

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BRENDA L PULLEN
Claimant

HY-VEE INC
Employer

APPEAL 16A-UI-02979-NM-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/07/16
Claimant: Appellant (6)

Iowa Code §96.5(2)a – Discharge for Misconduct
Iowa Code § 17A.12(3) – Default Decision
Iowa Admin. Code r. 871-26.14(7) – Dismissal of Appeal on Default

STATEMENT OF THE CASE:

The claimant/appellant, Brenda Pullen, filed an appeal from the February 26, 2016 (reference 01) unemployment insurance decision that concluded she was not eligible for unemployment insurance benefits. Notices of hearing were mailed to the parties' last-known addresses of record for a telephone hearing scheduled for March 29, 2016 at 11:00 a.m. On March 28, 2016, the claimant submitted written notice that she had another job and was not available until 12:00 p.m. Claimant requested the hearing be postponed. The employer's representative was contacted, and agreed to be available and have his witnesses available at 12:00 p.m. on March 29, 2016. A voice message was left at the number provided by the claimant at approximately 12:50 p.m. on March 28, 2016, informing her that her request to move the hearing back an hour was granted and the hearing would begin at 12:00 p.m. on March 29, 2016. A review of the Appeals Bureau's conference call system indicates that the appellant failed to respond at the telephone number she provided at the time the hearing was scheduled to begin. The employer followed the instructions on the hearing notice. The employer's representative and witnesses were present and prepared to proceed with the hearing as scheduled. Because the claimant/appellant failed to follow the instructions on the notice of hearing, and make herself available via the telephone number she provided at the time and date scheduled for her appeal hearing, no hearing was held.

ISSUE:

Should the appeal be dismissed based on the appellant's failure to appear and participate?

FINDINGS OF FACT:

The parties were properly notified of the scheduled hearing for this appeal. Upon the request of the claimant, the hearing start time was pushed back one hour to 12:00 p.m. The appellant failed to answer the administrative law judge's call at the telephone number she provided at the time scheduled for this appeal hearing. She was not available at the telephone number she provided for the scheduled hearing as required by the hearing notice. She did not request another postponement of the hearing or otherwise indicate that her requested time would no longer work. No hearing was held.

The hearing notice instruction specifically advises parties:

Immediately register your phone number online or by calling one of the numbers provided below for a telephone hearing scheduled for:

Date: TUESDAY, MARCH 29, 2016

Iowa Time: 11:00 A.M.

The judge will not call you on the day of the hearing if you have not registered your phone number with the Appeals Bureau in Des Moines, Iowa as instructed below.

The back page of the hearing notice provides further instruction and warning:

If you do not participate in the hearing because you do not register for the hearing, register late, or cannot be reached at the number you provided when the judge calls for the hearing, the appeal may be dismissed or decided based on other available evidence. **The judge will not call you unless you register online or by phone before the hearing and give your phone number to the Appeals Bureau as instructed on the front side of this notice.** This is true even if agency representatives previously contacted you directly or you provided your phone number on some written documentation.

The record was left open for a grace period of 50 minutes after the hearing start time to give the appellant a *reasonable* opportunity to participate. Allowing additional time would prejudice the non-appealing party for appearing in a timely manner. Holding the appellant in default for failure to appear and participate during a 50-minute window after the hearing start time is reasonable considering the time allocated for each unemployment hearing. Allowing this additional time period is more than reasonable under the circumstances.

The unemployment insurance decision had concluded that the claimant was not eligible for unemployment insurance benefits.

REASONING AND CONCLUSIONS OF LAW:

The Iowa Administrative Procedure Act at Iowa Code § 17A.12(3) provides in pertinent part:

If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and make a decision in the absence of the party. If a decision is rendered against a party who failed to appear for the hearing and the presiding officer is timely requested by that party to vacate the decision for good cause, the time for initiating a further appeal is stayed pending a determination by the presiding officer to grant or deny the request. If adequate reasons are provided showing good cause for the party's failure to appear, the presiding officer shall vacate the decision and, after proper service of notice, conduct another evidentiary hearing. **If adequate reasons are not provided showing good cause for the party's failure to appear, the presiding officer shall deny the motion to vacate.**

Agency rules at Iowa Admin. Code r. 26.14(7) provides:

If a party has not responded to a notice of telephone hearing by providing the appeals bureau with the names and telephone numbers of the persons who are participating in the hearing **by the scheduled starting time of the hearing** or is not available at the telephone number provided, the presiding officer may proceed with the hearing. If the appealing party fails to provide a telephone number or is unavailable for the hearing, the presiding officer may decide the appealing party is in default and dismiss the appeal as provided in Iowa Code § 17A.12(3). The record may be reopened if the absent party makes a request to reopen the hearing under subrule 26.8(3) and shows good cause for reopening the hearing.

a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.

b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire ex parte as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. **The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.**

c. **Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.** (Emphasis added.)

The Iowa Supreme Court has opined that a default should not be set aside for ordinary negligence or want of ordinary care. Defaults should not be set aside where the movant ignores plain instruction with ample opportunity to comply. See *Houlihan v. Emp't Appeal Bd.*, 545 N.W.2d 863 (Iowa 1996). Here the clear directive is to read the hearing notice and register a telephone number where the party can be reached for the hearing. The second part of that directive is to be available at the number provided at the date and time of the hearing. Further, if the party misses or does not receive the hearing call, he or she may call the telephone numbers on the hearing notice. Due process requires notice and an opportunity to be heard, both of which were provided to each party. *The rule does not provide exceptions for good intentions and/or a party contacting the Appeals Bureau within a 'reasonable' or certain amount of time after the hearing is scheduled.* It is assumed an appellant intends to participate in the hearing simply by the fact that an appeal is filed, but the appellant's responsibility does not end there. Each party is required to follow the prominent specific written instructions printed on the hearing notice. The appellant filed the appeal and is held solely responsible for going forward with the case in a prompt and deliberate manner. The rule holds an appellant in default if not present *at the start* of hearing. Here, the hearing time was postponed to a time specifically requested by the appellant. As a courtesy, appellant was granted an additional 50-minute grace period not required by statute or rule. Here, notwithstanding notice, a one-hour postponement, opportunity, and additional time, the appellant failed to prosecute the case at the appointed date and time without providing a good-cause reason for the delay or failure to do so. Accordingly, the appellant is in default and the appeal shall be dismissed. Iowa Code § 17A.12(3) and Iowa Admin. Code r. 24.14(7). The unemployment insurance decision remains in full force and effect.

If the appellant does not intend to pursue this appeal, she need not take any action. If she intends to pursue this appeal, the appellant must make a written request to the administrative law judge that the hearing be reopened within 15 days after the mailing date of this decision. The written request should be mailed to the administrative law judge at the address listed at the end of this decision and must explain the emergency or other good cause that prevented the appellant from participating in the hearing at its scheduled time. The appellant also has the option to appeal the decision directly to the Employment Appeal Board at the address listed in the caption appeal rights information.

DECISION:

The February 26, 2016 (reference 01) unemployment insurance decision denying benefits remains in effect, as the appellant is in default, and the appeal is dismissed.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/can