

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

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**TIMOTHY J HERBERS**

Claimant

and

**L A LEASING INC**

Employer

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**HEARING NUMBER: 15B-UI-10825**

**EMPLOYMENT APPEAL BOARD  
DECISION**

**NOTICE**

**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: 96.5-1-J, 96.3-7**

**DECISION**

**UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE**

The Employer appealed the issue of the chargeability of the overpayment in this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision on the **chargeability** of the overpayment. The Employment Appeal Board **REVERSES** on the overpayment chargeability issue as set forth below.

As a result the Claimant is still not eligible for benefits but now will also be responsible for paying back the overpayment.

**FINDINGS OF FACT:**

The Administrative Law Judge findings of fact are adopted by the Board. The Board makes the following additional findings:

On September 15, 2015 the Employer told the fact finder that it would “no longer be participating in fact finding’s via telephone”. That same communication gave the phone numbers of two persons to call “for rebuttal.” The Employer provided documents for the fact-finding interview on September 15, 2015. Those documents included a separation form which set out that the Claimant quit, stated that the Claimant did not check in for work within three days, and gave the last day on the assignment, that is, the date of the quit.

The persons listed for rebuttal had *personal* knowledge of the reasons for the Claimant's separation, that is, the failure to check-in three days. The Employer also supplied copies of the company "availability statement" that requires requesting reassignment in three days. The policy reflects that the Claimant received a copy of the statement. The fact finder had the supplied names and phone numbers available, but made no call. The Employer's only witness at hearing was Colleen McGuinty who was one of the listed rebuttal witnesses, and its only exhibits were those documents which had been supplied to the Workforce for the fact finding, and certain documents generated by Workforce.

## REASONING AND CONCLUSIONS OF LAW:

As an initial matter we make clear that the Claimant was disqualified based on the separation from employment, and **that that disqualification decision still stands**. Indeed, the disqualification decision was not appealed by the Claimant. Our decision today has no effect on the disqualification issue since we have no jurisdiction over it.

The Employer appealed to the Board the Administrative Law Judge's determination to charge the Employer for the overpayment based on the Administrative Law Judge's decision that the Employer failed to participate in fact finding. The regulations, cited by the Administrative Law Judge, set out the standard for determining participation:

24.10(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if un rebutted would be sufficient to result in a decision favorable to the employer. ....If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including....in the event of a voluntary separation, the stated reason for the quit....

871 IAC 24.10(1). If the Employer met this standard of participation then the Claimant has to pay back the overpayment. Otherwise the Employer's account is chargeable for this amount and the Claimant is relieved of having to pay it back.

As the quoted regulation makes clear in a quit case the Employer must "[a]t a minimum...identify the dates and particular circumstances, including...the stated reason for the quit." 871 IAC 24.10(1). What the Employer submitted was sufficient to meet this standard. We once again caution this particular employer that in a termination case, where the Employer has the burden, this likely would not have been sufficient. But in this quit case, under the specialized "j rule," the Employer gave the date of the quit (the last day of the assignment) and the stated reason for the quit, that is, that the Claimant failed to request reassignment within three days. The Employer also supplied the signed reassignment policy which on its face indicates that a copy is given to workers to keep. The letter specifically listed two persons to call for rebuttal. Since the Employer gave the name and number of employees to contact with questions, this was sufficient to meet the requirement of giving the contact information for an employee "who may be contacted, if necessary, for rebuttal." 871 IAC 24.10(1).

The Administrative Law Judge opines that the persons listed do not have personal knowledge of the circumstances of the Claimant's assignment and that it was mere boilerplate. But the people listed on the form are the ones who have personal knowledge of whether someone has called into to the employer within three days of the assignment ending. The disqualification is based on this failure to call in, and not on the reason the Claimant was removed from the assignment. On the circumstances of the assignment ending Ms. McGuinty may indeed have only hearsay. Yet on whether her own employee called into to her within the allotted time Ms. McGuinty can supply first-hand information. In fact the evidence at hearing before the Administrative Law Judge was from the Claimant and Ms. McGuinty, who was one of the listed rebuttal witnesses. The exhibits were the documents sent in for fact finding, along with some of the agency's own documents. The Claimant appeared at hearing to dispute the evidence, but still lost. How then could Ms. McGuinty's evidence supplied at hearing been sufficient to disqualify the Claimant but her evidence in rebuttal at fact finding would not have been sufficient? After all, the information required need only be such that "if un rebutted [it] would be sufficient to result in a decision favorable to the employer." 871 IAC 24.10(1). Granted the Claimant admitted at hearing he did not call in within 3 days, but he testified that he also said this at fact finding. So just as Ms. McGuinty's evidence, and documentation, (and the Claimant's admission) were sufficient to disqualify after the hearing, so that very same witness and information (and admission) meet the standard that the reasons for the separation, if un rebutted, would lead to a finding for the Employer. This is so even disregarding Ms. McGuinty's description at hearing of the Claimant's admission that he did not call in within 3 days. The Employer has satisfied the requirement of participation set out by regulation. The Employer is relieved of charges for the overpayment. The Claimant will be charged the overpayment.

#### **DECISION:**

The administrative law judge's decision dated October 13, 2015 is **REVERSED ON THE ISSUE OF OVERPAYMENT CHARGING**. The overpayment entered in the amount of \$1,460 is chargeable to the Claimant and not to the Employer's account.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman