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

WILLIAM S GRAY

Claimant

and

IWD QUALITY CONTROL

HEARING NUMBER: 19BUI-03462

EMPLOYMENT APPEAL BOARD DECISION

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: 96.3-7

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds the administrative law judge's decision is correct. 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**.

The Board affirms the Administrative Law Judge but adds the following analysis as additional explanation for the decision:

The confusion faced by the Claimant in this case is caused by the difference between “wages for insured work” which are the only earnings counted when trying to figure out how much benefits should be, and “earnings” which are counted for deciding if one has met the weekly earnings limit. 871 IAC 24.1(41)(“Earnings limit. An amount equal to the weekly benefit amount plus $15.”)

Determining Benefits: Wages For Insured Work

One of the requirements for being eligible for benefits is that the Claimant must have adequate wages in the base period of the claim. The basic idea is that person who is not actively in the labor market is not "unemployed" and should not receive unemployment compensation if they lose some miscellaneous temporary work. Further the law seeks to assure, as an actuarial matter, that sufficient payroll tax has been collected on the claimant's wages prior to filing for benefits. To meet these goals the Code requires that a minimum amount of wages (qualifying wages) be earned in the recent past (the base period).

Once an initial claim is filed this defines the applicable benefit year and base period, which in turn define monetary eligibility, and affect the weekly benefit amount. The key regulatory concept of the base period and benefit year are defined by statute:

> 3. "Base period" means the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim.
>
> 4. "Benefit year". The term "benefit year" means a period of one year beginning with the day with respect to which an individual filed a valid claim for benefits. Any claim for benefits made in accordance with section 96.6 , subsection 1, shall be deemed to be a valid claim for the purposes of this subsection if the individual has been paid wages for insured work required under the provisions of this chapter.

Iowa Code §96.19(3)-(4). Essentially the base period determines what, if any, wage credits can be drawn upon during the benefit year. The base period is a period of time *before* the original claim date, and the benefit year is the year starting on the original claim date and going *forward*.

As noted, in order to be monetarily eligible a claimant must meet certain minimum earnings requirements. Iowa Code §96.4. Section four of chapter 96 provides, in part:

> An unemployed individual shall be eligible to receive benefits with respect to any week only **if the department finds that**:
>
> 4. a. The individual has been **paid wages for insured work** during the individual's **base period in an amount** at least one and one-quarter times the wages paid to the individual during that quarter of the individual's base period in which the individual's wages were highest; provided that the individual has been paid wages for insured work totaling at least three and five-tenths percent of the statewide average annual wage for insured work, computed for the preceding calendar year if the individual's benefit year begins on or after the first full week in July and computed for the second preceding calendar year if the individual's benefit year begins before the first full week in July, in that calendar quarter in the individual's base period in which the individual's wages were highest, and the individual has been paid wages for insured work totaling at least one-half of the amount of wages required under this paragraph in the calendar quarter of the base period in which the individual's wages were highest, in a calendar quarter in the individual's base period other than the calendar quarter in which the individual's wages were highest. The calendar quarter wage requirements shall

be rounded to the nearest multiple of ten dollars.

The bold-faced language makes clear that not all money paid in the base period counts towards qualifying wages. It must be money in the form of "wages for insured work." Under Iowa Code §96.19(27) "'[i]nsured work' means employment for employers." While this definition seems self-explanatory, it is actually very technical. This is because both "employment" and "employer" are also defined by Code. And both definitions are quite lengthy.

An "employer" includes an "employing unit which … paid wages for service in employment…" Iowa Code §96.16(a). The term "employing unit" is also defined, and it does include "this state and its political subdivisions, state agencies, boards, commissions, and instrumentalities thereof…" Iowa Code §96.17. Then "employment" is defined and includes "service performed by an individual in the employ of a government entity unless specifically excluded from the definition of employment for a government entity…" Iowa Code §96.18(a)(4). So unpacking this, the City is political subdivision of the state and thus an employing unit. It also clearly has individuals performing services, such as the police and fire fighters, who are not excluded. Thus the City is an "employing unit" that has paid wages for services in "employment" (but not necessarily to the Claimant), and so is an "employer."

