

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was and still is employed by the employer as a part-time substitute custodian as needed. The employer is an educational institution being a public school district in the state of Iowa. The claimant worked for the employer in the 2004-2005 school year as a substitute custodian working part-time as needed. He was informed that the employer would put his name on the substitute custodian list for the 2005-2006 school year. Nothing was indicated to the claimant that he would not be used as a substitute custodian in the 2005-2006 school year. In fact, the claimant has performed services as a substitute custodian in the 2005-2006 school year. The 2004-2005 school year ended on or about June 3, 2005, and the claimant's substitute custodian work was completed for that year. However, the claimant then worked full-time all summer on the mowing crew for the employer. The last day he performed those services was on or about August 19, 2005. He was told that he would be off work for two weeks and then would be permitted to return as a substitute custodian. The 2005-2006 school year began on or about August 23, 2005, and the claimant has worked as a substitute custodian since the new school year began.

The claimant has placed no physical restrictions or training restrictions on his ability to work and has placed no time or day restrictions on his availability for work. However, concerning his seeking work, the claimant does not always make two in-person job contacts each week. Sometimes he does; sometimes he does not. He does not always make such contacts because he is back working as a substitute custodian as needed for the employer. The only earnings in the claimant's base period other than from the employer herein is \$255.00 from Supreme Staffing, Inc., in the third quarter of 2004.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant is still employed by an educational institution between two successive academic years or terms and has reasonable insurance and therefore would be ineligible to receive unemployment insurance benefits between the two successive academic years or terms. The administrative law judge concludes that the claimant is employed by an educational institution and was, for at least a period of time, off work between two successive academic years or terms but had reasonable assurance that he would be performing the same or similar services in the new academic year or term as he did in the prior academic year or term. Therefore, the claimant is ineligible to receive unemployment insurance benefits.
2. Whether the claimant is ineligible to receive unemployment insurance benefits because at relevant times he is and was not able, available, earnestly and actively seeking work. The claimant is ineligible to receive unemployment insurance benefits for this reason.

Iowa Code section 96.4-5-b provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

5. Benefits based on service in employment in a nonprofit organization or government entity, defined in section 96.19, subsection 18, are payable in the same amount, on the

same terms and subject to the same conditions as compensation payable on the same basis of other service subject to this chapter, except that:

b. Benefits based on service in any other capacity for an educational institution including service in or provided to or on behalf of an educational institution while in the employ of an educational service agency, a government entity, or a nonprofit organization, shall not be paid to an individual for any week of unemployment which begins during the period between two successive academic years or terms, if the individual performs the services in the first of such academic years or terms and has reasonable assurance that the individual will perform services for the second of such academic years or terms. If benefits are denied to an individual for any week as a result of this paragraph and the individual is not offered an opportunity to perform the services for an educational institution for the second of such academic years or terms, the individual is entitled to retroactive payments of benefits for each week for which the individual filed a timely claim for benefits and for which benefits were denied solely by reason of this paragraph.

871 IAC 24.51(6) provides:

School definitions.

(6) Reasonable assurance, as applicable to an employee of an educational institution, means a written, verbal, or implied agreement that the employee will perform services in the same or similar capacity, which is not substantially less in economic terms and conditions, during the ensuing academic year or term. It need not be a formal written contract. To constitute a reasonable assurance of reemployment for the ensuing academic year or term, an individual must be notified of such reemployment.

The administrative law judge concludes that there is a preponderance of the evidence that the employer is an educational institution. The evidence establishes that the employer is a community school district and therefore is an educational institution. See 871 IAC 24.51(1). The administrative law judge further concludes that at least for a brief period of time the claimant was off work between two successive academic years or terms. The administrative law judge further concludes that there is a preponderance of the evidence that the claimant had reasonable assurance that he would be performing the same or similar services in the new academic year or term, 2005-2006, that he performed in the prior academic year or term, 2004-2005. The claimant credibly testified that he was a substitute custodian for the 2004-2005 school year and that he was informed by the employer that he would be put on the substitute custodian list for the 2005-2006 school year. In fact, the claimant has worked as a substitute custodian in the new 2005-2006 school year. Reasonable assurance can be an implied agreement that the employee will perform services in the same or similar capacity as he did in the prior year and the administrative law judge concludes that the claimant had such an implied agreement. It is true that the claimant was merely a substitute custodian working as needed. However, the administrative law judge concludes that to the extent that the claimant is a substitute custodian, he is not unlike a substitute teacher, although not working in an instructional, research, or principle administrative capacity, and therefore would be subject to the "between terms denial" even though he is a substitute custodian. The administrative law judge further notes that the claimant is not otherwise eligible to receive unemployment insurance benefits after removing from consideration the claimant's earnings from the employer herein. Accordingly, the administrative law judge concludes that the claimant is not eligible to

receive unemployment insurance benefits during the period that he was off of work or unemployed between two successive academic years or terms.

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".

Although not specifically set out on the notice of appeal, the claimant permitted the administrative law judge to take evidence on and decide, if necessary, whether he was ineligible to receive unemployment insurance benefits because at relevant times he was not able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3. This issue is really directly related to the issue above concerning the "between terms denial" which is also an able and available issue. In any event, the claimant permitted the administrative law judge to take evidence and decide if he was ineligible to receive unemployment insurance benefits because at relevant times he was not able, available, and earnestly and actively seeking work. The administrative law judge concludes that the claimant has the burden of proof to show that he is able, available, earnestly and actively seeking work under Iowa Code section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322, N.W.2d 269, (Iowa, 1982). The administrative law judge concludes that the claimant has failed to meet his burden of proof to demonstrate by a preponderance of the evidence that, at relevant times, he was either temporarily unemployed or partially unemployed as defined by Iowa Code section 96.19(38)(b)and(c) so as to excuse the claimant from the requirement that he be available and earnestly and actively seeking work. The claimant's regular job was merely part time on-call and the administrative law judge concludes that this is not the kind of regular full-time job contemplated by the definition of partially unemployed.

The claimant testified that he has placed no physical restrictions or training restrictions on his ability to work and therefore the administrative law judge concludes that the claimant is able to work. However, the administrative law judge concludes that the claimant is not available for work. The claimant testified that he had placed no restrictions on the time or day that he could or could not work but the administrative law judge notes that the claimant is not earnestly and actively seeking work as discussed below and appears to be holding out for work from the employer herein which is part time as needed. See 871 IAC 24.23(21). There is also work the claimant does not wish to perform which is unduly limiting his opportunity to work and this also is a reason for the claimant to be disqualified for being unavailable for work. See 871 IAC24.23(19). Finally, the claimant is employed in a part-time job at the same hours and wages as contemplated in the original contract of hire and is not working on a reduced workweek basis different from the contract of hire. The claimant cannot be considered partially unemployed as noted above and further this is a reason for the claimant to be disqualified for being unavailable for work. See 871 IAC 24.23(26). Finally, the claimant testified that he is not always making two in-person job contacts each week. Accordingly, the administrative law judge

concludes that although the claimant is able to work, he is not available for work nor is he earnestly and actively seeking work and, as a consequence, he is ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless the claimant demonstrates that he is available for work and earnestly and actively seeking work and is otherwise entitled to benefits.

DECISION:

The representative's decision of September 7, 2005, reference 01, is affirmed. The claimant, Arlo L. Agee, Jr., is not entitled to receive unemployment insurance benefits, until or unless he demonstrates that he is available and earnestly and actively seeking work and is otherwise entitled to such benefits, because for part of the time he sought benefits he was employed by an educational institution but was off work between academic years or terms and he had reasonable assurance that he would be performing the same work in the new academic year or term as he did in the prior academic year or term and further thereafter because he was not available or earnestly and actively seeking work.

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