

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

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Appeal Number: 04A-UI-11190-RT
OC: 09-12-04 R: 04
Claimant: Respondent (1)

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)
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Van Buren Community School District, filed a timely appeal from an unemployment insurance decision dated October 8, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Michael W. Rube. After due notice was issued, a telephone hearing was held on November 8, 2004, with the claimant participating. Deb Franklin, Business Manager, and Richard Barton, Superintendent, participated in the hearing for the employer. The employer was represented by Crystal Cronk, Attorney at Law. Employer's Exhibits 1 and 2 and Claimant's Exhibit A were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development department of unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record including Employer's Exhibits 1 and 2 and Claimant's Exhibit A, the administrative law judge finds: The claimant had been employed by Fox Valley Community School District for two years as a regular elementary school teacher in a self-contained classroom for the 2002-2003 and 2003-2004 school years as shown at Claimant's Exhibit A. The claimant was primarily a fifth grade teacher with departmental responsibilities for grades four through sixth in Science. On or about January 28, 2004, a decision was finally made to reorganize and consolidate the Fox Valley Community School District with Van Buren Community School District to be effective July 1, 2004. The new school district was to keep the name Van Buren Community School District but add "of Davis and Van Buren Counties." Because of the reorganization and consolidation there were no longer sufficient regular elementary school positions for the claimant. The claimant was then reassigned to a position as a "district substitute teacher" as shown by a letter dated April 15, 2004 at Employer's Exhibit 2. The claimant was then offered a contract on May 1, 2004 as a district substitute teacher. The claimant's pay would not change and he would have full benefits but his duties would be as a substitute teacher teaching in a variety of classrooms for any regular teacher who was ill or absent from school. The claimant would not have his own self-contained classroom nor would he have his own students. On days when the claimant would not be needed as a substitute teacher, he would be expected to perform other duties as assigned. The claimant refused this position and did not return the contract offered to the claimant by June 1, 2004 which was the deadline. The claimant refused the position because he had been a regular classroom teacher and would not be continued in that position and he would be a substitute teacher teaching in a variety of classrooms to a variety of students even though the claimant was a "senior" teacher.

The claimant has placed no physical restrictions or training restrictions on his ability to work and has placed no restrictions on the days or times when he would be available for work and has been earnestly and actively seeking work while making two in-person job contacts or sending out resumes as approved by Iowa Workforce Development, every two weeks. The claimant has received no other offers of work from the employer, Van Buren Community School District, of Davis and Van Buren Counties. The claimant filed for unemployment insurance benefits effective September 12, 2004 and has received unemployment insurance benefits in the amount of \$2,638.00 as follows: \$158.00 for benefit week ending September 18, 2004 (earning \$229.00) and \$310.00 per week for eight weeks from benefit week ending September 25, 2004 to benefit week ending November 13, 2004. The claimant had no other yearly claims for unemployment insurance benefits. The claimant's average weekly wage for unemployment insurance benefit purposes is \$565.86. The offered position from the employer as a district substitute teacher would pay \$26,361.00 for 192 days of service or \$137.29 per day or a gross weekly wage of \$686.45.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant is ineligible to receive unemployment insurance benefits because he is and was at relevant times not able, available, and earnestly and actively seeking work. The claimant is not ineligible to receive unemployment insurance benefits for that reason.

2. 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 for that reason.

3. Whether the claimant is overpaid unemployment insurance benefits. The claimant is not overpaid unemployment insurance benefits.

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 preponderance of the evidence that he is and was at relevant times able, available, and earnestly and actively seeking work. The claimant credibly testified that he has placed no restrictions on his ability to work including no physical kinds of restrictions or training kinds of restrictions. The claimant also testified credibly that he has placed no restrictions on his availability for work including days or times when he could or could not work. Finally, the claimant credibly testified that he is actively and earnestly seeking work by making at least two in-person job contacts or sending out resumes as approved by Iowa Workforce Development, each week. Accordingly, the administrative law judge concludes that the claimant is able, available, and earnestly and actively seeking work and, as a consequence, he is not ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided he is otherwise entitled to such benefits.

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(8) provides:

(8) Refusal disqualification jurisdiction. Both the offer of work or the order to apply for work and the claimant's accompanying refusal must occur within the individual's benefit year, as defined in subrule 24.1(21), before the Iowa code subsection 96.5(3) disqualification can be imposed. It is not necessary that the offer, the order, or the refusal occur in a week in which the claimant filed a weekly claim for benefits before the disqualification can be imposed.

The administrative law judge concludes that the employer has the burden to prove that the claimant has refused to accept suitable work and, as a result, should be disqualified to receive unemployment insurance benefits. Norland v. Iowa Department of Job Service, 412 N.W.2d 904, 910 (Iowa 1987). 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 has refused to accept suitable work and that he should be disqualified for such refusal. According to 871 IAC 24.24(8) noted above, both the offer of work and the claimant's accompanying refusal must occur within the claimant's benefit year before a disqualification for a refusal to accept suitable work can be imposed. In this case, the evidence establishes that the offer of work made to the claimant occurred May 1, 2004 and continued through June 1, 2004 when the claimant declined or refused the offer. Iowa Workforce Development records indicate that the claimant did not file for unemployment insurance benefits and establish a benefit year until September 12, 2004. Accordingly, the administrative law judge concludes that

a disqualification to receive unemployment insurance benefits for a refusal to accept suitable work cannot be imposed upon the claimant.

Not wishing to rest solely on a procedural rule, the administrative law judge would further note that the claimant had been a regular classroom teacher teaching the fifth grade for the prior two school years, 2002-2003 and 2003-2004, with Fox Valley Community School District which was consolidated with Van Buren Community School District and renamed Van Buren Community School District of Davis and Van Buren Counties. The claimant also had responsibilities for fourth, fifth, and sixth grade Science as shown at Claimant's Exhibit A. After the reorganization or consolidation of the two school districts, the claimant's old position was no longer available. Instead, the claimant was informed by letter dated April 15, 2004 that he would be transferred to a position as "district substitute teacher," as shown at Employer's Exhibit 2. The claimant was then offered a contract for that position on May 1, 2004 as shown at Employer's Exhibit 1. The position of "district substitute teacher" was essentially just a substitute teacher where the claimant would teach in a variety of classrooms, not his own, for regular teachers who were ill or otherwise absent. However, previously, the claimant had had his own self-contained classroom and the same students. Under the new position when the claimant was not acting as a substitute teacher, he would be assigned other duties. The administrative law judge is constrained to conclude on the record here that this change in the claimant's position was not suitable. Although the claimant was on a year-to-year contract, the administrative law judge would note that had the claimant been on an extended contract that this change would have been a willful breach by the employer of his contract of hire which breach would be substantial involving drastic modifications in the type of work and location of employment and would not be just a minor change in the claimant's work routine and would justify a voluntary quit. The administrative law judge does note that the claimant's pay would not have been decreased and that he was to be paid \$26,361.00 for 192 days of service which would equal \$137.29 per day or a gross weekly wage of \$686.45 which exceeds 100 percent of the claimant's average weekly wage. The position offered would be suitable in terms of its pay but the administrative law judge is constrained to conclude that the offered position is not suitable in terms of the character of the position which is substantially different from what the claimant had had in the previous two school years. Accordingly, even if the claimant had been offered the position after having established a benefit year for unemployment insurance benefits, the offered position would not be suitable and the claimant would not have refused to accept suitable work.

In summary, the administrative law judge concludes that the claimant did not refuse to accept suitable work and even if he had he could not be disqualified to receive unemployment insurance benefits for such a refusal because the offer and refusal were not made in an unemployment insurance benefit year. Therefore, the administrative law judge concludes that the claimant is not disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided he is otherwise entitled to such benefits.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$2,638.00 since filing for such benefits effective September 12, 2004. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision dated October 8, 2004, reference 01, is affirmed. The claimant, Michael W. Rube, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he did not refuse to accept suitable work in as much as the position offered was not suitable and the claimant is able, available, and earnestly and actively seeking work. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits as a result of his refusal to accept an offer of work from the employer.

sc/b