So far so good for the Claimant, but now we come to the exceptions to the term "employment." Recall that to be "insured work" it must be "employment" for an "employer." We have found the City is an "employer" as it pays *some* workers for "employment." But it is not enough that the City be an employer. It must also be that the Claimant's position as an elected City council member be "employment." On this issue, the Code provides:

> For the purposes of subparagraphs (4) [government work] and (5) [religious and charitable organizations], the term "**employment" does not apply to service performed**…(f) In the employ of a governmental entity, if such service is performed by an individual in the exercise of the individual's duties **as an elected official**…

So the Code excludes services performed as an elected official from the definition of "employment." Since it is not "employment," work performed by an elected official in the exercise of his duties is not "employment for employers," which means it does not meet the definition of "insured work." So this means that the money paid by the City cannot be used to qualify the Claimant for benefits, and cannot be used in the benefit calculation.

Without going in the nitty gritty suffice it that the Claimant's job at Convergeone, Inc. paid him more than enough to be eligible for benefits. His monetary eligibility was thus not affected by exclusion of the City monies.

As far as the *amount* of benefits, the Code of Iowa sets out the calculation for the weekly benefit amount. The weekly benefit amount is "[t]he full amount of benefits a claimant is entitled to receive for a week of total unemployment." 871 IAC 24.1(13)(c). The weekly benefit amount depends on the number of dependents, but may not exceed a specified state weekly maximum. Again, the Code:

> [A]n eligible individual's weekly benefit amount for a week of total unemployment shall be an amount equal to the following fractions of the individual's total **wages in insured work** paid during that quarter of the individual's base period in which such total wages were highest; the director shall determine annually a maximum weekly benefit amount equal to the following

percentages, to vary with the number of dependents, of the statewide average weekly **wage paid to employees in insured work**…:

If the number of dependents is	The weekly benefit amount shall equal the following fraction of high quarter wages:	Subject to the following maximum percentage of the statewide average weekly wage
0	1/23	53%
1	1/22	55%
2	1/21	57%
3	1/20	60%
4 or more	1/19	65%

Iowa Code §96.3(4)(a)(emphasis added). Since the Claimant claimed one dependent his weekly benefit is at most 1/22 of his average weekly wage in his high quarter, and is subject to the 55% maximum of the statewide average weekly wage. Applicable to this Claimant that maximum is 55% of $882, that is, is equal to $485.

If the City of Des Moines wages are *included* in the Claimant's high quarter then 1/22nd of his average weekly wage exceeds $485. And if the City of Des Moines wages are *excluded* from the Claimant's high quarter then 1/22nd of his average weekly wage still exceeds $485. So whether or not we were to include the City of Des Moines earnings as part of the monetary calculation the Claimant is still getting only $485 a week as his weekly benefit amount. So the exclusion of the City monies does not affect the amount of benefits.

Despite the fact that the exclusion of the City monies from the monetary calculations has no effect on the Claimant's claim, the *charging* of the benefits is affected by the exclusion of such monies. This is why the Department issued a decision to the Claimant on 12/31/18 stating that "These earnings cannot be used on your claim for Unemployment Insurance. These wages have been deleted from your unemployment insurance claim." This decision actually did not affect the Claimant's benefit amount or his eligibility, but it did have the effect of relieving the City of any charges. Unfortunately, the Claimant stopped reporting the City earnings for benefit offset and earnings limitation purposes. This is not correct.

(We note the Department decision excluding the City monies from wages for insured work cites "345.3.71(3)(c)." The regulations of the Department have not been in chapter 345 since the 1970's. The correct cite is 871 IAC 23.71(3)["The term 'employment' does not apply to services performed for…a political subdivision of this state…by an individual who is…an elected official…"]).

Definition of Unemployment & The Earnings Limit: Earnings

As we have explained a claimant's wage history is used to determine the amount of benefits. This history is restricted to "wages for insured work" that are paid during a specified period of time prior to

filing for benefits (the base period). But we are now concerned not with the past but the present. We now come to each week that the Claimant asks to be paid for benefits. In any week that the Claimant asks for benefits the agency must offset from the benefit amount certain moneys, and must each week determine whether the Claimant is eligible under Iowa Code §96.4 or has exceeded the earnings limit. This is where the Claimant runs into trouble.

In order to be eligible for benefits a worker must be "unemployed." Iowa Code §96.4(first unnumbered paragraph)(" An unemployed individual shall be eligible…"). Perhaps it is no surprise that the Code once again provides detailed definitions of what it means to be "unemployed."

> 38. "Total and partial unemployment".
>
> a. An individual shall be deemed "totally unemployed" in any week with respect to which no wages are payable to the individual and during which the individual performs no services.
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> b. An individual shall be deemed partially unemployed in any week in which either of the following apply:
>
> > (1) While employed at the individual's then regular job, the individual works less than the regular full-time week and in which the individual earns less than the individual's weekly benefit amount plus fifteen dollars.
> >
> > (2) The individual, having been separated from the individual's regular job, earns at odd jobs less than the individual's weekly benefit amount plus fifteen dollars.

Iowa Code §96.19(38). So we must address whether this Claimant is either totally or partially unemployed. If he is neither, he does not get benefits because he is not an unemployed individual who is eligible for *unemployment* benefits under Iowa Code §96.4.

First we look at "total unemployment." Total unemployment occurs if one performs no services, and "no wages are payable" with respect to the week in question. We skip the "perform no services" requirement, even though it is clear that most, if not all, weeks of the claim the Claimant did perform services. Instead, we focus on the payable wages requirement because we *know* the Claimant was getting his $500 earnings for every week. We know from the above discussion that the work of an elected official is not "employment" and so any wages paid are not for "insured work." But the Code definition of "totally unemployed" does not use "no wages for insured work are payable." It uses only "wages." We thus, again, look to the definition section.

> 41. a. "Wages" means all **remuneration for personal services**, including commissions and bonuses and the cash value of all remuneration in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the department.

Iowa Code §96.19(41). The exceptions to "wages" which follow in paragraph "b" do not apply here. Certainly the monies paid by the City in consideration of the Claimant's services as an elected official is "remuneration for personal services." The money is wages. It just isn't wages for insured work, as set out above. Thus the Claimant is not totally unemployed.

We now turn to partial unemployment. The Claimant is not employed at his "regular" job at

Convergeone, so subparagraph 96.19(38)(b)(1) does not apply. We thus turn to Iowa Code §96.19(38)(b)(2) which applies to an "individual having been separated from the individual's regular job…" In order to be partially unemployed it

has to be that the individual earned at an odd job (*i.e.* one other than the regular job) "less than the individual's weekly benefit amount plus fifteen dollars." Here the weekly benefit amount plus $15 is $500 and the Claimant does not earn less than this. The only way around this would be if we could somehow exclude the money earned as an elected official the way it is excluded for the purposes of eligibility. But, in fact, the exclusion from the eligibility provision makes us more firm in our finding that the Claimant is not partially unemployed.

The way the Code excludes elected officials' earnings from the monetary calculation is to exclude such service from "employment." This in turn means the money paid for such service is excluded from "wages for insured work" and thus will not count for monetary eligibility purposes. But the word "employment" is not used in §96.19(38)(b)(2). That subparagraph could have said "earns [at employment] less than the individual's weekly benefit amount plus fifteen dollars." It does not. It could have said "earns [wages for insured work] less than the individual's weekly benefit amount plus fifteen dollars." It does not. All that is required is "earning" money at a "job." The City monies fit this description. The phrase "wages for insured work" appears twelve times in chapter 96. Had the legislature meant for the earnings limit to include only "wages for insured work" then it would have said so. Its failure to do so confirms the conclusion that §96.19(38)(b)(2) earnings include wages other than those for insured work. Similarly, Chapter 96 uses the term "employment" multiple times, while excluding elected official from the term, and had the law meant to exclude the earnings from elected position from §96.19(38)(b)(2) it could have easily just used the word "employment." Again, the failure to do so confirms the conclusion that §96.19(38)(b)(2) earnings include wages other than those for "employment" as that term is defined in the Code.

Upshot: The money paid to the Claimant by the City is not "wages for insured work" but still is "wages" earned at a job. The monies thus do not count for eligibility purposes, but do count for the earnings limit. The monies are not less than the applicable weekly earnings limit. The decision of the Administrative Law Judge finding the Claimant ineligible for the weeks in question is therefore correct.

Overpayment Due Regardless of Fault:

In *Galvin v. Iowa Beef Proc.*, 261 N.W.2d 701 (1978) the Iowa Supreme Court cast doubt on anyone having to pay back benefits received in good faith while an internal agency appeal was pending. Shortly after *Galvin* the legislature made express that overpayments are to be recovered "unless the recovery would be contrary to equity or good conscience." 67 G.A. ch. 1059, §3. According to the Iowa Supreme Court this amendment was "enacted in response to *Galvin*" and "might well" alter *Galvin* even with excusing good faith overpayments. *Hiserote Homes, Inc. v. Riedemann*, 277 N.W.2d 911, 915 (Iowa, 1979). Yet even this much waiver flexibility prevailed in Iowa for only a year. In 1979 it was struck and the first unnumbered paragraph (now letter "a") was made to read simply that "the benefits shall be recovered." Iowa Code §96.3(7)(2019) *as amended by* 68 G.A. ch 33, §§1-5. What the legislature did in 1979 was strike "unless the recovery would be contrary to equity or good conscience." So this portion of *Galvin* is of no effect. *See Sievertsen v. Employment Appeal Board,* 483 N.W.2d 818 (Iowa 1992)(overpayment based on mistake of law is still recoverable given the *Galvin* amendments); *Bailey v. Employment Appeal Board,* 518 N.W.2d 369 (Iowa 1994)(affirming refusal to waive overpayment); *Powell v. EAB*, 861 N.W.2d 279, 281 (Iowa App. 2014)("This provision requires repayment notwithstanding Powell's lack of fault in incurring the overpayment"). There is no general good faith exception to the recovery of overpayments.

Neither does estoppel apply in this case. *ABC Disposal Systems, Inc. v. Department Of Natural Resources*, 681 N.W.2d 596, 606 (Iowa 2004); *Fennelly v. A-1 Machine & Tool Co*., 728 N.W.2d 163, 180 (Iowa 2006). Thus in *Sievertsen v. Employment Appeal Board*, 483 N.W.2d 818 (Iowa 1992) a claimant needed to satisfy the $250 earnings requirement to be eligible for benefits. "Claimant endeavored to obtain the required $250 in covered wages through employment at Marycrest College as a carpenter. At the time, he was a full-time student at Marycrest. The record reflects that claimant specifically asked DES representatives whether this employment would serve to qualify him for continued unemployment eligibility and was given the assurance that it would." *Sievertsen* at 819. After Mr. Sievertsen had collected benefits with the imprimatur of the agency the agency realized it had made an error of law. Then Mr. Sievertsen was then socked with an overpayment. The Supreme Court concluded that, despite the error by the agency and the fact that the claimant had been pre-approved to apply for benefits, there was no basis for preventing recovery of the overpayment. The Court specifically rejected the notion that the agency could be estopped. The Court cited to Iowa Code §96.3(7), and found "[w]e believe that the authorities cited preclude a finding that the Department of Employment Services is estopped from recouping the payments made to the claimant for which he was ineligible under the controlling regulations." *Sievertsen* at 819. This case is on the same footing, and this means the overpayment has to be repaid even if the Claimant did nothing blameworthy, and even if he was following erroneous advice.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv