

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0754

Late Application for Review Allowed
Reversed
Eligible Weeks 25-24 through 34-24

PROCEDURAL HISTORY: On July 15, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was denied unemployment insurance benefits from June 16, 2024 through August 24, 2024 (weeks 25-24 through 34-24), a school recess period, because claimant was likely to return to work for the employer after the break, and claimant's wages and/or hours with other employers were not sufficient to entitle her to benefits during the break (decision # L0005069909).¹ Claimant filed a timely request for hearing. On September 17, 2024, ALJ Frank conducted a hearing at which the employer failed to appear, and on September 25, 2024, issued Order No. 24-UI-267333, affirming decision # L0005069909. On October 15, 2024, Order No. 24-UI-267333 became final without claimant having filed an application for review with the Employment Appeals Board (EAB). On October 27, 2024, claimant filed a late application for review with EAB.

EVIDENTIARY MATTER: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence is the statement included with claimant's application for review explaining why it was filed late, and has been marked as EAB Exhibit 1, and a copy provided to the parties with this decision. Any party that objects to our admitting EAB Exhibit 1 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 exhibit will remain in the record.

FINDINGS OF FACT: (1) Dallas School District No. 2 employed claimant as a special education assistant, including during the employer's 2023-2024 academic year.

¹ Decision # L0005069909 listed the recess period as June 14, 2024 through August 24, 2024, so it is presumed that the decision intended to state that claimant was ineligible for benefits for weeks 25-24 through 34-24.

(2) Claimant worked 7 hours per day and 5 days per week during the 2023-2024 academic year. Claimant's job duties included approximately one hour per day of instruction, and the remainder of her time was spent assisting a licensed teacher and helping with recess and in the cafeteria.

(3) Prior to the conclusion of the 2023-2024 academic year, the employer assured claimant that she could return to work in the same position and under the same or better financial conditions in the 2024-2025 academic year. The employer's recess between academic years was from June 14, 2024, through August 24, 2024.

(4) On June 19, 2024, claimant filed an initial claim for unemployment insurance benefits. The Department determined that the claim was monetarily valid with a weekly benefit amount (WBA) of \$459, and that the four quarters of the 2023 calendar year constituted her base year. Claimant had wages only from the employer during her base year. Claimant earned \$24.16 per hour during the base year and earned more than her WBA during at least one week of the 2023-2024 academic year. Claimant claimed benefits for the weeks of June 16, 2024, through August 24, 2024 (weeks 25-24 through 34-24). These are the weeks at issue. The Department did not pay claimant benefits for the weeks at issue.

(5) On September 25, 2024, Order No. 24-UI-267333 was mailed to claimant's address of record on file with the Office of Administrative Hearings (OAH). Claimant received the order shortly thereafter. Order No. 24-UI-267333 stated, "You may appeal this decision by filing the attached form Application for Review with the Employment Appeals Board within 20 days of the date that this decision is mailed." Order No. 24-UI-267333 at 5. Order No. 24-UI-267333 also stated on its Certificate of Mailing, "Any appeal from this Order must be filed on or before October 15, 2024, to be timely."

(6) On September 27, 2024, the Department issued decision # L0006349659, which purported to amend decision # L0006059909 by correcting the start date of the ineligibility period from June 14, 2024, to June 16, 2024, apparently to conform to the conclusions of Order No. 24-UI-267333. Decision # L0006349659 stated that claimant had the right to request a hearing by October 17, 2024.²

(7) On October 17, 2024, claimant filed a request for hearing on decision # L006349659. The Department's notes show that on October 25, 2024, the Department notified claimant that they had rejected her request for hearing because decision # L0006349659 did not have appeal rights, and advised that an application for review of Order No. 24-UI-267333 was claimant's only means of appealing the conclusions of both documents.³

(8) On October 27, 2024, claimant filed a late application for review of Order No. 24-UI-267333 with EAB.

² EAB has taken notice of these facts, which are 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 facts will remain in the record.

³ EAB has taken notice of these facts, which are 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 facts will remain in the record.

CONCLUSIONS AND REASONS: Claimant’s late application for review is allowed. Claimant’s base year wages were not based on service for an educational institution performed in an instructional, research, or principal administrative capacity, and claimant is eligible to receive benefits during the employer’s recess between academic years based on those wages.

Late application for review. An application for review is timely if it is filed within 20 days of the date that the Office of Administrative Hearings (OAH) mailed the order for which review is sought. ORS 657.270(6); OAR 471-041-0070(1) (May 13, 2019). The 20-day filing period may be extended a “reasonable time” upon a showing of “good cause.” ORS 657.875; OAR 471-041-0070(2). “Good cause” means that factors or circumstances beyond the applicant’s reasonable control prevented timely filing. OAR 471-041-0070(2)(a). A “reasonable time” is seven days after the circumstances that prevented the timely filing ceased to exist. OAR 471-041-0070(2)(b). A late application for review will be dismissed unless it includes a written statement describing the circumstances that prevented a timely filing. OAR 471-041-0070(3).

The application for review of Order No. 24-UI-267333 was due by October 15, 2024. Because claimant’s application for review was filed on October 27, 2024, it was late.

Claimant included an explanation for the late filing with her application for review. This explanation, along with the Department’s records, suggest that the Department’s issuance of decision # L0006349659 during the timely filing period led claimant to reasonably but mistakenly believe that Order No. 24-UI-267333 had been superseded by the administrative decision and that claimant had the right to request a second hearing to challenge the identical conclusions of both documents. It can reasonably be inferred that this led claimant to file what would have been a timely request for hearing on decision # L0006349656 on October 17, 2024, rather than filing an application for review of Order No. 24-UI-267333 by the October 15, 2024, deadline. The Department’s issuance of decision # L0006349656 with erroneous and misleading information about her right to appeal its conclusions, which were identical to the conclusions of Order No. 24-UI-267333, was a circumstance beyond claimant’s reasonable control that prevented timely filing of an application for review. Therefore, good cause has been shown to extend the deadline for timely filing.

The Department’s records showed that claimant was informed on October 25, 2024, that her request for hearing on decision # L0006349656 had been rejected and that she had to file an application for review of Order No. 24-UI-267333 to challenge the identical conclusions of both documents. Less than seven days later, on October 27, 2024, claimant filed her late application for review with EAB. Therefore, claimant’s late application for review was filed within a “reasonable time” after the circumstance that prevented timely filing ended. Accordingly, claimant’s late application for review is allowed.

Educational institution wages. 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) 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.”⁴

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 monetarily established a claim for benefits without the use of wages from the employer, that she was not “unemployed” during the 2023-2024 academic year within the meaning of OAR 471-030-0074(3)(b), and that she had reasonable assurance of performing work in the same capacity during the 2024-2025 academic year as in the prior academic year. The order under review concluded that claimant’s benefits, if paid, would have been based on work for an educational employer in an instructional capacity and that she was therefore subject to the ineligibility provisions of ORS 657.167(1) for the weeks at issue. Order No. 24-UI-267333 at 3. The record does not support this conclusion.

The Department’s representative testified that their records showed that claimant earned more than her WBA during at least one week of the 2023-2024 academic year, and that she had therefore not been unemployed during the relevant period under OAR 471-030-0074(3). Audio Record at 19:04. Claimant did not rebut this testimony. The representative further testified that the employer, an educational

⁴ 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 in this matter.

institution, was the only employer that paid claimant wages during her base year, that claimant had reasonable assurance of returning to work during the 2024-2025 academic year in the same capacity as the previous year, and that she worked in an instructional capacity. Audio Record at 17:23, 17:56, 18:42. Claimant agreed with this testimony except that she rebutted the assertion that she had worked at least 50 percent of the time in an instructional capacity. Audio Record at 23:50.

Claimant explained that she spent no more than one hour per day giving instruction and spent the majority of her time “assisting” a licensed teacher and doing “recess duties” and “cafeteria duties.” Audio Record at 24:40. This testimony is consistent with claimant having performed the duties of an “instructional assistant” as defined in ORS 342.120(7) for more than 50 percent of the time worked, and is sufficient to rebut the Department representative’s testimony characterizing her work as “instructional.” As “instructional capacity” does not include services performed as an instructional assistant, claimant’s eligibility for benefits during the recess between academic years is governed by ORS 657.221(1) rather than ORS 657.167(1). Accordingly, claimant is eligible to receive benefits during that recess period, which occurred during the weeks at issue, even though the benefits are based on her work for an educational institution.

DECISION: Order No. 24-UI-267333 is set aside, as outlined above.

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

DATE of Service: November 22, 2024

NOTE: This decision reverses the ALJ’s order denying claimant benefits. Please note that in most cases, payment of benefits owed will take about 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 stated above.** See ORS 657.282. For forms and information, visit <https://www.courts.oregon.gov/courts/appellate/forms/Pages/appeal.aspx> and choose the appropriate form under “File a Petition for Judicial Review.” You may also contact the Court of Appeals by telephone at (503) 986-5555, by fax at (503) 986-5560, or by mail at 1163 State Street, Salem, Oregon 97301.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. If you are unable to complete the survey online and wish to have 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 محكمة الاستئناف 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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 Email: appealsboard@employ.oregon.gov
 Website: www.Oregon.gov/employ/pages/employment-appeals-board.aspx

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