

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0709

Reversed & Remanded

PROCEDURAL HISTORY: On August 14, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not eligible to receive unemployment insurance benefits during his school recess period of June 7, 2024, through August 23, 2024, because his employer was an educational institution, and his wages and hours from non-educational employers were not sufficient to entitle him to benefits during the break (decision # L0005603052). Claimant filed a timely request for hearing. On September 11, 2024, ALJ Frank conducted a hearing at which the employer failed to appear, and on September 19, 2024, issued Order No. 24-UI-266830, modifying decision # L0005603052 by concluding that claimant was not eligible to receive benefits for the weeks of June 9, 2024, through August 24, 2024 (weeks 24-24 through 34-24). On October 5, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that he provided a copy of his argument to the opposing party as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also 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 as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

The parties may offer new information into evidence at the remand hearing. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

FINDINGS OF FACT: (1) During the 2023-2024 academic year, claimant worked for School District 549C (the employer) as a special education teaching assistant.

(2) The employer's 2023-2024 academic year ended on June 7, 2024. On that date, claimant stopped working for the employer. The summer recess period began on June 7, 2024, and continued until August 23, 2024.

(3) In June 2024, as the end of the academic year drew near, the employer offered claimant a contract to resume working as a special education teaching assistant for the 2024-2025 academic year, beginning in August 2024, at the same capacity as he had for the 2023-2024 school year. Claimant accepted the offer and signed the contract.

(4) In early June 2024, claimant filed an initial claim for unemployment insurance benefits.¹ The Department determined that claimant had a monetarily valid claim for benefits with a weekly benefit amount of \$279.

(5) 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 2023, the third quarter of 2023, the fourth quarter of 2023, and the first quarter of 2024. All of the wages claimant earned during his base year were for services he performed as a special education teaching assistant for the employer. Claimant did not have any wages from non-educational employers in his base year.

(6) In the 2023-2024 academic year, claimant worked 35 hours per week for the employer. During the academic year, claimant's earnings exceeded his weekly benefit amount during at least one week.

(7) Claimant claimed benefits for the weeks of July 28, 2024, through August 17, 2024 (weeks 31-24 through 33-24). These are the weeks at issue. The Department did not pay claimant benefits for the weeks at issue.

(8) In August 2024, at the beginning of the next academic year, claimant resumed working for the employer as a special education teaching assistant working 35 hours per week.

CONCLUSIONS AND REASONS: Order No. 24-UI-266830 is reversed, and this matter remanded for further proceedings consistent with this order.

ORS 657.167(1) prohibits 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." ORS 657.167(1) further provides, "All services by an individual for an institution shall be deemed in instructional, research, or principal administrative capacity if at least 50 percent of the individual's time is spent in such activities."

¹ EAB has taken notice of this fact, which is contained in Employment Department records. OAR 471-041-0090(1). Any party that objects to our taking notice of this information must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the noticed fact will remain in the record.

However, under ORS 657.010(10), “Instructional capacity” does not include services performed as an instructional assistant as defined in ORS 342.120. ORS 342.120(7) defines “Instructional assistant” as “a classified school employee who does not require a license to teach, who is employed by a school district or education service district and whose assignment consists of and is limited to assisting a licensed teacher in accordance with rules established by the Teacher Standards and Practices Commission.”²

As relates to an employee who works “other than [in] an instructional, research or principal administrative capacity,” prior to January 1, 2024, ORS 657.221(1)(b) prohibited benefits based upon services for an educational institution performed by such 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. Prior to the enactment of SB 489 (2023), ORS 657.221 read, in pertinent part, as follows:

(1)(a) Benefits based on services performed in other than an instructional, research or principal administrative capacity for an educational institution or institution of higher education shall be payable to an individual in the same amount, on the same terms and subject to the same conditions as benefits payable on the basis of other service subject to this chapter.

(b) Notwithstanding paragraph (a) of this subsection, benefits shall not be paid on the basis of such services for any week of unemployment that commences during a period between two successive academic years or terms if the individual performs such services in the first academic year or term and there is a reasonable assurance that the individual will perform any such services in the second academic year or term for any institution.

* * *

However, with the enactment of SB 489 (2023), ORS 657.221 was amended, effective January 1, 2024, to extend eligibility for benefits during school recess periods to employees working for an educational institution if they are not primarily employed in an instructional, research, or principal administrative capacity.

With the passage of SB 489, effective January 1, 2024, ORS 657.221 now reads, in pertinent part, as follows:

(1) Benefits based on services performed in other than an instructional, research or principal administrative capacity for an educational institution or institution of higher education shall be payable to an individual in the same amount, on the same terms and subject to the same conditions as benefits payable on the basis of other service subject to this chapter.

* * *

² See also OAR 584-005-0005(20) (January 1, 2021) (defining “Instructional Assistant or Educational Assistant or Teaching Assistant” as “A non-licensed position of employment in a school district assigned to assist a licensed teacher in a supportive role in the classroom working directly with students.”).

Thus, an employee of an educational institution who performs services other than in an instructional, research or principal administrative capacity is eligible for benefits during break or recess periods regardless of whether their employer has provided them with reasonable assurance to return to work, provided the employee meets all other eligibility criteria each week they claim benefits.

Applying the amended statute, the analysis in this case requires an assessment of whether claimant, employed as a special education teaching assistant, was an instructional assistant as defined by ORS 342.120(7). If he was, then the services he performed for the employer were not services in an instructional capacity and ORS 657.167(1) does not apply to him. Instead, the services claimant performed for the employer would constitute services performed in other than an instructional capacity. Services performed for an educational institution in other than an instructional capacity implicate ORS 657.221(1). Under that provision, as amended by SB 489, an individual who performs services for an educational institution in other than an instructional capacity is entitled to benefits without any special limitation owing to their status as a school employee. Thus, if claimant meets the definition of an instructional assistant under ORS 342.120(7), he would be eligible for benefits for the weeks at issue, so long as he is otherwise eligible.

On the other hand, if claimant's work as a special education teaching assistant amounted to services performed in an instructional capacity, claimant would be subject to ORS 657.167(1). Moreover, per OAR 471-030-0074(4)(b) (effective September 1, 2021), 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.

Therefore, if claimant's work amounted to services performed in an instructional capacity and ORS 657.167(1) is applicable, 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.

As to the third condition, that is, whether claimant had reasonable assurance of returning to work during the 2024-2025 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).

(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.

* * *

The order under review deemed claimant ineligible to receive benefits for the weeks of June 9, 2024, through August 24, 2024 (weeks 24-24 through 34-24), concluding that claimant worked in an instructional capacity for the employer during the 2023-2024 academic year and then resumed working in that capacity for the employer during the 2024-2025 academic year. Order No. 24-UI-266830 at 3, 5. The order also concluded that claimant was not unemployed during the academic term prior to the recess period because during the 2023-2024 academic year claimant earned more than his weekly benefit amount during at least one week. Order No. 24-UI-266830 at 3. The order also concluded that claimant had reasonable assurance of work in the same or similar capacity during the term following the recess period. Order No. 24-UI-266830 at 2, 5.

The record supports some of these conclusions. First, the weeks claimed occurred during a period between two academic terms, as they fell during the school recess period of June 7, 2024, through August 23, 2024. Second, under ORS 657.100(1), an individual is not “unemployed” during any week in which their earnings exceed their weekly benefit amount. The record shows that in the 2023-2024 academic year, claimant earned more than his weekly benefit amount during at least one week. Third, claimant had reasonable assurance of returning to work during the term following the recess period given that the employer offered claimant a contract to resume working as a teaching assistant at the beginning of the 2024-2025 academic year, at the same rate of pay and number of hours per week. Further, claimant resumed working for the employer at that time, supporting an inference that the 2024-2025 employment contract the employer offered him was non-contingent.

However, the record as developed does not support that ORS 657.167(1) is applicable to claimant because the record is insufficiently developed to determine whether claimant performed services for the employer in an instructional capacity. Remand is therefore necessary.

On remand, the ALJ should ask questions to determine whether claimant worked as an “Instructional assistant” for the employer, as that term is defined by ORS 342.120(7). To that end, the ALJ should inquire whether claimant was a classified school employee, whether claimant’s position as a special education teaching assistant required a license to teach, and whether his job assignment involved assisting a licensed teacher consistent with the rules of the Teacher Standards and Practices

Commission.³ If the record on remand establishes that claimant was an instructional assistant as defined by ORS 342.120(7), claimant is not subject to ORS 657.167(1) and would be eligible for benefits for the weeks at issue, so long as he meets other eligibility criteria.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether claimant performed services for the employer in an instructional capacity and therefore is subject to ORS 657.167(1) and (2), Order No. 24-UI-266830 is reversed, and this matter is remanded.

DECISION: Order No. 24-UI-266830 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: October 23, 2024

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 24-UI-266830 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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³ The administrative rules of the Teacher Standards and Practices Commission are set forth under Chapter 584 of the Oregon administrative rules. Under OAR 584-210-0020(1) (January 1, 2016), “A teacher of record performs one or more of the following tasks: plans instruction, establishes a classroom climate conducive to learning, implements plans for instruction, evaluates student achievement, and appropriately directs instructional assistants.” Per OAR 584-210-0020(6), appropriately directing instructional assistants includes, but is not limited to, “delegate[ing] specific instructional tasks to be performed for individual students or groups of students, in accordance with the skills and abilities of each instructional assistant[.]”



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.

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