IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JON M MALL Claimant **THE HON COMPANY** Employer	**APPEAL 16A-UI-07703-H2T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/12/16** **Claimant: Respondent (2)**

Iowa Code § 96.6-2 – Timeliness of Appeal
Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
871 IAC 24.10 – Employer Participation in the fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the July 1, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 2, 2016. Claimant participated. Employer participated through Mike Reddersdorf, MCR Generalist; Russ Hillman, Project Manager with HNI Technical Services and was represented by Sandra Linsin of Employer's Edge. Employer's exhibit one was entered and received into the record. Employer's exhibits one and two were entered and received into the record.

ISSUES:

Did the employer file a timely notice of appeal?

Was the claimant discharged due to job connected misconduct or did he voluntarily quit his employment without good cause attributable to the employer?

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: Claimant was hired to be a full-time welder beginning on June 25, 2012 through February 3, 2016 when he voluntarily quit by refusing to continue working for the employer as a welder. The claimant initially worked for a temporary employment agency who assigned him to work at HON. While working as an employee of the temporary company the claimant performed mechanical maintenance duties at the HON facilities. HON does not hire any employee to be a permanent maintenance technician unless they have successfully completed their own internal

apprenticeship program. This ensures that employees are well qualified to work safely and accurately on HON's equipment. The claimant was specifically hired at HON as a full-time welder with no guarantee made to him that he would be allowed to perform mechanical maintenance duties.

HON offers an extensive apprenticeship program that employees may voluntarily apply to join. A committee then meets to decide if an employee will be allowed to participate in the apprenticeship program. The claimant applied for and was accepted into the apprenticeship program on January 27, 2013. He signed the apprenticeship agreement that put him on notice that if he did not complete the requirements of the apprenticeship program he would not be allowed to work as a maintenance technician but would be allowed to return to his position as a welder. Among other requirements, the apprenticeship program requires completion of 8,000 hours of on-the-job training and successful completion of 52 hours of college technical training course work within a four-year period. Employees must obtain passing grades in the course work to be considered to have successfully completed the class.

The claimant struggled to complete the course work primarily because he did not attend the required classes. The claimant did not give the apprenticeship his best efforts because he did not attend class or complete his homework in a timely manner. The claimant knew that he had to pass the classes in order to complete in and remain a part of the apprenticeship program. Claimant knew that attending classes and passing the class with a passing grade was his responsibility. Additionally, the claimant was not as truthful and forthcoming with Mr. Hillman about his attendance and progress in the program as he should have been. The claimant kept assuring Mr. Hillman that he was attending class and completing the required work when in fact he was not.

All employees in the apprenticeship program were expected to comply with the same rules. One of the rules, which the claimant knew about, was that he be able to complete the program within four years. The claimant was placed on a performance improvement plan on December 3, 2013. That warning placed him on specific notice about what was expected of him going forward. Part of claimant's performance warning included a requirement that the claimant be honest and forthcoming with the employer.

Mr. Hillman made ongoing contemporaneous notes of his meetings and discussions with the claimant about his lack of progress in the apprenticeship program. Mr. Hillman's notes are an accurate reflection of how events occurred during the claimant's time in the apprenticeship program. For the spring 2015 term the claimant obtained two "D" grades in his classes. He was not satisfactorily attending class or completing the homework requirements. Mr. Hillman continued to meet with him and counsel him. In the fall 2015 term the claimant reported to the employer that he was attending class while his teacher reported to Mr. Hillman that he was not. The claimant obtained an "F" or failing grade in his math class. The committee reviewed every employee in the apprenticeship program every six months to determine if the employee was eligible to continue in the program. After the fall 2015 term the committee determined it would be physically impossible for the claimant to finish the requirements of the program within the four-year period as he would have to repeat so many classes. The claimant would have to successfully take and complete 24 credit hours in a three semester period. Additionally, the claimant's failure to attend class and his failure to be honest with Mr. Hillman led the committee to determine that the claimant should be removed from the apprenticeship program. The claimant's employment was not ended by his removal from the apprenticeship program. Continued work was available for him at a welder position in any number of plant locations during various shifts.

The claimant was notified by letter dated December 8, 2015 that he was being removed from the apprenticeship program. That same letter specifically put him on notice that he was being given until February 3, 2016 to bid into another open job in the plant. At the time the claimant was removed from the apprenticeship program his employment was not ended by HON. At the time the claimant was removed from the apprenticeship program, the employer had at least seven welding positions open that the claimant could have bid into and obtained. Continued work as a welder was available to the claimant. The claimant did not apply for any of the open positions in the plant because he did not want to continue working as a welder. The claimant's own actions are what caused him to be removed from the program, but continued work as a welder was available for him. When the claimant did not bid into a new position, the employer considered him to have terminated his employment and his separation paperwork was processed.

The employer sent an e-mail to the representative company on July 11 indicating that they wanted to appeal the fact-finder's decision that awarded the claimant benefits. Due to an e-mail switchover and malfunction, the e-mail to the representative was captured in the quarantine folder and not sent. The employer learned of the malfunction on July 12 and their appeal was filed that day.

The claimant has received unemployment benefits after the separation on a claim with an effective date of June 12, 2016.

The employer did participate personally in the fact-finding interview through Mike Reddersdorf who provided essentially the same information to the fact-finder as was provided at the appeal hearing.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the employer's appeal is timely. The administrative law judge determines it is.

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 section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 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 section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 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 section 96.8, subsection 5.

A recent amendment to the administrative rules allows appeals to be filed via e-mail or through the internet. Prior to allowing electronic appeals generally only appeals filed in person or via the United States mail were allowed. The agency rules have always allowed an error or delay by the US post office as an acceptable reason for a late filed appeal. (see 871 IAC 24.35(2)). Under the reasoning it makes sense to allow a late filed appeal due to an e-mail or electronic malfunction. The employer's records clearly establish an electronic e-mail malfunction as the reason for their late filed appeal. Thus, the employer's appeal shall be considered as timely.

For the reasons that follow, the administrative law judge concludes the claimant was not discharged but voluntarily left the employment without good cause attributable to the employer.

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
>
> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
>
> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Code § 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Iowa Admin. Code r. 871-24.25(27) and (28) provides:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (27) The claimant left rather than perform the assigned work as instructed.
>
> (28) The claimant left after being reprimanded.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer.

The claimant had no right to remain in the apprenticeship program indefinitely or without completing or meeting the clearly set out expectations. The claimant was removed from the program due to his own actions, that is his failure to attend the classes and to complete the homework successfully. The claimant did not give the program his best efforts because he did not at a minimum attend classes. The employer followed their own policy in removing him from the program. The claimant was given several warnings and counseling that he was in jeopardy of losing his apprenticeship, but did not make the required changes to remain in the program. The claimant was not discharged from his employment. He was clearly told he had only to bid into an open position, and there were seven open welder position, to continue his employment. The welder position is the one the claimant was originally hired to perform and was suitable work for him. The claimant simply chose not to continue his employment. His leaving was not for good cause attributable to the employer. Benefits are denied.

Iowa Code § 96.3(7)a-b, as amended in 2008, provides:

> 7. Recovery of overpayment of benefits.
>
> a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.
>
> b. (1) (a) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.
>
> (b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.
>
> (2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This

subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant.

> Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.
>
> This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer participated in the fact-finding interview the claimant is obligated to repay the benefits he received to the agency and the employer's account shall not be charged.

DECISION:

The July 1, 2016, (reference 01) decision is reversed. The employer did file a timely notice of appeal. The claimant voluntarily left employment without good cause attributable to the employer. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has been overpaid unemployment insurance benefits in the amount of $2,586.00 and he is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and their account shall not be charged.

_____
Teresa K. Hillary
Administrative Law Judge

_____
Decision Dated and Mailed

tkh/pjs