

IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
Division of Administrative Hearings
Lucas State Office Building
Des Moines, Iowa 50319

Appeal Number: 07-IWDUI-166
OC: 04/08/07
Claimant: Appellant (4)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

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.**

VICTOR H VASQUEZ
PO BOX 625
STORM LAKE IA 50588-0625

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

INVESTIGATION AND RECOVERY
IOWA WORKFORCE DEVELOPMENT
1000 EAST GRAND AVENUE
DES MOINES IA 50319-0209

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 the department. 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.

DAN ANDERSON, IWD

(Administrative Law Judge)

December 21, 2007

(Decision Dated & Mailed)

Section 96.4-3 - Able and Available
Section 96.5-8 - Administrative Penalty
871 IAC 25.9(2) - Penalties

STATEMENT OF THE CASE:

The claimant filed an appeal from an Iowa Workforce Development Department decision dated November 16, 2007, reference 02, which disqualified the claimant from receiving benefits for a period from November 11, 2007 to March 15, 2008, due to a prior overpayment based on misrepresentation.

The hearing was held pursuant to due notice on December 17, 2007, by telephone conference call. The claimant participated with the assistance of Interpreter, Giovana Carnet. No one participated on behalf of Iowa Workforce Development, Investigation and Recovery.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witness, and having considered all of the evidence in the record, finds: The claimant was the subject of an audit and investigation on his claim for benefits effective April 8, 2007. A representative of Iowa Workforce Development issued a decision that the claimant was over paid benefits \$1,086.00 due to misrepresentation on June 21, 2007. The department has no record on any claimant appeal from the decision. The claimant does not disagree with the overpayment.

When the claimant filed his most recent claim, a department representative advised Investigator Finley. The department record does not show any warning letter issued to the claimant prior to the department decision. The record contains a notation by Investigator Finley that he imposed a penalty of eighteen (18) weeks based on three (3) weeks of claimant unreported wages, and that he had prior unemployment claim experience.

The claimant expressed remorse for the overpayment, and he stated that this had not happened before. When asked about paying it back, a department representative advised that it could be paid by withholding from future benefits. The claimant could not recall how it was that he failed to report wages earned from Christensen Brothers, but he offered assurance that this would not reoccur.

The department administrative policy manual has a guideline of imposing a penalty period ranging from five (5) to twelve (12) weeks without a prior offense when the number of weeks misrepresented is three (3) weeks.

The department did not respond to the hearing notice, and the Investigator was not available when called for the hearing.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether the claimant is able and available for work.

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.

The further issue is whether the administrative penalty imposed is correct.

Iowa Code Section 96.5-8 provides:

8. Administrative Penalty. If the department finds that, with respect to any week of an insured worker's unemployment for which such person claims credit or benefits, such person has, within the thirty-six calendar months immediately preceding such week, with intent to defraud by obtaining benefits not due under this chapter, willfully and knowingly failed to disclose a material fact; such person shall be disqualified for the week in which the department makes such determination, and forfeit all benefit rights under the unemployment compensation law for a period of not more than the remaining benefit period as determined by the department according to the circumstances of each

case. Any penalties imposed by this subsection shall be in addition to those otherwise prescribed in this chapter.

871 IAC 25.9(2) provides:

b. The general guide for disqualifications for deliberate falsification for the purpose of obtaining or increasing unemployment insurance benefits is listed below. It is intended to be used as a guide only and is not a substitute for the personal subjective judgment of the investigator because each case must be decided on its own merits. The administrative penalty recommended for falsification ranges from three weeks through the end of the benefit year.

The administrative law judge concludes that the administrative penalty imposed by the department should be modified pursuant to Iowa Code Section 96.4-3 and Iowa Code Section 96.5-8. The claimant was the subject of an overpayment decision due to misrepresentation within the time period established by the law, which was not appealed, and it has now become final. The 18-week period of disqualification imposed by the department is NOT within the administrative penalty discretion of the law, as it exceeds the guideline range of twelve (12) weeks with no prior offense.

Since there is no record of any prior overpayment offense, the minimum penalty of five weeks is appropriate. While the claimant's unemployment history supports the conclusion he should have known to correctly report his wages from Christensen's, the fact that he had no prior overpayment history demonstrates that he had been accurately reporting his wages up to this incident. Since the claimant will be disqualified for five weeks, and he will suffer further by having his benefits withheld to repay the overpayment (\$1,086), the minimum penalty is appropriate in this matter.

DECISION:

The decision of Iowa Workforce Development dated November 16, 2007, reference 02, is MODIFIED in favor of the claimant. The claimant is disqualified from receiving benefits for the 5-week period ending December 15, 2006. The claimant is entitled to receive benefits effective December 16, 2007, provided he is otherwise eligible.

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