

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0728

Reversed & Remanded

PROCEDURAL HISTORY: On June 28, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was ineligible to receive unemployment insurance benefits from June 9, 2024 through August 24, 2024 (weeks 24-24 through 34-24), a school recess period, because the employer was an educational institution, and her wages and hours from non-educational employers were not sufficient to entitle her to benefits during the break (decision # L0004805820).¹ Claimant filed a timely request for hearing. On September 18, 2024, ALJ Frank conducted a hearing at which the employer failed to appear, and on September 26, 2024, issued Order No. 24-UI-267492, affirming decision # L0004805820. On October 16, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that she provided a copy of her 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 her 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, such as the information contained in claimant's written argument, 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.

¹ Decision # L0004805820 stated that the employer's school recess period was from June 5, 2024, through August 23, 2024, and that claimant's wages and hours from other employers were not enough to monetarily establish a claim for benefits, but did not specify the resulting period of weeks for which claimant was ineligible for benefits. Given the dates of the school recess period, however, it can be inferred that the Department intended to find claimant ineligible for benefits for weeks 24-24 through 34-24, pursuant to ORS 657.167(1) and (2).

FINDINGS OF FACT: (1) Grants Pass School District # 7, an educational employer, employed claimant as an educational assistant for the 2023-2024 academic year. The employer's recess period between the 2023-2024 and 2024-2025 academic years was June 5, 2024, through August 23, 2024. Claimant worked five days per week, six hours per day.

(2) On June 3, 2024, claimant filed an initial claim for unemployment insurance benefits. The Department determined that claimant's weekly benefit amount was \$293, with a base year consisting of all four calendar quarters of 2023. Claimant's only wages reported for her base year were from the employer. Claimant had no base-year wages from non-educational employers. For the first quarter of 2024, the employer reported that claimant earned \$6,509.80 in gross wages and worked 318 hours.

(3) After claimant filed her initial claim, the Department mailed claimant a questionnaire regarding claimant's work for the employer. In her response, claimant indicated, in relevant part, that she had earned wages in excess of her weekly benefit amount during at least one week of the 2023-2024 academic year; that she had reasonable assurance of returning to work for the employer in the following academic year; and that she intended to return to work for the employer on August 22, 2024. Claimant also indicated in her response that her job duties included assisting K-5 teachers in their classrooms, providing one-on-one instruction and support for students, "recess duty," "check-out duty," and working as an emergency substitute teacher. Audio Record at 12:37.

(4) Claimant claimed benefits for the weeks of June 9, 2024, through July 20, 2024 (weeks 24-24 through 29-24). These are the weeks at issue. The Department did not pay claimant benefits for the weeks at issue.

CONCLUSIONS AND REASONS: Order No. 24-UI-267492 is reversed, and this matter remanded for further proceedings consistent with this order.

ORS 657.167(1) prohibits the payment of benefits based on service for an educational institution performed in an instructional, research, or principal administrative capacity "for any week of unemployment commencing during the period between two successive academic years [or terms]" if the claimant "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) also 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." OAR 471-030-0075 (April 29, 2018) sets forth the criteria for determining whether a claimant has reasonable assurance.

However, under ORS 657.010(10), "Instructional capacity" does not include services performed as an instructional assistant as defined in ORS 342.120. Further, 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."

ORS 657.221(1), which was amended effective January 1, 2024, extends 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. ORS 657.221(1) provides, “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

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:

* * *

(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.

* * *

The record shows that claimant could not have established a monetarily-valid claim for benefits without the use of wages from the employer, which was an educational employer, because claimant did not have any non-educational wages in her base year.

Furthermore, the employer reported that they paid claimant \$6,509.80 in gross wages for the first quarter of 2024 and that she worked 318 hours during that quarter. Based on this report, it can be inferred that claimant earned an average of approximately \$20.47 per hour during the first quarter of 2024. As claimant worked 30 hours per week, she therefore earned approximately \$614.10 per week during the first quarter of 2024. That calendar quarter was wholly within the 2023-2024 academic year. It is therefore reasonable to infer that claimant earned more than her weekly benefit amount of \$293 during at least one week of that academic year. Therefore, the record shows that claimant was not “unemployed” during the 2023-2024 academic year within the meaning of OAR 471-030-0074(3)(b).

In order to conclude whether or not claimant’s wages may be used to pay benefits for the break between academic years, two additional determinations must be made: first, whether claimant’s work for the employer during the 2023-2024 academic year was in an “instructional capacity”; and, if so, whether claimant had reasonable assurance of returning to work for the employer in the following academic year. The record as developed is insufficient to make either of these determinations.

² This version of ORS 657.221 became effective January 1, 2024, and is applicable to benefit weeks after that date, including the weeks at issue.

Instructional Capacity. Claimant worked for the employer as an educational assistant, which suggests that her role would meet the definition of “instructional assistant” under ORS 342.120(7). If claimant’s position is properly characterized as an “instructional assistant,” then, under ORS 657.010(10), claimant was not acting in an “instructional capacity,” she would be eligible for benefits during the break period under ORS 657.221(1). However, if claimant’s work as an educational assistant amounted to services performed in an instructional capacity and not as an “instructional assistant,” claimant would be subject to ORS 657.167(1). If the provisions of ORS 657.167(1) are 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.

On remand, further inquiry should be made into claimant’s job title and assignments performed; whether claimant had additional job titles or performed assignments outside the scope of ORS 342.120(7) and, if so, what percentage of time was devoted to instructional assistant assignments; whether claimant was licensed to teach; and, if so, whether any assignments she performed required such a license. If the record on remand shows that claimant did not devote at least 50 percent of time worked to assignments in an “instructional capacity,” any determination of whether claimant was eligible for benefits during the weeks at issue should be made in accordance with ORS 657.167(1) and ORS 657.221(1).³

Reasonable Assurance. OAR 471-030-0075 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).

³ At hearing, claimant gave conflicting answers regarding what percentage of her work time she devoted to instructional work, and expressed confusion as to the inquiry the ALJ made on that point. *See* Audio Record at 16:40. On remand, the ALJ should explain the inquiry on that point carefully.

(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.

* * *

If the record on remand shows that claimant did not meet the definition of “instructional assistant,” and shows instead that claimant’s work amounted to services performed in an instructional capacity such that 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.

The order under review concluded, “Reasonable assurance existed in this case, in that claimant fully expected to resume working for the employer as an educational assistant following the recess period. There is no evidence of a contrary argument from any party. In the event, claimant returned to work as expected. Because claimant had reasonable assurance of working for an educational employer during the 2024-2025 academic year in the same or similar capacity as that in which she worked during the academic year preceding the summer recess period at issue, she is not eligible to receive benefits based on school wages during the recess.” Order No. 24-UI-267492 at 4–5. This reasoning, and the record as developed, is insufficient to show that claimant had reasonable assurance.

The order under review appeared to rely on claimant’s having expected to return to work for the employer as an educational assistant in the following academic year, and ultimately returning as expected, to conclude that claimant had reasonable assurance. It should be noted, however, that the reasonable assurance analysis does not rest on an individual’s subjective belief that they will be returning in the same capacity in the following year. Neither can the fact that an individual *has* returned to work in the same capacity that year be used to prove whether, at the relevant point in time (i.e., *prior* to the beginning of the following academic year), the individual had reasonable assurance.⁴

On remand, if the record shows that claimant did not meet the definition of “instructional assistant” and worked in an “instructional capacity” at least 50 percent of the time, inquiry should be made in accordance with the provisions of OAR 471-030-0075 to determine whether claimant had reasonable assurance. In particular, this inquiry should include claimant’s rate of pay in the 2023-2024 academic year;⁵ the rate of pay offered for the 2024-2025 academic year; whether the employer offered claimant an enforceable, non-contingent contract to perform services in the same or similar capacity in the 2024-2025 academic year; if not, whether the employer made claimant a non-contractual offer of employment for the 2024-2025 academic year; whether any such offer was contingent upon factors within the employer’s control; whether the totality of the circumstances showed that it was highly probable, *at the time any offer of work was made to claimant*, that there would be a job available to claimant in the 2024-2025 academic year; and, regardless of whether an offer of work for the 2024-2025 academic year was considered a contract, when the employer made any such offer to claimant.

⁴ See *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”).

⁵ While claimant’s reported gross wages for the first quarter of 2024 were offered into evidence at hearing, it is preferable to develop the record to show claimant’s actual rate of pay during the entirety of the academic year.

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 was eligible to receive benefits during the employer's school recess period, Order No. 24-UI-267492 is reversed, and this matter is remanded.

DECISION: Order No. 24-UI-267492 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: November 7, 2024

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 24-UI-267492 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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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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