BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

TINA M PEDERSON	:	
	:	**HEARING NUMBER:** 20B-UI-09306
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
WESLEYLIFE	:	
	:	
Employer	:	

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.4-3, 96.3-7

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Claimant appealed this case to the Employment Appeal Board. All members of the Employment Appeal Board reviewed the entire record. Two Board members find the administrative law judge's decision is correct. With the following modification, the administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED** with the following **MODIFICATION IN THE CLAIMANT'S FAVOR BUT WITHOUT EFFECT ON THE EMPLOYER**:

THE ADMINISTRATIVE LAW JUDGE'S DISCUSSION OF THE RECOVERY OF OVERPAID FPUC BENEFITS IS MODIFIED TO BE CONSISTENT WITH THE FOLLOWING DISCUSSION:

The Administrative Law Judge's discussion of the recovery of overpaid FPUC benefits is modified to be consistent with the following discussion:

The CARES Act provides:

> In the case of individuals who have received amounts of Federal Pandemic Unemployment Compensation to which they were not entitled, the State shall require such individuals to repay the amounts of such Federal Pandemic Unemployment Compensation to the State agency, **except** that the State agency may waive such repayment if it determines that—

> (A) the payment of such Federal Pandemic Unemployment Compensation was without fault on the part of any such individual; and
>
> (B) such repayment would be contrary to equity and good conscience

PL116-136, Sec. 2104(f)(2). In this case the Claimant was allowed benefits and the Employer appealed. After the hearing, the Employer prevailed. We note that Claimants are advised throughout the appeal process to continue to file weekly claims even if denied benefits. The Claimant here did so and was paid benefits until the Administrative Law Judge issued the appeal decision locking the claim. The Claimant was paid FPUC in addition to regular state benefits. We now consider whether the FPUC overpayment can be waived.

In deciding the question of fault, we will consider factors such as whether a material statement or representation was made by the Claimant in connection with the application for benefits, whether the Claimant knew or should have known that a fact was material and failed to disclose it, whether the Claimant should have known the Claimant was not eligible for benefits, and whether the overpayment was otherwise directly caused by the knowing actions of the Claimant. In deciding equity and good conscience we consider whether the overpayment was the result of a decision on appeal, and the financial hardship caused by a decision requiring overpayment. *Cf*. 871 IAC 24.50(7) (setting out factors for similar issue under TEUC from 2002). Applying these factors to the totality of the circumstances in this case including that there is no evidence of material misrepresentation, we find on this individualized basis that the **FPUC overpayment** should be waived.

The Employer should note that the Employer will not be charged for any waived FPUC.

THE BOARD PROVIDES THE FOLLOWING DISCUSSION FOR INFORMATIONAL PURPOSES:

We point out to the Claimant that although the Claimant is denied benefits under state unemployment law, **this does not bar receipt of certain special pandemic related benefits**. In fact, being ineligible from state unemployment benefits is a prerequisite to some of these benefits. Of particular interest to the Claimant is Pandemic Unemployment Assistance [PUA]. That law provides benefits to persons who are unavailable for work due to certain pandemic related reasons, or who lost work as a direct result of the Pandemic. Such persons may be able to collect PUA during any week this situation persists, going back to February 8, 2020 (for a maximum of 39 weeks). The federal Department of Labor has instructed that **eligible persons would include**:

> a) The individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and is seeking a medical diagnosis. ...
> b) A member of the individual's household has been diagnosed with COVID-19. ...
> c) The individual is providing care for a family member or a member of the individual's household who has been diagnosed with COVID-19. ...

UIPL 16-20, Attachment 1.

(https://wdr.doleta.gov/directives/attach/UIPL/UIPL_16-20_Attachment_1.pdf).

It is further our understanding that federal law requires all PUA claims to be backdated to as early as February 8, depending on when the applicant's CVOID-related unavailability or job loss began. The upshot is that if Claimant can make the necessary PUA showing Claimant may very well be eligible for PUA for any qualifying week. **Our ruling today is no bar to PUA.** Our ruling on the separation would mean if the Claimant can get PUA then once the Claimant comes off PUA the Claimant would have to requalify by earning 10 times the weekly benefit amount before Claimant could receive state unemployment benefits.

Should the Claimant wish to apply for PUA, and the information on how to do so is found at: https://www.iowaworkforcedevelopment.gov/pua-information .

DECISION: The decision of the Administrative Law Judge dated **October 13, 2020** is **AFFIRMED AS MODIFIED IN THE CLAIMANT'S FAVOR** but with **NO EFFECT ON THE EMPLOYER.**

The overpayment of $4,200 in FPUC benefits is hereby waived, and the Claimant has no obligation to pay back those benefits. The Claimant continues to be obliged to repay the overpayment of $4,500 in state benefits at this time. The Employer will not be charged for waiver of FPUC since FPUC is a federally funded benefit. In all other respects the decision of the Administrative Law Judge is affirmed.

Lastly, we would note the Claimant's argument about on call benefits in the base period is misplaced. That argument is backward looking to the base period. The regulation cited by Claimant deals with whether or not a claimant was, in the past, even job attached. If the claimant is purely an on-call worker then, under the regulation, they are not job attached in the past, and in the present (the benefit year) this means they are not **unemployed**.

In order to be eligible, the wage requirements are not high – with a claim date of March 2020 all that is required is over $1,660 in the high quarter, and $830 in the second high quarter. So, consider an on-call teacher who earns enough to be eligible, and then experiences weeks of total unemployment, as happens to a substitute teacher. Part-time regulations on being employed at the same hours and wages would not prevent the substitute teacher from collecting total unemployment. Yet the school districts would be supplying the "same employment" and so could be relieved of charges. This would leave the balancing fund paying for benefits for the ordinary and expect down time of an on-call substitute worker. Thus, the rules of the Department provide that "[a]n individual whose wage credits earned in the base period of the claim consist exclusively of wage credits by performing on-call work, such as a banquet worker, railway worker, substitute school teacher or any other individual whose work is solely on-call work during the base period, is **not considered an unemployed individu**al …." 871 IAC 24.22(i)(3)(emphasis added). What this regulation means is that if all the credits in the base period, from every employer, are for on-call work then the claimant is **not considered unemployed** and would thus not ever be eligible for unemployment benefits based on that base period. This would **not** be a finding that the worker is unavailable for work during the benefit year, but would be a finding that the worker is not an "unemployed individual" and so is not eligible for benefits. The case at bar is totally different.

If a worker is *currently* on-call, but in the base period was full-time then clearly that worker *is* an unemployed individual and rule 24.22(i)(3) does not deny benefits. But with this worker we have the totally separate issue of whether the worker is able and available for work. Even unemployed individuals will not be eligible for benefits if they are not both able and available for work **on the same basis as during the base period.**

On ability the regulations states:

> 24.22(1)(b). Interpretation of ability to work. The law provides that an individual must be able to work to be eligible for benefits. This means that the individual must be physically able to work, not necessarily in the individual's customary occupation, but able to work in some reasonably suitable, comparable, gainful, full-time endeavor, other than self-employment, which is generally available in the labor market in which the individual resides.

871 IAC 24.22.

On availability the regulations provide:

> 24.22(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.
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> a. Shift restriction. The individual does not have to be available for a particular shift. **If** an individual is available for work on the **same basis on which the individual's wage credits were earned** and if after considering the restrictions as to hours of work, etc., imposed by the individual there exists a reasonable expectation of securing employment, then the individual meets the requirement of being available for work.
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> …
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> f. Part-time worker, student—other. Part-time worker shall mean any individual who has been in the employ of an employing unit and has established a pattern of part-time regular employment which is subject to the employment security tax, and has accrued wage credits while working in a part-time job. If such part-time worker becomes separated from this employment for no disqualifiable reason, and providing such worker has reasonable expectation of securing other employment for the same number of hours worked, no disqualification shall be imposed under Iowa Code section 96.4(3). **In other words, if an individual is available to the same degree and to the same extent as when the wage credits were accrued, the individual meets the eligibility requirements of the law.**
>
> 871 IAC 24.22.
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> Thus, a claimant collecting benefits on full-time wage credits may not limit her availability to only part-time work. Were it otherwise someone who has full-time credits could decide to only look for part-time jobs while collecting full benefits. Plus, they could quit those jobs any time they like

without consequence since the quit disqualification does not apply to supplemental part-time work. 871 IAC 24.27(1). Even worse such a claimant would not even have to accept any of the part-time work applied for. A person on benefits is disqualified for refusing suitable work, but under the statute the wage rate has to be enough to be "suitable." So, for example, if occurring in the first five weeks of employment an offer has to be for work that is 100% of the "gross weekly wages" earned in the base period. Iowa Code §96.5(3)(a)(1)(a); *see Biltmore Enterprises, Inc. v. Iowa Dept. of Job Service*, 334 N.W.2d 284, 287 (Iowa, 1983). So, assume a claimant works full-time in the base period and is laid off. Now that claimant is either injured and unable to work full-time, or simply chooses to move to part-time to spend more time with family etc.. If such a claimant could look exclusively for part-time work at the same wage rate or lower, then that claimant could turn all of it down because the weekly pay is too little. And this could go on indefinitely since the lowest the person ever has to accept is 65% of the gross weekly wage from the base period. Furthermore, the person could accept part-time work and collect partial benefits thus using the unemployment fund to supplement a choice, or even a medical need, to go to a part-time schedule. While social security retirement income, and disability benefits (and now PUA) may be designed for such uses, the Employment Security Law is not, and so we deny regular state benefits.

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Ashley R. Koopmans

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James M. Strohman

AMG/fnv