

**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**

**THOMAS A HOHANSHELT
1304 MARSHALL ST
BOONE IA 50036**

**AERUS LLC
c/o FRICK UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283**

**Appeal Number: 04A-UI-00893-B4T
OC: 11/09/03 R: 02
Claimant: Appellant (5/R)**

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 96.4-3 – Whether claimant is able and available for work.
Section 96.4-3 – Whether claimant is still employed at same hours and wages.

STATEMENT OF THE CASE:

Thomas A. Hohanshelt appealed from and unemployment insurance decision dated January 15, 2004, reference 04, that held, in effect, the claimant was still employed in his same job with Aerus, LLC under the same terms and conditions as his original contract of hire. The claimant cannot be considered partially unemployed and benefits were denied effective November 9, 2003.

A telephone conference hearing was scheduled and held on February 17, 2004, pursuant to due notice. The claimant, Thomas A. Hohanshelt did not respond to the notice of hearing mailed to him by the Appeals Section by providing a telephone number of where he could be

contacted at the time of the scheduled hearing. The claimant did not participate in the hearing held.

Lisa Morris, Human Resource Supervisor, participated on behalf of Aerus, Inc.

Official notice was taken of the unemployment insurance decision dated January 15, 2004, reference 04, together with the pages attached thereto (9 pages in all). Employer Exhibit One was admitted into evidence as a late exhibit when received.

FINDINGS OF FACT:

The administrative law judge, having examined the entire record in this matter, finds that: Thomas A. Hohanshelt (claimant) was initially employed with Aerus, Inc. on April 14, 1973 as a sales representative. The claimant was employed on a part-time basis through December 28, 2003 at which time he left his employment with Aerus, Inc. in order to accept work with a franchise employer as an independent contractor. The claimant had the choice of remaining with Aerus, Inc. under the same terms and conditions as he had been employed since April 14, 1973. The claimant, however, chose to leave his employment and accept a position as an independent contractor operating as a sales representative. See Exhibit One admitted into evidence.

The claimant has reported income since the termination of his employment with Aerus, Inc.

Work was available to the claimant as a sales representative with Aerus, Inc. had he chosen to remain in that position.

REASONING AND CONCLUSIONS OF LAW:

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".

871 IAC 24.23(7) – The following are reasons for a claimant being disqualified for being unavailable for work: 24.23(7) where an individual devotes time and effort to becoming self-employed.

871 IAC 24.23(26) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(26) Where a claimant is still employed in a part-time job at the same hours and wages as contemplated in the original contract for hire and is not working on a reduced workweek basis different from the contract for hire, such claimant cannot be considered partially unemployed.

The evidence is clear that the claimant was initially employed as a part-time sales representative on April 14, 1973 and continued in that position up to and including December 28, 2003 when he voluntarily left his employment to become self-employed. The claimant filed a claim for benefits having an effective date of November 9, 2003. The claimant is still employed on a part-time basis as a sales representative however, he is operating as a self-employed person. Under such circumstances the claimant is not able and available for work within the intent and meaning of Iowa Code Section 96.4-3 and the foregoing sections of the Iowa Administrative Code.

The claimant has failed to participate and establish that he is able and available for work within the meaning of Iowa Code Section 96.4-3.

In addition, this matter is remanded to the Unemployment Insurance Services Division for inquiry with respect to the nature of the claimant's termination of employment with Aerus, Inc. on December 28, 2003 as shown by Exhibit One admitted into evidence and further inquiries as may be required.

DECISION:

The unemployment insurance decision dated January 15, 2004, reference 04 is affirmed. Thomas A. Hohanshelt is still employed in his same position as a sales representative as existed at the time of his original hire. Benefits are denied effective November 9, 2003, until such time as he has requalified under the provisions of the Iowa Employment Security Law.

This matter is remanded to the Unemployment Insurance Services Division for inquiry with respect to the nature of the claimant's termination of employment with Aerus, Inc. if any there may have been and such other and further inquiries as may be required.

kjf/b