

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**DAVID V PEAVLER
503 – 7TH AVE
PRESCOTT IA 50859**

**ADVANCE SERVICES INC
C/O TALX UCM SERVICES INC
PO BOX 66864
ST LOUIS MO 63166-6864**

**Appeal Number: 05A-UI-04679-RT
OC: 04-03-05 R: 03
Claimant: Appellant (2)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-3 – Failure to Accept Work
Section 96.4-3 – Required Findings (Able and Available for Work)

STATEMENT OF THE CASE:

The claimant, David V. Peavler, filed a timely appeal from an unemployment insurance decision dated April 21, 2005, reference 02, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on May 20, 2005, with the claimant participating. Mindy Shackelford, Human Resources Coordinator, participated in the hearing for the employer, Advance Services, Inc. Employer's Exhibits One and Two were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. This appeal was consolidated with appeal number 05A-UI-05358-RT, for the purposes of the hearing with the consent of the

parties. That appeal dealt with an overpayment of unemployment insurance benefits. Although no notice was sent to the parties for that appeal or that issue, the parties permitted the administrative law judge to take evidence on, and decide, if necessary, whether the claimant is overpaid unemployment insurance benefits under Iowa Code section 96.3-7. The parties waived further notice of that issue.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One and Two, the administrative law judge finds: The employer is a temporary employment agency. The claimant was assigned to Cardinal Glass beginning June 21, 2004. This assignment was a temporary to hire position. The assignment was on the third shift from 11:00 p.m. to 7:00 a.m. and paid \$11.25 per hour for a 40-hour week with overtime possibilities. Cardinal Glass is located in Greenfield, Iowa, approximately 30 miles from the claimant's residence in Prescott, Iowa. Generally, Cardinal Glass will hire as its own employee a temp worker who has worked between six months and one year. On April 5, 2005, the claimant was temporarily laid off from this position for a couple of weeks. Although there was no guarantee that the claimant or other temp workers would be recalled, the employer and the claimant expected the layoff to be between two and three weeks and the claimant would be recalled. The employer even offered employees who were assigned to Cardinal Glass the opportunity to keep their insurance coverage in effect for two weeks pending their return to Cardinal Glass and continued payments by the employee to the employer. The claimant did not have insurance and, therefore, was not involved in this but was aware that other employees were offered such an arrangement. The claimant was recalled and went back to work for Cardinal Glass on April 20, 2005, where he is still employed. At all material times hereto the claimant hoped, and still does, that he would be taken on as a permanent employee.

The claimant informed the employer of his layoff within three working days of his layoff but did not remember the date. On April 5, 2005, the employer by telephone call offered the claimant another position with Kraft Foods in Creston, Iowa which is only 20 miles from the claimant's residence in Prescott, Iowa. This position paid between \$9.00 per hour and \$11.00 per hour depending upon the shift that the claimant selected. The claimant had an option for a third shift which would have the same hours as the claimant had at Cardinal Glass. The claimant refused this offer because he wanted to wait to return to Cardinal Glass. If the claimant had accepted the position with Kraft Foods, he would not have been able to return to Cardinal Glass. The claimant believed that he was on the verge of being hired permanently by Cardinal Glass and wanted to maintain the opportunity for such employment. The claimant was also offered by telephone call a position with Wellman's Dynamics in Creston, Iowa on the third shift with the same hours as the claimant had with Cardinal Glass. This position was also temp-to-hire and paid \$10.50 per hour for a 40-hour week. The claimant did not accept this position for the same reason he refused to accept the position with Kraft Foods.

The claimant had placed no physical restrictions or training restrictions on his ability to work. The claimant had placed no restrictions on the times or days or shifts when he could or could not work including his availability for work except that at least temporarily he was holding out to be recalled by Cardinal Glass. The claimant liked his job with Cardinal Glass and preferred that employment to the other employment offers made by the claimant. The claimant was not earnestly and actively seeking work by making two in-person job contacts each week because he fully expected to be re-hired by Cardinal Glass and ultimately was. The employer has a policy as shown at Employer's Exhibit Two requiring that he notify the employer within three working days after the end of an assignment and seek reassignment or he would be considered

to have voluntarily quit and his failure to do so could affect his eligibility for unemployment insurance benefits. The claimant's average weekly wage for unemployment insurance benefit purposes is \$440.35.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant is disqualified to receive unemployment insurance benefits because he refused to accept suitable work. The claimant is not disqualified to receive unemployment insurance benefits because he did not refuse to accept suitable work.
2. Whether the claimant is ineligible to receive unemployment insurance benefits because at relevant times he was not able, available, and earnestly and actively seeking work and was subject to such requirements. The claimant is not ineligible to receive unemployment insurance benefits for these reasons because he was excused from the provisions requiring him to be available for work and earnestly and actively seeking work and he has remained able to work.

Iowa Code section 96.5-3-a provides:

An individual shall be disqualified for benefits:

3. Failure to accept work. If the department finds that an individual has failed, without good cause, either to apply for available, suitable work when directed by the department or to accept suitable work when offered that individual. The department shall, if possible, furnish the individual with the names of employers which are seeking employees. The individual shall apply to and obtain the signatures of the employers designated by the department on forms provided by the department. However, the employers may refuse to sign the forms. The individual's failure to obtain the signatures of designated employers, which have not refused to sign the forms, shall disqualify the individual for benefits until requalified. To requalify for benefits after disqualification under this subsection, the individual shall work in and be paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

a. In determining whether or not any work is suitable for an individual, the department shall consider the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness, prior training, length of unemployment, and prospects for securing local work in the individual's customary occupation, the distance of the available work from the individual's residence, and any other factor which the department finds bears a reasonable relation to the purposes of this paragraph. Work is suitable if the work meets all the other criteria of this paragraph and if the gross weekly wages for the work equal or exceed the following percentages of the individual's average weekly wage for insured work paid to the individual during that quarter of the individual's base period in which the individual's wages were highest:

- (1) One hundred percent, if the work is offered during the first five weeks of unemployment.
- (2) Seventy-five percent, if the work is offered during the sixth through the twelfth week of unemployment.

(3) Seventy percent, if the work is offered during the thirteenth through the eighteenth week of unemployment.

(4) Sixty-five percent, if the work is offered after the eighteenth week of unemployment.

However, the provisions of this paragraph shall not require an individual to accept employment below the federal minimum wage.

871 IAC 24.24(1)a provides:

(1) Bona fide offer of work.

a. In deciding whether or not a claimant failed to accept suitable work, or failed to apply for suitable work, it must first be established that a bona fide offer of work was made to the individual by personal contact or that a referral was offered to the claimant by personal contact to an actual job opening and a definite refusal was made by the individual. For purposes of a recall to work, a registered letter shall be deemed to be sufficient as a personal contact.

The administrative law judge concludes that the employer has the burden to prove that the claimant has refused to accept suitable work. Norland v. Iowa Department of Job Service, 412 N.W.2d 904, 910 (Iowa 1987). Although it is a close question, the administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant refused to accept suitable work and should, therefore, be disqualified to receive unemployment insurance benefits. The evidence is uncontested that the claimant was made two bona fide offers of work by personal contact (telephone) while on temporary layoff from an assignment to Cardinal Glass. The first offer was with Kraft Foods in Creston, Iowa, approximately 20 miles from the claimant's home in Prescott, Iowa. A third shift position with the same hours as the claimant had been working at Cardinal Glass was available to the claimant and Cardinal Glass was in Greenfield, 30 miles from the claimant's home. However, the position at Kraft Foods paid between \$9.00 per hour and \$11.00 per hour. The maximum gross weekly wage paid by Kraft Foods would be \$440.00 per week. Although it is very close, this amount is less than the claimant's average weekly wage of \$440.35. The offer of the position at Kraft Foods was made in the claimant's first week of unemployment and should pay him 100 percent of his average weekly wage. Although it is close, it does not. In all other respects, the employment at Kraft Foods is suitable with the possible other exception that the claimant was waiting to be recalled by Cardinal Glass so that he could go back to work there. The claimant had already amassed over nine months of employment with Cardinal Glass and believed that after a year of employment he could be hired as a regular full-time employee which the claimant wanted very much. If the claimant had taken the position with Kraft Foods, he would have given up an opportunity to work for Cardinal Glass and to become a regular employee of Cardinal Glass. The administrative law judge concludes that for this reason also the offer with Kraft Foods was not suitable. Accordingly, the administrative law judge concludes that the position offered with Kraft Foods was not suitable and the claimant's refusal to accept the position was justified and, as a consequence, the claimant did not refuse to accept suitable work and he is not disqualified to receive unemployment insurance benefits.

The claimant was also offered a position with Wellman's Dynamics on April 14, 2005. This position was also in Creston and a third shift assignment was available to the claimant for the same hours as he had been working at Cardinal Glass. However, this position paid \$10.50 per

hour or a gross weekly wage of \$420.00 which is less than the claimant's average weekly wage of \$440.35. This offer was made in the claimant's second week of unemployment and should have paid the claimant 100 percent of his average weekly wage and it did not. The claimant refused this position for the reasons that he refused the Kraft Foods position. The administrative law judge reaches the same conclusion for this offer as the administrative law judge reached for the offer for Kraft Foods. The gross weekly wage was insufficient to establish that the Wellman's Dynamics position was suitable. Accordingly, the administrative law judge concludes that the position offered to the claimant with Wellman's Dynamics was not suitable because of the pay and because the claimant was awaiting recall to Cardinal Glass and, as a consequence, his refusal was justified. Therefore, the administrative law judge concludes that the claimant did not refuse to accept suitable work when he refused the offer of a position at Wellman's Dynamics and, as a consequence, he is not disqualified to receive unemployment insurance benefits.

It is true that both the offer of work and the refusal must occur within the claimant's benefit year but here both offers and both refusals occurred within the claimant's benefit year because the claimant established a benefit year effective April 3, 2005. See 871 IAC 24.24(8). It is also true that before a disqualification for a failure to accept work can be imposed the individual must be able to work and available for work or is not subject to such requirements. See 871 IAC 24.24(4). Hereinafter, the administrative law judge concludes that the claimant is able to work and is not subject to the requirements that he be available for work and earnestly and actively seeking work. Nevertheless, as noted above, the administrative law judge concludes that the claimant did not refuse to accept suitable work and, as a consequence, is not disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The administrative law judge concludes that the claimant has the burden of proof to show that he is able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has met his burden of proof to demonstrate by a preponderance of the evidence that he is able to work. The claimant credibly testified, and the employer's witness agreed, that the claimant has placed no restrictions on his ability to work and there is no evidence to the contrary. The administrative law judge also concludes that the claimant has met his burden of proof to demonstrate by a preponderance of the evidence that he is not subject to the requirements that he be available for work and earnestly and actively seeking work. The administrative law judge concludes on the record here that the claimant is temporarily unemployed under Iowa Code

section 96.19(38)(c) and is therefore excused from the provisions requiring him to be available for work and earnestly and actively seeking work. The administrative law judge concludes that the claimant was temporarily unemployed for a period not to exceed four consecutive weeks due to a lack of work from the claimant's regular job with the employer as assigned to Cardinal Glass where the claimant worked full time and anticipates working again full time and, in fact, is again working full time. There is nothing to indicate that the claimant's employment had been terminated.

It is true here that the employer is a temporary employment firm and that the claimant was merely assigned to Cardinal Glass. However, the claimant's assignment to Cardinal Glass was a temporary-to-hire position and he had been assigned there from June 21, 2004 until he was laid off for a lack of work on April 5, 2005, over nine months. The evidence establishes that the employer and the claimant fully expected the claimant to be recalled in two to three weeks and, in fact, he was. The employer's witness testified that the recall was not guaranteed but the administrative law judge notes that the employer agreed with employees who were similarly assigned to Cardinal Glass to keep their insurance in effect for two weeks even though the employee was not making any money and that the employee could pay the employer back when the employee went back to Cardinal Glass. This certainly seems to indicate that the employer anticipated that the layoff was only temporary. The insurance situation did not affect the claimant because he did not have insurance but nevertheless it indicates the temporary nature of the claimant's layoff. The claimant credibly testified that he needed to work for Cardinal Glass from six months to one year to be hired as a permanent employee of Cardinal Glass and that he wanted to be hired as such and had already amassed over nine months of tenure and did not want to lose that. Accordingly, the administrative law judge concludes, although the claimant's job was actually on an assignment from the employer, that the job was nevertheless his regular job and, therefore, the claimant was temporarily unemployed and was not subject to the requirements that he be available for work and earnestly and actively seeking work. The evidence does indicate that the claimant was not available for work because he was waiting to be recalled to work by a former employer, in this case the assignee, Cardinal Glass, and would not consider other suitable work which was unduly limiting the claimant's availability for work. The claimant was also not earnestly and actively seeking work. Nevertheless, the claimant is excused from the provisions requiring him to be available for work and earnestly and actively seeking work. Accordingly, the administrative law judge concludes that the claimant was able to work and was excused from the provisions requiring him to be available for work and earnestly and actively seeking work and, as a consequence, he was not ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is and was otherwise entitled to benefits.

DECISION:

The representative's decision of April 21, 2005, reference 02, is reversed. The claimant, David V. Peavler, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he did not refuse to accept suitable work and he is able to work and is excused from the provisions that require him to be available for work and earnestly and actively seeking work.

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