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

KYLE A DORNATH	:	
	:	**HEARING NUMBER:** 21B-UI-09456
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
WINGER CONTRACTING CO	:	
	:	
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

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

STATEMENT OF THE CASE:

The issue of timeliness was raised on appeal when the Claimant filed his appeal beyond the deadline. The Board finds good cause for the untimely appeal, and considers it as timely.

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**.

In addition to the analysis of the Administrative Law Judge the EAB adds the following analysis.

As we explained at length to the Claimant in our previous ruling, there are two separate and independent reasons for finding the Claimant is not eligible for benefits. At this point, on this record, we are less sure about the leave of absence ruling, because of a lack of evidence on a critical point. But we are quite certain that regardless, the Claimant, based on his own admission, was not available for work, and nor does he fall within any of the exceptions to availability.

Leave of Absence Analysis

First off, we continue to make the same point as we did in the previous case. A mandatory condition of employment that results from a freely negotiated contract between the parties is voluntary. Its mandatory nature is a result of the volition of the two parties in consenting to the contract in the first place. Such is the nature of contracts – once you freely agree to them they are binding. You negotiate away some subsequent freedom of action, but so long as the agreement is not the result of duress, the loss of freedom is voluntary. No duress is alleged here. So, for example, a leather supplier who agrees to supply leather to a shoe manufacturer at a given price has bargained away the freedom to charge a higher price. The price set by contract is now mandatory, but the supplier freely agreed to this, and so its inability to charge a higher price for its goods is, of course, voluntary. And consent is no less voluntary in the eyes of the law merely because the negotiations take place in the person of the workers' exclusive bargaining representative.

It is in this regard that the Claimant's mighty efforts to equate the independence of the JATC with rule by fiat is unconvincing. This can be understood if we ask "By what right does the JATC tell the members of the bargaining unit and the Employer what to do?" Is it by decree of the federal government and its regulations that the JATC has this power? It is not. Is it through some sort of divine right conferred upon the JATC from above? Of course not. Then whence comes the power of the JATC? The power of the JATC is given to it in the first instance by the freely negotiated collective bargaining agreement. If there were no Article V of the CBA (Exhibit A), then the JATC could issue orders to report to training as often as it wants, and there would be no obligation of either employer or employee to obey the orders. In short, "the JATC made me do it" argument misses the predicate issue of the source of the JATC's power. Any authority of the JATC is solely the result of voluntary consent of the parties to the CBA. And those parties include the Claimant's exclusive bargaining representative. *See Efkamp v. IDJS*, 383 N.W.2d 566, 569-70 (Iowa 1986).

Meanwhile, the critical difference between a leave of absence, and a mere reassignment of duties, is lack of pay. One who consents to cease normal duties for a given period has agreed to cessation of normal duties. And this is so whether this consent is expressed personally or through that worker's exclusive bargaining representative. If the consent also encompasses the understanding that the worker will be unpaid during the cessation, then this is an agreed-to leave of absence. If, however, the worker consents to stop doing his normal job, but does not consent to a lack of pay, then we cannot view this as consenting to a "leave of absence." The Claimant hints at this through citation to *Iowa Malleable v. IESC*, 195 N.W2d 714 (Iowa 1972). Now Claimant argues *Iowa Malleable* means a union cannot consent to conditions on behalf of the workers in the collective bargaining unit, a rewriting of federal labor law the case most certainly does not stand for. But in *Iowa Malleable* the CBA had allowed for plant shutdowns for vacation, and the employer there argued consent to the shutdown should bar unemployment compensation. Under Iowa's current law a plant shutdown for "vacation," that lasts less than five weeks, would be temporary unemployment and the availability requirement would be waived. Iowa Code §96.1A(37)(c). But in 1972 there was no concept in Iowa of temporary unemployment as it is now constituted. Those statutory provisions were added by S.F. 485 of the 66th General Assembly in 1975. Back in '72, the Iowa Supreme Court thus cited to general principles, and observed that merely consenting to a shutdown is not the same as consenting to going unpaid during the shutdown. *Iowa Malleable* at 718-19. In the same way we may say in this case that consenting to spend time in mandatory training is not necessarily to same as consenting to training *leave* (i.e. unpaid training). We thus search the record to answer a critical question about this training period: why is it unpaid?

The relevant federal regulations provide for an apprenticeship agreement. Those regulations state that "[t]he apprenticeship agreement must contain, explicitly or by reference: …. [a] statement of the graduated scale of wages to be paid to the apprentice **and whether or not the required related instruction is compensated**." 29 C.F.R. 29.7(g)(emphasis added). In consonance with this directive, Section XI of the training standards states "[b]efore being employed as an apprentice or enrolled in related instruction classes, the selected applicant will sign an Apprenticeship Agreement with the JATC. The Apprenticeship Agreement will immediately be submitted to the Registration Agency for approval. …(See Appendix C, Apprenticeship Agreement.)" *Exhibit B*, p. 18. We turn to the referenced Appendix C, and see under section 8d of the form, "d. Apprentice wages for related instruction [] will be paid [] will not be paid." *Exhibit* B, p. C3. It is certainly clear that both the agreement of the parties (inasmuch as they agree to be bound by the training standards of the JATC) and the federal regulations contemplate that related instruction time may be unpaid. The only thing we have signed by Mr. Dornath that even comes close to his apprenticeship agreement is the Local Committee Policy for the JATC. It looks nothing like Appendix C. More importantly there is nothing about compensation for related instruction that we can find. The Claimant asserts in argument that he did not consent to being unpaid, but the reality of the record is that this issue is left unaddressed. We cannot find where either Claimant or Employer directly addresses the reason that the related instruction time is unpaid. We had the Employer claiming a "stipend" was offered and declined, and the Claimant denying that a stipend was offered. But stipend or no, the underlying issue was what provision in this apprenticeship system results in the unpaid nature of time spent in related instruction. We do not see this in the record. Thus we are left to puzzle questions like "Did the Claimant know at the time that he started as an apprentice that time in related instruction was unpaid?" If so, then "How did he know this?" "Is there a form like Appendix C which is signed by the Claimant?" We cannot on this record answer these questions. Now the Claimant had the burden of proof on the availability issue by statute. Iowa Code §96.6(1). We could thus rule that the Claimant has failed to prove that he was not on an agreed-to unpaid leave. But in unemployment cases we are inclined to be less technical about such things, even when counsel are present. If this issue were to be dispositive we would remand the case. As it is, the Claimant still has not proven his availability, as we discuss below, and so we forebear on a remand at this time. The parties may want to note in future cases that asking the Claimant simple questions about did he expect to be paid in training, if not then why not, whether he ever signed an agreement addressing this issue, etc. etc. could save a good deal of effort down the road. And certainly even though the Employer has no burden, it could tell us what it relied upon to not pay wages during training weeks.

Of course, simply *not* being on an agreed to leave of absence is insufficient to be available to work. A worker who is job separated is not on a leave of absence, and yet must still be available for work in order to collect benefits. Being on a leave of absence is just one way of not being available to work. It's not the only way. Therefore, while we forbear on a remand for the time being and leave unresolved the leave of absence issue, we now turn to the more basic question of availability *vel non*.

Was the Claimant Available?

At first blush, it seems that the Claimant is not available to work while he is in training. But now, in this appeal, he asserts that he does not have to be available for any particular shift. This is true. He asserts therefore that even though effectively a full-time student for the training week, this does not mean he could not have worked some different shift. This is at least possible.

Looking to the somewhat analogous full-time student regulation we note that full-time students are presumed to be unavailable for work but with an exception. If the student is available "to the same degree and to the same extent as they accrued wage credits they will meet the eligibility requirements of the law." 871 IAC 24.23(5).

While the Claimant is not a full-time student in the traditional sense, it must be recognized that the availability requirement is a weekly one. Being available one week does not necessarily make one available the next. It is in this sense that the Claimant's situation, one in which the Claimant is in class every work day in a claim week, can be analyzed under the full-time student regulation. The Iowa appellate courts have found this regulation to create a rebuttable presumption of unavailability. *Davoren v. IESC*, 277 N.W.2d 602 (Iowa 1979); *Savage v. EAB,* 361 N.W.2d 329 (1984). Those cases, and rule 24.22(2), make clear, however, that a Claimant does not have to be available for a particular shift. If we could find, based on the credible evidence, that the Claimant was available to work a full-time shift outside the classroom hours, then the Claimant might be available under this analysis. But the testimony from the Claimant himself belies such a claim:

> Q: And it wasn't possible for you to go to the training and still work full-time that week? Is that right? Because of the hours involved?
> A: Yes

(Recording at 16:13).

Again, he testified later:

> [Employer Attorney]: You were… You were not able to attend both the class and perform your job, isn't that correct?
> A: Yes.

(Recording at 38:06).

Given the lack of any evidence in the record that the Claimant was in fact available for different shifts, and given this clear testimony, we cannot find that the Claimant has proven that he was available to work some other shift for the week in question. We thus conclude that he was *not* available to work for that week, and so we must ask whether he had to be. In other words, does he fall within one of the statutory exceptions to the availability requirement.

Does The Claimant Have To Be Available?

General Principles

The unemployment system is a joint federal-state system, in the sense that federal law, through the Social Security Act, and the Federal Unemployment Tax Act, sets out minimum requirement state *laws* must satisfy to qualify for receipt of certain federal monies, and to receive tax breaks for that state's employers. The first law to set out such a requirement for receipt of funds was the Social Security Act. On August 14, 1935 the Social Security Act was signed into law by President Franklin D. Roosevelt. Among other things this law gave states until January 1, 1937 to enact legislation in order to access over $250 million in funding available to the states for unemployment compensation. In January 1936 the federal Social Security Board issued a "draft bill" setting out guidance to states in order for them to draft legislation that would satisfy the federal requirements. *Draft Bills for State Unemployment Compensation of Pooled Fund and Employer Reserve Account Types, The Social Security Board (Washington 1936)*. This draft language included a three-member board like the EAB, and is why such Boards are nearly universal. That draft also included the following:

> SEC. 4. An unemployed individual shall be eligible to receive benefits with respect to any week only if the commission finds that ~

(c) He is able to work, and is available for work.

Draft Bills for State Unemployment Compensation of Pooled Fund and Employer Reserve Account Types, The Social Security Board (Washington 1936). Of course, this Draft Bill was relied upon by the great majority of the states and so this provision was a common feature of state laws. In the summer of 1936 Iowa's 46th General Assembly, in an extraordinary session, passed the Employment Security Law allowing for unemployment benefits in Iowa. That law also included, in subsection four "c" just like the Draft Bill, an able and available requirement:

> SEC 4. An unemployed individual shall be eligible to receive benefits with respect to any week only if the commission finds that:
>
> (c) He is able to work, and is available for work.

47 GA ch. 102, §4(c). This requirement has been in Iowa's **statute** for the 85 years that we have had an Employment Security Law.

The able and available requirements are fundamental to the unemployment system. Under section 303(a)(12) of the Social Security Act federal funds will not be released to a state unless that state's law requires that an individual is able to work, available to work, and actively seeking work as a condition of eligibility for regular UC for any week. 42 U.S.C. 503(a)(12)("A requirement that, as a condition of eligibility for regular compensation for any week, a claimant must be able to work, available to work, and actively seeking work.") The requirement is an indispensable and defining part of the unemployment system. Without this requirement the unemployment benefit system becomes a form of disability insurance, or a kind of job-training fund. The Employment Security system is not designed for this, and the tax-supported fund could not be maintained on that basis.

The Department of Labor has issued a guidance letter on apprenticeship training. Training and Employment Guidance Letter 12-09, which remains active, addresses the payment of unemployment compensation during subsidized work-based training initiatives for workers, such as registered apprenticeship programs. The TEGL first describes general unemployment principles, and then set out the implications of those principles. We quote at length:

> *Overview of Basic UC principles*. Since the inception of the Federal-State UC program, Federal law has permitted participating states to make payment of UC only with respect to an individual's unemployment. Put another way, Federal law prohibits the payment of UC to an individual who is not unemployed for some portion of the week in which UC is claimed, unless specifically authorized by Federal law. As a result, states' attempts to develop innovative models to assist UC recipients' return to work must adhere to this requirement. Following is a discussion of this requirement, its implications, and some options available to states.
>
> *Unemployment fund dollars may only be used to pay UC.* Section 3304(a)(4), FUTA, requires, as a condition for employers in a state to receive credit against the Federal tax, that state law provide that: . . .all money withdrawn from the unemployment fund of the State shall be used solely in the payment of unemployment compensation.…Taken together, these provisions are referred to as "the withdrawal standard." Under the withdrawal standard, money may only, with statutorily-authorized exceptions, be

withdrawn from a state's unemployment fund for the payment of UC to an individual "with respect to [an individual's] unemployment."

....

UC may only be paid if the individual is unemployed. As noted above, amounts may be withdrawn from the unemployment fund for payment to individuals with respect to an individual's "unemployment." The 1935 Senate Report on the original Social Security Act creating the program also emphasized that UC may be paid only with respect to an individual's unemployment:

> Unemployment compensation differs from relief in that payments are made as a matter of right not on a needs basis, but only while the worker is involuntarily unemployed. . . . Payment of compensation is conditioned upon continued involuntary unemployment. [S. Rep. No. 628, 74th Cong., 1st Sess. 11 (1935).]

During the debate on the passage of the Social Security Act, the original sponsor, Senator Wagner, stated that, "the only important requirement [of the Social Security Act's unemployment compensations provisions] is that the State law shall be genuinely protective, and that its revenues shall be devoted exclusively to the payment of insurance benefits", 79 CONG. REC. 9284 (June 14, 1934).

Implications. Because UC may only be paid to individuals with respect to their unemployment, it may not be paid to individuals who have not experienced unemployment during the week claimed. Similarly, UC may not be paid as a subsidy for employment (e.g. to make up the difference in hourly wages between the individual's former job and the individual's new, lower paying job) or as a stipend since it is not a payment "with respect to unemployment," but is instead a payment with respect to being employed. …

UC may be paid to individuals in training notwithstanding the requirement that they be able and available for work. **Federal UC law has always been interpreted as requiring states, as a condition of participation in the Federal-State UC program, to limit the payment of UC to individuals who are able and available (A&A) for work**. (For additional information, see 20 CFR 604.5.) However, a state may consider an individual available for work "for all or a portion of the week claimed, provided that any limitation placed by the individual on his or her availability does not constitute a withdrawal from the labor market." Thus it would be **possible** for a state to consider individuals in workbased training (for example, 20 hours a week) A&A **as long as they were available for work during some portion of the week**.

UC may be paid to individuals in training approved by the state UC agency. Federal law prohibits denial of UC to individuals participating in training with the approval of the state agency based on state law provisions relating to availability for work, active search for work, or refusal of work. However, individuals who are participating in employer sponsored "on-the-job training" are not "unemployed" and thus may not be paid UC unless they are not working full time during the week the on-the-job training takes place. **In TEGLs Nos. 21-08 and 21-08, Change 1, the Department encouraged states to broaden their definition of approved training and to implement procedures that would facilitate individuals' participation in training.** In TEGL No. 2-09, the Department provided information about recommended policies for approved training.

*Individuals working **part-time** may be eligible for UC*. Each state's UC law includes provisions for UC payments to individuals who are partially unemployed. Depending on state law requirements concerning monetary and non-monetary eligibility, individuals who are **earning part-time wages** may be eligible for UC **a**s long as they are unemployed for some **part** of the week being claimed.

TEGL, 12-09 p. 6-7 (emphasis added). The upshot is that there are specific conditions which will allow payment of unemployment. Partial unemployment, approved training, and temporary unemployment are all exceptions to the able, available, and work-seeking requirements both federally and at the state level. None apply here.

Department Approved Training

As mentioned by TEGL 12-09 a broad concept of approved training might allow collection of benefits during a week of classroom training without meeting the requirements of Iowa Code §96.4(3). But Workforce has not implemented such a broad concept and there has been no approval of the training in this case. Thus, the Claimant is not excused from the requirements by being on approved training. The fact is, Workforce recently tightened up the criteria for Department Approved Training. 871 IAC 24.39(2). Formerly, under a more expansive approach, training as in this case was commonly approved, and the unemployment fund ending up paying for such ongoing apprenticeship training since employers are not charged for benefits paid for approved training. Effective February 7, 2018 rule 24.39(2) requires that DAT "be completed 104 weeks or less from the start date," that it be at "a college, university or technical training institution," and that the claimant be "enrolled and attending the training program in person as a full-time student." No doubt these requirements explain why the training here has not been granted DAT status. This being the case we cannot act *as if* it had been approved for DAT.

This change being recent is why it has not come up until recently whether someone who is in training all day long for an entire week is not available for work. Previously such persons were put on approved training, were given benefits charged to the taxpayer-supported fund, and no one would appeal the matter to the Board. The regulatory change being recent is why the issue had not come before this Board until recently. The same is true for the "years of precedent" cited – the law has changed, and as a result the outcome has changed. Such is the way of the law.

Partial Unemployment

If a worker is working part of the week, and is partially unemployed, then the worker would not have to be available under Iowa Code §96.4(3) and *TEGL 12-09* makes clear this would be consistent with Federal law. The Code of Iowa provides

> 37. "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.
>
> 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 §96.1A(37). Obviously, "odd jobs" in not an issue in this case since the Claimant is not separated from the Employer, and in any event the waiver of availability does not apply to "odd job" partial unemployment. Iowa Code §96.4(3). We thus turn to whether the Claimant meets the three conditions of paragraph (b)(2). First, he must be job attached. Second, he must work less than the regular full-time week. Third, he must earn less than his weekly benefit amount plus fifteen dollars. As noted the Claimant is job attached, and satisfies the first condition. However, we note that being job attached itself *does not* negate total unemployment. The definition of "totally unemployed" does not refer to whether the individual remains job attached. Thus people who are laid off for lack of work, and then recalled, would be totally unemployed in the interim even though still job attached. On the third requirement the Claimant clearly made less than his weekly benefit amount plus fifteen dollars. Again, since the Claimant earned nothing this is also consistent with the no wages payable requirement of total unemployment. We now turn to the second requirement for partial unemployment: "the individual works less than the regular full-time week."

The difficulty for the Claimant is that either attending training falls within the category of performing work for the Employer, or it does not. The Claimant was in training full-time. If attending training is working for the Employer then the Claimant was performing services for the Employer on a full-time basis during that week. He thus did not meet the second prong of partial unemployment. He did not work "less that the regular full-time week." He thus would not be partially unemployed if attending training falls within the category of performing work for the Employer.

So then, what if attending training is *not* performing work for the Employer? In such a case then, superficially at least, the Claimant has satisfied the conditions for partial unemployment since in that situation he would work "less than the regular full-time week." **But** the problem for the Claimant is that he would in fact perform no services whatsoever for the Employer, and have payable no wages whatsoever for that week. He would thus be "totally unemployed" since performing **no** services, and having **no** wages payable is the definition of "totally unemployed." Iowa Code §96.1A(37)(a).

The Claimant's argument is thus that someone who is totally unemployed need not ever be available for work since total unemployment is but a special case of partial unemployment (the "null case" where work and wages are reduced all the way to zero).

It is inconceivable to us that total unemployment can be viewed as a species of partial unemployment where the work and wage equal zero. If this were the case then all layoffs would fall under the definition of partial unemployment. Under the Code when an "individual's employment although temporarily suspended, has not been terminated" and the period of suspension is for enumerated reasons, and also for no more than four weeks then the worker need not be available for, or seeking work. See 871 IAC 21.1(113)(a)("A layoff is a suspension from pay status initiated by the employer…"). If we viewed all such suspensions of paid status to be partial unemployment then a worker would never have to be available for work, or seek work, while on layoff no matter for how long. A twelve-week seasonal layoff would be compensable even if the laid off worker was not looking for work while waiting for recall. This is inconsistent with the regulations of the Department. 871 IAC 24.23(20) (A claimant is not available for work "Where availability for work is unduly limited because the claimant is waiting to be recalled to work by a former employer…") The concepts of temporary and partial unemployment are different and one is not a subcategory of the other. Partial unemployment "applies where, during a particular week, services are performed for one's regular employer for less than the regular work week, or where no services are performed for the regular employer during a particular week and 'odd job' employment for that week yields

less than an established amount." *Hart v. Iowa Dept. of Job Service,* 394 NW 2d 385, 387 (Iowa 1986). That total unemployment is different is made clear in *Hart* where a pregnant worker who was allowed to return on a part-time basis filed for weeks during which she performed no services and earned no money. The Supreme Court *reversed a finding that she was partially unemployed*, reasoning:

> **Petitioner's claims are for those weeks in which no services are performed. As a result, she does not meet the statutory definition of a partially unemployed individua**l. Because the district court determined her benefit eligibility solely on that basis, its decision must be reversed.

Hart at 387. The definition of partial unemployment quoted by the decision in *Hart* is identical to the current definition of partial unemployment. Under a plain reading of the statute, and *Hart,* we cannot treat total unemployment as a form of partial unemployment in order to excuse the Claimant from complying with the availability and actively seeking work requirements.

Temporary Unemployment

Under Code §96.4(3) a worker who is temporarily unemployed need not meet the availability and job seeking requirements. But the definition of temporary unemployment is now statutory:

> c. An individual shall be deemed temporarily unemployed if for a period, verified by the department, not to exceed four consecutive weeks, the individual is unemployed due to a **plant shutdown, vacation, inventory, lack of work, or emergency from the individual's regular job** or trade in which the individual worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated.

Iowa Code §96.1A(38)(c). Being off for training does not fit this paragraph. The statute lists explicit categories of reasons for being unemployed that qualify as temporary unemployment. It does not say temporary unemployment is being unemployed due to causes "such as" or "similar to" or "akin to" plant shut downs etc. Specific categories are listed, and training is not one of them. We have seen cases where various theories have been tried to fit apprentice training into these categories and none are convincing. We address them now, and in so doing note that Claimant, who had counsel this time around, had the burden of proof.

We have previously address "apprenticeship training as plant shutdown" and we fail to see how this could even be akin to a "plant shutdown." The plant is not shut down, the Claimant is off work that's all. There was no showing by the Claimant that the plant was operating at reduced capacity, much less that it was "shut down."

Next, we have seen the argument that there was a "lack of work" within the meaning of §96.1A(38)(c). Given the clear import of the statute, this notion of "lack of work," is off base. This concept first of all treats "lack of work" as if it means "lack of work for the particular person not working." If this were so then every last layoff, no matter the cause, would qualify as temporary unemployment if less than four weeks. Being off work because you are injured and unable to work, under the such reading, would be due to a "lack of work" for the worker since the Employer would have no job tasks to assign to that particular injured worker. Such a reading of temporary unemployment would make the listing of reasons that qualify for temporary unemployment pointless – almost any suspension of paid status would fall under the "lack of work" moniker. Clearly "lack of work" means that the Employer has laid off the worker because the Employer has more workers available to perform tasks than it has tasks to assign. In short, there's not enough work to go around. That has simply not been shown to be the case here.

We have even seen the argument that attending apprenticeship training is an "emergency" of sorts. "Absent a statutory definition or an established meaning in the law, words in the statute are given their ordinary and common meaning by considering the context within which they are used…Under the guise of construction, an interpreting body may not extend, enlarge or otherwise change the meaning of a statute." *Auen v. Alcoholic Beverages Div.,* 679 NW 2d 586, 590 (Iowa 2004). And while the statute must be liberally construed, this does not come into play when reading plain English. S*ee e.g. Standard Water Control Sys., Inc. v. Jones*, No. 15-0458, 2016 WL 4543505, at *1 (Iowa Ct. App. Aug. 31, 2016) ("We look no further than the language of the statute when it is unambiguous."); *Estate of Ryan v. Heritage Trail Assoc.,* 745 N.W.2d 724, 730 (Iowa 2008)("When the statute's language is plain and its meaning is clear, we look no further. … [W]e resort to the rules of statutory construction only when the terms of [a] statute are ambiguous."); *In re Detention of Fowler*, 784 N.W.2d 184, 187 (Iowa 2010) ("We do not search for meaning beyond the express terms of a statute when the statute is plain and its meaning clear."); *Swiss Colony, Inc. v. Deutmeyer*, 789 N.W.2d 129, 135 (Iowa 2010)("[T]he principle of liberal construction does not vest th[e] court with an editor's pen with the power to add or detract from the legislature's handiwork."); *Moulton v. Iowa Emp't Sec. Comm'n,* 239 Iowa 1161, 34 N.W.2d 211, 216 (Iowa 1948)(In unemployment cases "[w]hile the statute under consideration is to be liberally construed in order to effect its beneficent purpose, yet construction should not be carried beyond the limits of its plain legislative intent.") We thus turn to the ordinary meaning of "emergency."

As ordinarily understood an emergency is a serious matter that arises suddenly. If it arises suddenly but is minor – your pen runs out of ink – it is no emergency. If it is serious, but scheduled in advance – your knee replacement surgery scheduled for next January – it is no emergency. Thus the American Heritage Dictionary defines emergency to be "[a]n unexpected situation or sudden occurrence of a serious and urgent nature that demands immediate action." *American Heritage Dictionary, 2nd College Edition*, p. 448 (Houghton Mifflin, Boston: 1982). The 2019 version of the Oxford English Dictionary agrees: "4. a. (The ordinary modern use.) A juncture that arises or 'turns up'; esp. a state of things unexpectedly arising, and urgently demanding immediate action." *Oxford English Dictionary*, online edition (2019) *accord The Century Dictionary and Cyclopedia,* p. 1897 (The Century Company, New York: 1895). While this is the fourth definition in the OED that dictionary lists definition in order of historical usage, and this one is parenthetically indicated as the "ordinary modern use" by the OED editors. The massive *Webster's Third New International Dictionary* (dating to 1960 despite the moniker "new") gives for "emergency" the definition "an unforeseen combination of circumstances or the resulting state that calls for immediate action." The Iowa Court of Appeals recently explained:

> The term "emergency" is widely understood. Black's Law Dictionary defines an emergency as "[a] sudden and serious event or an unforeseen change in circumstances that calls for immediate action to avert, control, or remedy harm." *Emergency, Black's Law Dictionary* (10th ed. 2009). In *Stych v. City of Muscatine,* the court applied the dictionary definition of the term "emergency" to conclude that it is "a state of things unexpectedly arising, and urgently demanding immediate action." 655 F. Supp. 2d 928, 935-36 (S.D. Iowa 2009) (quoting *Emergency*, Oxford English Dictionary (2d ed. 1989)).

Shipton v. Chickasaw Co. Bd of Health, No. 17-2041, slip op. at 6-7 (Iowa App. 11-21-18) *further review denied* 1-17-19. *See also Bangs v. Keifer,* 174 NW 2d 372, 374 (Iowa 1970).

It is clear that being unforeseen and/or sudden are essential to being an "emergency." The scheduled-in-advance training that the everyone including the Claimant knew was part and parcel of being an apprentice is not in any sense an emergency. If a college student needs to leave his job because he is starting back to school at Iowa State on August 23, 2021 then when that date comes he can hardly claim any emergency need to be absent. Here the leave of absence to attend the school was scheduled, anticipated, prepared for, expected, understood, a given. It was not an emergency.

This situation has not been shown to be a case of temporary unemployment. As far as the record shows, the plant is there, the work is there, there is no emergency, no inventory or plant-wide vacation. It is not any of the listed categories of temporary unemployment and does not meet the statutory definition. We thus cannot find the Claimant is excused from the availability and job seeking requirements by being temporarily unemployed.

Precedent Is Either Not On Point or Is Unpersuasive

The Claimant cites some precedent to us in support of his claim. Iowa administrative decisions decided before the change to the approved training regulation are inapposite because such cases rely on the old approved training regulation. Unappealed Administrative Law Judge decisions allowing benefits post-regulatory change have some persuasive value, but since this Board has consistently rejected allowance of benefits when such decisions are appealed to the Board we remain unpersuaded by cases which were not appealed to us.

As for other states the precedent is unconvincing in Iowa in 2021. The Claimant cites a case out of Florida, *Kennedy v. Florida UAC,* 46 So. 3d 1192 (DCA 2010). That case is a very brief one-paragraph decision holding simply that the claimant was not fully employed. Notably that case relies on *Winters v. Fla. Unemployment Appeals Comm'n*, 858 So.2d 1218 (Fla. 4th DCA 2003). In *Winters* a claimant attended pre-employment training on an unpaid basis. The agency had held that the worker was "employed" and thus not eligible for benefits. Obviously, even in Florida, employed individuals do not receive *un*employment. The Florida Court held that Ms. Winters was **not** employed. The Court wrote "Winters was totally unemployed…" *Winters* at 1219. Unfortunately, in *Iowa* being totally unemployed does not help the claimant as we discuss above. The Florida precedent makes absolutely no discussion of the availability and job search requirements. Meanwhile the statutes cited by the Claimant which allow apprentices to collect benefits are not helpful. We have no such statute, so we can apply no such statute to grant benefits. (In fact, the existence of the statutes in other states tends to suggest that in those states the apprentices would be denied if there were no explicit statutory allowance.) In Iowa we do have Code chapters on apprentices, but none say that apprentices should get unemployment benefits while in classroom instruction. And we do have unemployment provisions that explicitly waive availability for training, but these do not include related instruction for apprentices in their scope. Iowa Code §96.4(6)(a); Iowa Code §96.4(6)(b); 871 IAC 24.58(5).

As for the Maryland case of *Hradsky*, 01827-BR-95 (1995), we note first of all this is doubly removed from binding precedent, as it is from another state, and is not even from a court. Furthermore in *Hradsky* the two Board members voted to allow benefits to a person who was in training in order to start a job she had accepted. But in Iowa we have a regulation that provides that a worker is not available for work while waiting to commence employment. Rule 24.23(20) states that "[t]he following are reasons for a claimant being disqualified for being unavailable for work…[w]here availability for work is unduly limited because the claimant is … waiting to go to work for a specific employer and will not consider suitable work with other employers." 871 IAC 24.23(20). Obviously, Maryland's law is different, so the result is different.

Upshot

The benefit account of the unemployment compensation fund is not a job training fund. Workers are paid out of this account for being unemployed, not for being underpaid, and not to receive training other than Department Approved Training. Here the Claimant was not partially unemployed, temporarily unemployed, or on Department approved training. He met none of the exceptions to being able and available and actively seeking work. Since he has not shown he was available for work, he thus is disallowed benefits even if we do not treat this as an agreed leave of absence.

What This Case Is Not

The Employment Security Law is not a general law for righting perceived wrongs. This law is in place to pay unemployment benefits as a wage replacement for those who are unemployed and either looking for work, or excused from looking for work. If a worker is rendering service to an employer, and yet receives no or inadequate wages, then that may be an issue under the Fair Labor Standards Act, or Iowa's Wage Payment Collection Law. **But payment of unemployment benefits to a worker who is neither available for work, nor temporarily nor partially unemployed, is not a remedy for enforcing perceived violations of the FLSA or the IWPCL**. We, of course, do not suggest that such claims would necessarily lie here. 29 C.F.R. §785.27-§785.29; *Willets v. City of Creston*, 433 N.W.2d 58, 62 (Iowa Ct. App. 1988)(wages must be due under applicable contract for Ch. 91A violation to occur). We only make clear that any such wrong, if there be any, would not be cognizable in this forum.

Ashley R. Koopmans

James M. Strohman

RRA/fnv

Myron R. Linn