BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

JOSEPH E DAVIS

Claimant

and

MODERN PIPING INC

Employer

HEARING NUMBER: 19BUI-08214

EMPLOYMENT APPEAL BOARD DECISION

SECTION: 10A.601 Employment Appeal Board Review

D E C I S I O N

FINDINGS OF FACT:

A hearing in the above matter was held November 7, 2019. The administrative law judge's decision was issued November 15, 2019. The administrative law judge's decision has been appealed to the Employment Appeal Board. The Board finds that the decision and record below failed to address issues critical to an accurate resolution of this case.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 10A.601(4) (2019) provides:

> 5. Appeal board review. The appeal board may on its own motion affirm, modify, or set aside any decision of an administrative law judge on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it. The appeal board shall permit such further appeal by any of the parties interested in a decision of an administrative law judge and by the representative whose decision has been overruled or modified by the administrative law judge. The appeal board shall review the case pursuant to rules adopted by the appeal board. The appeal board shall promptly notify the interested parties of its findings and decision.

Pursuant to this authority we review this case and determine to remand it for further proceedings consistent with this decision.

The decision below focused on the question of the Claimant had a subjective feeling that he would rather not have had gone to unpaid training in order to remain in the apprenticeship program. The Administrative Law Judge was focused on the idea that there must be the consent of both parties to the training, yet did not adequately develop the record regarding the circumstances of the requirement. As we have **repeatedly** explained in past:

The Union as the exclusive bargaining representative has the power to consent for the workers in the bargaining unit. Of course, "[i]n most respects a collective bargaining agreement cannot supplant a statutory scheme for unemployment compensation." E.g. *Efkamp v. IDJS*, 383 N.W.2d 566 (Iowa 1986); *accord Central Foam Corp. v. Barrett*, 266 N.W.2d 33, 35 (Iowa 1978); *Crane v. Iowa Dept. of Job Service*, 412 N.W.2d 194 (Iowa App. 1987). But in the specific circumstance whether a worker is allowed to disagree with negotiated terms of a CBA and quit, the Court has held that the Union consents to the terms of the contract of hire through the CBA.

> It does not however follow that collective bargaining agreements are irrelevant to the question of whether a worker could reasonably refuse to work for a reduced wage. On that question we note and approve the following:
>
> > [S]ince the majority of the employees in an appropriate collective bargaining unit by selecting a union to represent them, make that union the exclusive bargaining agent for all of the employees in the union ... **the rights of the individual worker to deal with his employer is surrendered to the bargaining agent....** 76 Am.Jur.2d Unemployment Compensation § 65 (1975).

Efkamp v. IDJS, 383 N.W.2d 566, 569-70 (Iowa 1986). It is black letter law, then, that the governing CBA is the contract of hire for every worker in a bargaining unit**. Thus, in the sense that the statute uses voluntary, i.e. in the sense of volition, the worker has through the Union agreed to the period of training, and to the terms of that training, and any period of unemployment is not through no fault of the worker and his representative, the Union.** So, could the worker quit rather than attend training and claim that the term of the contract of hire requiring the unpaid training was contrary to his will, and thus a change in the contract of hire? Not under Efkamp he couldn't. Under Efkamp this is an agreed to term of the contract of hire. **Even if the worker is not a union member or voted against certification, once the Union is certified then it is the exclusive bargaining agent for the worker, and the governing CBA is the worker's contract of hire so long as the worker is in the covered bargaining unit. This means even if the worker is providing no services during this period, and also receiving no wages, then it is a voluntary period of unemployment and the worker is not able and available for work**. *See Amana Refrigeration v. IDJS*, 334 N.W.2d 316, 319 (Iowa App. 1983); 871 IAC 24.23(10); 871 IAC 24.22(2)(j). Within the meaning of our law the leave of absence while on training was exactly "[a] leave of absence negotiated with the consent of both parties…" 871- 24.22(2)(j).

Davis v. Modern Piping, 19B-UI-07541 (EAB 11/7/2019); *see also Lewis v. Modern Piping Inc,* 19B-UI-07540-EAB (11-5-2019); *Rammelsberg v. Pipe Pro Inc,* 19B-UI-06247-EAB (9-25-2019); *Eden v. Day Mechanical Systems Inc*, 19B-UI-05609-EAB (9-12-2019); *Stonger v. Frank Millard & Co Inc*, 19B-UI-05919-EAB (9-10-2019); *Walker v. Frank Millard & Co Inc,* 19B-UI-04801-EAB (8-5-2019); *Myrick v. Bowker Mechanical Contractors*, 19B-UI-03842-EAB (7-18-2019*); Scott v. Frank Millard & Co Inc*, 19B-UI-03654-EAB (7-15-2019); *Gayewski C. Frank Millard & Co Inc*, 19B-UI-03701-EAB (7-3-2019); *Sheremet v. Frank Millard & Co Inc,* 19B-UI-03702-EAB (7-3-2019); *Nosek v. Bowker Mechanical Contractors*, 19B-UI-03841-EAB (7-1-19); *Pasker v. Bowker Mechanical Contractors*,

19B-UI-03840-EAB (7-1-2019); *Betenbender v. Bowker Mechanical Contractors*, 19B-UI-03839-EAB (7-1-2019); *Johnston v. Winger Contracting Company,* 19B-UI-03620-EAB (6-20-2019); *Harms v. Winger Contracting Co*, 19B-UI-03094-EAB (6-18-2019); *Butterbaugh v. Bowker Mechanical Contractors*, 19B-UI-02749-EAB (5-22-2019).

We **again** emphasize that one need not subjectively choose to be represented by a union in order to surrender the right to individually bargain with the employer. A worker can scorn the union, vote against the union, oppose unionization on principle, and if that worker is in a covered collective bargaining unit then the federally certified union is that worker's exclusive bargaining agent, period. As *Efkamp* – an Iowa Supreme Court case – makes clear a worker consents to the terms of the CBA through this exclusive bargaining agent. This means that in a case where a leave of absence for training is negotiated between the union and the employer then the training leave of absence would be negotiated with the legal consent of *each and every worker in the collective bargaining unit*.

Furthermore, as we have explained in the past, a worker who takes a job under the union contract and understands that a leave of absence will be part and parcel of the apprenticeship program the worker has signed up for, and that this leave will be unpaid, then the worker has *also* subjectively consented to the unpaid leave of absence.

Given these rulings the Administrative Law Judge should have addressed at a minimum whether the Claimant understood when he started the apprenticeship program that he would be required to attended training during an unpaid leave of absence. The Administrative Law Judge should also have addressed whether the requirement was the result of a collective bargaining agreement that applies to the Claimant's job classification. The relevant terms of the CBA should also be addressed.

We note that we have previously ruled that a Claimant on a training leave of absence is not temporarily unemployed under Iowa Code §96.4(3). We have then gone on to find that regardless of whether the leave is with consent, the worker who devoted 100% of his time to the training is not able and available and/or earnestly and actively seeking work and so not eligible for benefits. We might be able to reverse the Administrative Law Judge based on this provision. But after so many rulings we think we are entitled to a complete record, and so choose to remand.

The record of the hearing before the administrative law judge only addresses the question of subjective feelings of consent from the Claimant. It fails to address the issues of the role of the collective bargaining agreement in the leave, the terms of that collective bargaining agreement, and the terms and conditions of the apprenticeship which were known to the Claimant when he entered that program. As the Iowa Court of Appeals noted in *Baker v. Employment Appeal Board*, 551 N.W. 2d 646 (Iowa App. 1996), the administrative law judge has a heightened duty to develop the record from available evidence and testimony given the administrative law judge's expertise. Further although the Employer did not show to the hearing, the Claimant was the appellant, and the Claimant has the burden of proof on availability. Since the Employment Appeal Board is unable to adequately make a decision based on the record now before it, this matter must be remanded for a new hearing in order that evidence may be obtained from the parties.

In conducting the new hearing, the Administrative Law Judge and the parties should make sure to get evidence on whether during the relevant time the Claimant was covered by an applicable collective bargaining agreement, the relevant terms of any applicable agreement (having the agreement as an exhibit would be best and simplest), whether the Claimant was on notice when he started the apprenticeship program that periodic mandatory unpaid training was required, and any other relevant matter. The Administrative Law Judge should also make sure to seek information on whether there was a plant shutdown, vacation, inventory, lack of work, or emergency that caused the Claimant to be

unemployed during the week in question. We caution the parties that under Iowa Code §96.4 the phrases “lack or work” and “shutdown” refer to conditions affecting the Employers workforce at the relevant location(s) *in general*. Iowa Code §96.19(38)(c).

DECISION:

The decision of the administrative law judge dated November 15, 2019 is not vacated at this time. This matter is remanded to an administrative law judge in the Workforce Development Center, Appeals Section. The administrative law judge shall conduct a new hearing following due notice. After the hearing, the administrative law judge shall issue a decision that provides the parties appeal rights.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv