

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DAVID W MEYER
Claimant

KUDER INC
Employer

APPEAL 16A-UI-09132-DL-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/29/16
Claimant: Appellant (6)

Iowa Code § 17A.12(3) – Default Decision
Iowa Admin. Code r. 871-26.14(7) – Dismissal of Appeal on Default

STATEMENT OF THE CASE:

An appeal was filed from an unemployment insurance decision dated August 3, 2016, (reference 05) that deducted vacation pay from benefits. Notice of hearing was mailed to the parties' last-known addresses of record for a telephone hearing to be held at 11:05 a.m. on Thursday, September 8, 2016. A review of the Appeals Bureau's conference call system shows the claimant/appellant failed to respond to the hearing notice and register a telephone number at which he could be reached for the hearing. The appellant wrote an e-mail on Friday, September 9, 2016, indicating he had set his reminder for the wrong day.

ISSUES:

Should the hearing record be reopened?
Should the appeal be dismissed based upon the appellant not participating in the hearing?

FINDINGS OF FACT:

The parties were properly notified of the scheduled hearing for this appeal. Official notice of the Clear2there hearing control screen is taken to establish that appellant did not call or register online with the Appeals Bureau to provide a telephone number and/or name of a representative. Nor did he call the number on the hearing notice to ask for a postponement, assistance, more information, or to provide contact information. After the hearing record was closed at the end of the grace period, the appellant e-mailed asking the record be reopened because he set his reminder for the wrong day.

The hearing notice instruction specifically advises parties:

Immediately register your phone number online or by calling one of the numbers provided below for a telephone hearing scheduled for:

Date: THU SEP 08, 2016

Iowa Time: 11:05 AM

The judge will not call you on the day of the hearing if you have not registered your phone number with the Appeals Bureau in Des Moines, Iowa as instructed below.

The back page of the hearing notice provides further instruction and warning:

If you do not participate in the hearing because you do not register for the hearing, register late, or **cannot be reached at the number you provided when the judge calls for the hearing, the appeal may be dismissed or decided based on other available evidence.** The judge will not call you unless you register online or by phone before the hearing and give your phone number to the Appeals Bureau as instructed on the front side of this notice. This is true even if agency representatives previously contacted you directly or you provided your phone number on some written documentation.

As a *courtesy* to the appellant the record was left open for a minimum grace period of 15 minutes after the hearing start time to give the appellant a *reasonable* opportunity to participate. Allowing additional time would prejudice the non-appealing party for appearing in a timely manner. Holding the appellant in default for failure to appear and participate during a 15-minute window after the hearing start time is reasonable considering the time allocated for each unemployment hearing.

The representative's decision concluded that vacation pay was deductible from unemployment insurance benefits.

REASONING AND CONCLUSIONS OF LAW:

The Iowa Administrative Procedure Act at Iowa Code § 17A.12(3) provides in pertinent part:

If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and make a decision in the absence of the party. ... If a decision is rendered against a party who failed to appear for the hearing and the presiding officer is timely requested by that party to vacate the decision for good cause, the time for initiating a further appeal is stayed pending a determination by the presiding officer to grant or deny the request. If adequate reasons are provided showing good cause for the party's failure to appear, the presiding officer shall vacate the decision and, after proper service of notice, conduct another evidentiary hearing. **If adequate reasons are not provided showing good cause for the party's failure to appear, the presiding officer shall deny the motion to vacate.**

Agency rules at Iowa Admin. Code r. 26.14(7) provide:

If a party has not responded to a notice of telephone hearing by providing the appeals bureau with the names and telephone numbers of the persons who are participating in the hearing **by the scheduled starting time of the hearing** or is not available at the telephone number provided, the presiding officer may proceed with the hearing. If the appealing party fails to provide a telephone number or is unavailable for the hearing, the presiding officer may decide the appealing party is in default and dismiss the appeal as provided in Iowa Code § 17A.12(3). The record may be reopened if the absent party makes a request to reopen the hearing under subrule 26.8(3) and shows good cause for reopening the hearing.

a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.

b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire ex parte as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. **The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.**

c. **Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.** (Emphasis added.)

The Iowa Supreme Court has opined that a default *should not be set aside for ordinary negligence or want of ordinary care*. Defaults should not be set aside where the movant ignores plain instruction with ample opportunity to comply. See *Houlihan v. Emp't Appeal Bd.*, 545 N.W.2d 863 (Iowa 1996). (Emphasis added.) Here the clear directive is to read the hearing notice and register a telephone number where the party can be reached for the hearing. The second part of that directive is to be available at the number provided at the date and time of the hearing. Further, if the party misses or does not receive the hearing call, the party has telephone numbers on the hearing notice at which inquire. Due process requires notice and an opportunity to be heard, both of which were provided to each party. *The rule does not provide exceptions for good intentions and/or a party contacting the Appeals Bureau within a 'reasonable' or certain amount of time after the hearing is scheduled.* It is assumed an appellant intends to participate in the hearing simply by the fact that an appeal is filed, but the appellant's responsibility does not end there. Each party is required to follow the prominent specific written instructions printed on the hearing notice. The appellant filed the appeal and is held solely responsible for going forward with the case in a prompt and deliberate manner. The rule holds an appellant in default if not present *at the start* of hearing. As a courtesy, appellant was granted an additional 15-minute grace period not required by statute or rule. Here, notwithstanding notice, opportunity and additional time, the appellant failed to prosecute the case at the appointed date and time without providing a good-cause reason for the delay or failure to do so. Accordingly the appellant is in default and the appeal shall be dismissed. Iowa Code § 17A.12(3) and Iowa Admin. Code r. 24.14(7). The unemployment insurance decision remains in force and effect.

DECISION:

The appellant is in default and the appeal is dismissed. The record shall not be reopened. The unemployment insurance decision dated August 3, 2016, (reference 05) deducting vacation pay from benefits remains in effect.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/pjs