching in both the year preceding and the year succeeding a summer recess will disqualify a teacher from benefits during the recess.").

The remaining elements of OAR 471-030-0075, subparts (2) and (3), reflect ORS 657.167's language that *either* a contract *or* reasonable assurance to perform services during the ensuing academic year is sufficient to invoke the statute. Here, the employer's implied offer of substitute teaching work for the 2023-2024 academic year was not a contract, so OAR 471-030-0075(2), which elaborates upon what is sufficient to be a contract within the meaning of ORS 657.167, is not applicable.

Instead, reasonable assurance to perform services during the ensuing academic year is the operative concept here. In the context of substitute teaching, case law controls whether an offer of substitute teaching work for the next academic year is sufficient to amount to reasonable assurance. In *Johnson*, the claimant worked as a substitute teacher during the 1980-1981 academic year. 59 Or. App. at 628. The employer school district sent the claimant a form letter offering substitute teaching work for the 1981-1982 academic year and requesting he check a box indicating whether he wished to remain on the substitute list. *Johnson*, 59 Or. App. at 628. The Oregon Court of Appeals concluded that the claimant in that case "was a substitute teacher in the year immediately preceding the summer recess for which he claims benefits, and for the year immediately following he has 'reasonable assurances' that he will again be a substitute teacher if he remains on the active substitute list." *Johnson*, 59 Or. App. at 632. Therefore, the Court concluded, the claimant performed services in the same capacity for two successive academic years, "falling directly within the ORS 657.167 disqualification." *Johnson*, 59 Or. App. at 632. In *Slominski*, the claimant was a substitute teacher in the 1983-1984 academic year, the employer sent the claimant a form letter advising of their intent to employ her as a substitute in the 1984-1985 academic year, and the Court held that reasonable assurance was present, noting that mutual commitment to future employment was not necessary and the employer's notification was sufficient. 77 Or. App. at 146-147.

Here, similar to *Johnson*, claimant received a communication from the employer requesting confirmation that he wished to remain on the substitute list and calling for a response if claimant wanted to be taken off the list. Also, as in *Slominski*, it is not necessary for the employer and claimant to mutually agree to future employment because the employer's unilateral notice of their intent to re-employ claimant as a substitute teacher in the next academic year was sufficient to establish reasonable

assurance. Based on these precedents, the employer's email provided reasonable assurance to claimant of substitute teacher work in the 2023-2024 academic year.

Accordingly, benefits for the weeks at issue are not payable because they are based upon services for an educational institution performed by claimant in an instructional capacity, the weeks at issue occurred during a school recess period between academic years, and claimant had reasonable assurance that he would perform services in an instructional capacity in the next academic year. Claimant is not eligible to receive unemployment insurance benefits for the weeks at issue.

DECISION: Order No. 23-UI-236007 is affirmed.

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

DATE of Service: November 8, 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.

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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 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

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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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