

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

GREGORY LEVERETTE
Claimant

K & M JANITORIAL SERVICES INC
Employer

APPEAL NO. 21A-UI-25433-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 03/14/21
Claimant: Respondent (2R)**

Iowa Code Section 96.6-2 - Timeliness of Protest

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 12, 2021, reference 02, decision that allowed benefits to the claimant provided he was otherwise eligible, that held the employer's account could be charged for benefits, and that held the employer's protest could not be considered because it was untimely. After due notice was issued, a hearing was held by telephone conference call on January 14, 2022. Claimant, Gregory Leverette, participated.

Andre McKay represented the employer. Exhibit I was received into evidence. The administrative law judge took official notice of the notice of claim/protest received and processed by Iowa Workforce Development. The administrative law judge left the hearing record open through the end of January 14, 2022 for the limited purpose of allowing the employer to present fax transmission documentation reflecting transmission of the protest to Iowa Workforce Development on April 5, 2022. The employer did not submit the fax transmission record for the administrative law judge's consideration.

ISSUE:

Whether the employer's protest of the claim for benefits was timely.

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: On March 26, 2021, Iowa Workforce Development mailed a notice of claim concerning the above claimant to the employer's address of record. The notice of claim contained a warning that any protest must be postmarked, faxed or returned by the due date set forth on the notice, which was April 5, 2021. The notice of claim was received at the employer's Des Moines address of record in a timely manner, prior to the deadline for protest. On April 4, 2021, Andre McKay, Business Development, reviewed the claimant's personnel file in preparation for submitting a protest. On April 5, 2021, Mr. McKay completed the employer's protest information on the notice of claim form and signed to certify the accuracy of the information. At 5:00 p.m. on April 5, 2021, Mr. McKay faxed the protest to Iowa Workforce Development at one of the designated protest fax numbers. Mr. McKay received a fax transmission report that confirmed successful

transmission of the protest. Iowa Workforce Development Customer Service erroneously stamped the protest as being received on April 6, 2021 and stamped the protest as late.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.6(2) provides, in pertinent part:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant.

Another portion of this same Code section dealing with timeliness of an appeal from a representative's decision states that such an appeal must be filed within ten days after notification of that decision was mailed. In addressing an issue of timeliness of an appeal under that portion of this Code section, the Iowa Supreme Court held that this statute prescribing the time for notice of appeal clearly limits the time to do so, and that compliance with the appeal notice provision is mandatory and jurisdictional. *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979). The administrative law judge considers the reasoning and holding of the court to be controlling on this portion of that same Iowa Code section which deals with a time limit in which to file a protest after notification of the filing of the claim has been mailed.

Iowa Administrative Code Rule 871-24.8(2)(a) and (b) provide as follows:

- (2) Responding by employing units to a notice of the filing of an initial claim or a request for wage and separation information and protesting the payment of benefits.
 - a. The employing unit which receives a Form 65-5317, Notice of Claim, or a Form 68-0221, Request for Wage and Separation Information, must, within ten days of the date of the notice or request, submit to the department wage or separation information that affects the individual's rights to benefits, including any facts which disclose that the individual separated from employment voluntarily and without good cause attributable to the employer or was discharged for misconduct in connection with employment.
 - b. The employing unit may protest the payment of benefits if the protest is postmarked within ten days of the date of the notice of the filing of an initial claim. In the event that the tenth day falls on a Saturday, Sunday or holiday, the protest period is extended to the next working day of the department. If the employing unit has filed a timely report of facts that might adversely affect the individual's benefit rights, the report shall be considered as a protest to the payment of benefits.

Iowa Administrative Code Rule 871-24.35(1) provides:

Date of submission and extension of time for payments and notices.

- (1) Except as otherwise provided by statute or by division rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the division shall be considered received by and filed with the division:
 - a. If transmitted via the United States Postal Service on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark of the

envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.

b. If transmitted via the State Identification Data Exchange System (SIDES), maintained by the United States Department of Labor, on the date it was submitted to SIDES.

c. If transmitted by any means other than those outlined in paragraphs 24.35(1)"a" and "b", on the date it is received by the division.

Iowa Administrative Code Rule 871-24.35(2) provides:

Date of submission and extension of time for payments and notices.

(2) The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the division that the delay in submission was due to division error or misinformation or to delay or other action of the United States postal service.

a. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

b. The division shall designate personnel who are to decide whether an extension of time shall be granted.

c. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the department after considering the circumstances in the case.

d. If submission is not considered timely, although the interested party contends that the delay was due to division error or misinformation or delay or other action of the United States postal service, the division shall issue an appealable decision to the interested party.

The employer's protest was timely. The employer's protest was filed on April 5, 2021, the date Iowa Workforce Development received the faxed protest and date documented in the employer's fax transmission record. The administrative law judge found the employer's testimony regarding the timely steps taken to transmit and confirm successful transmission of the protest to be credible. Iowa Workforce Development Customer Service erroneously stamped the protest as being received on April 6, 2021 and erroneously stamped the protest as late. Because the protest was timely, this matter will be remanded to the Benefits for a fact-finding interview to address the claimant's May 20, 2020 separation from the employer.

DECISION:

The November 12, 2021, reference 02, decision is reversed. The employer's protest was timely. This matter is **remanded** to the Benefits Bureau for a fact-finding interview to address the claimant's eligibility for benefits and the employer's liability for benefits in connection with the May 20, 2020 separation.

A handwritten signature in cursive script that reads "James E. Timberland". The signature is written in black ink on a light gray rectangular background.

James E. Timberland
Administrative Law Judge

February 11, 2022
Decision Dated and Mailed

jet/mh