**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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| **GLENN L ROCHHOLZ**<br>Claimant<br><br>**MAIN STREET DONUTS LLC**<br>Employer | **APPEAL 17A-UI-04162-NM-T**<br><br>**ADMINISTRATIVE LAW JUDGE DECISION**<br><br>**OC: 02/26/17**<br>**Claimant: Respondent (1)** |

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

## STATEMENT OF THE CASE:

The employer filed an appeal from the March 24, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on May 8, 2017. The claimant did not participate. The employer participated through owner John Tauchen. Department's Exhibit D-1 was received into evidence and offical notice was taken of the administrative record.

## ISSUES:

Is the appeal timely?
Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

## FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: A disqualification decision was mailed to employer's last known address of record on March 24, 2017. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by April 3, 2017. The appeal was not filed until April 14, 2017, which is after the date noticed on the disqualification decision. Tauchen testified he did not believe that he received the decision until April 6 or 7, 2017, though mail from Des Moines usually arrives within three to five business days. Tauchen waited an additional seven to eight days before filing his appeal because he was traveling out of town and working on getting documentation and exhibits together. No proposed exhibits were submitted with the appeal or for the hearing.

Claimant was employed full time as a donut maker from the fall/winter 2015, until this employment ended on October 8, 2016, when he was discharged. On October 8, 2016, claimant was observed covering up security cameras. The employer had suspected claimant

was stealing its property. Claimant was last suspected of taking property three to four weeks prior to his termination, but the employer was unable to confirm for certain whether this occurred. The employer did not confront claimant about its suspicions. Following the October 8 incident a full inventory was done and it did not appear any of the employer's property was missing. Claimant had received no prior warnings for similar incidents. Nevertheless, the employer concluded it could no longer employ claimant.

The claimant filed a new claim for unemployment insurance benefits with an effective date of February 26, 2017. The claimant filed for and received a total of $798.00 in unemployment insurance benefits for the weeks between February 26 and April 8, 2017. The employer participated in a fact-finding interview regarding the separation on March 23, 2017. The fact finder determined claimant qualified for benefits.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the employer's appeal is untimely.

Iowa Code § 96.6(2) provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of § 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to § 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving § 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to § 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving § 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding § 96.8, subsection 5.

The ten calendar days for appeal begins running on the mailing date. The "decision date" found in the upper right-hand portion of the representative's decision, unless otherwise corrected immediately below that entry, is presumptive evidence of the date of mailing. *Gaskins v. Unempl. Comp. Bd. of Rev.*, 429 A.2d 138 (Pa. Comm. 1981); *Johnson v. Bd. of Adjustment*, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

The record in this case shows that more than ten calendar days elapsed between the mailing date and the date this appeal was filed. The Iowa Supreme Court has declared that there is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and that the administrative law judge has no authority to change the decision of a representative if a timely appeal is not filed. *Franklin v. Iowa Dep't of Job Serv.*, 277 N.W.2d 877, 881 (Iowa 1979). Compliance with appeal notice provisions is jurisdictional unless the facts of a case show that the notice was invalid. *Beardslee v. Iowa Dep't of Job Serv.*, 276 N.W.2d 373, 377 (Iowa 1979); see also *In re Appeal of Elliott*, 319 N.W.2d 244, 247 (Iowa 1982). The question in this case thus becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. *Hendren v. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). The employer testified it did not receive the fact-finding decision until April 6 or 7, even though it generally only takes mail from Des Moines three to five days to arrive. The employer had no explanation for this delay. Nevertheless, assuming the employer's testimony is accurate, it waited an additional seven or eight days before filing the appeal. The reason given for this delay was that the employer was gathering documentation and evidence, none of which was provided with the appeal or for the hearing. The record shows that the appellant did have a reasonable opportunity to file a timely appeal, but failed to do so.

The administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was not due to any Agency error or misinformation or delay or other action of the United States Postal Service pursuant to Iowa Admin. Code r. 871-24.35(2). The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code § 96.6(2), and the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the appeal. See *Beardslee v. Iowa Dep't of Job Serv.*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. Iowa Dep't of Job Serv.*, 277 N.W.2d 877 (Iowa 1979).

Even if the appeal were timely, the employer has not met its burden in showing that claimant engaged in any current act of misconduct. While theft from the employer would generally be considered misconduct, the employer testified that it had been unable to definitively show the claimant engaged in theft, that the last suspected theft occurred three to four weeks prior to the termination, and nothing appeared to be missing following the October 8 incident. Benefits are allowed provided claimant is otherwise eligible. The issues of overpayment and participation are moot.

**DECISION:**

The March 24, 2017, (reference 01) unemployment insurance decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs