

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

DAVID B MUETHER

Claimant,

and

DECORAH COMM SCHOOL DIST

Employer.

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HEARING NUMBER: 14B-UI-10056

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.4-3

DECISION

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Employer appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds the administrative law judge's decision is correct. The administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED**. The matter is further **REMANDED** to the Administrative Law Judge to consider the issue of whether the Claimant is unemployed, as set forth below.

A hearing in the above matter was held October 16, 2014. The administrative law judge's decision was issued October 17, 2014. The administrative law judge's decision has been appealed to the Employment Appeal Board. The Board affirms on the issue of able and available, but remands on the question of whether the Claimant is unemployed. The Board finds that the notice of hearing, the record, and the decision below failed to address issues critical to an accurate resolution of this case.

Iowa Code section 10A.601(4) (2014) 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. We note in particular that the Board has the statutory authority to remand to the Administrative Law Judge without the unnecessary step of going through the fact finding process. In particular, “[i]f new issues appear, different from those which are noticed in the appeal, the board may remand such issues to an **administrative law judge** for appropriate action...” 486 IAC 3.1(6) (emphasis added). This we do today.

In general, a part-time worker who works hours that vary according to need, at least to some extent, and has been so working in the past, will not be unemployed just because work is down. The rules on school employment refer to this concept. “The school employer who continues to furnish part-time employment to the claimant may make a protest on the basis that the individual is still employed at the part-time employment and request removal of any charges to the part-time employer account, whether contributory or reimbursable, pursuant to Iowa Code section 96.7(3)’a’(2).” 871 IAC 24.52(13). This provision is but a special application of the more general law governing part-time workers. The Code section in question (although the cite in the regulation is a typo) states “if the individual to whom the benefits are paid is in the employ of a base period employer at the time the individual is receiving the benefits, and the individual is receiving the same employment from the employer that the individual received during the individual’s base period, benefits paid to the individual shall not be charged against the account of the employer.” Iowa Code §96.7(2)(a)(2). While this is about charging of benefits the Department regulations address availability disqualification:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

....

(26) Where a claimant is still employed in a part-time job at the same hours and wages as contemplated in the original contract for hire and is not working on a reduced workweek basis different from the contract for hire, such claimant cannot be considered partially unemployed.

871 IAC 24.23(26). This regulation applies to any week the Claimant applies for partial benefits. For weeks where the Claimant does not work at all, and thus claims for full benefits, rule 24.23(26) may not be applicable. Yet “[a]n individual whose wage credits earned in the base period of the claim consist exclusively of wage credits by performing on-call work, such as ... any other individual whose work is solely on-call work during the base period, is not considered an unemployed individual.” 871 IAC 24.22(i)(3). It is clear this Claimant performed on-call work during at least some periods of his employment, and perhaps all of it was on-call work. We need a more complete discussion of the contract under which this Claimant performed work for the Employer. Plus if the Claimant worked at any other base period job on a basis other than on-call then rule 24.22(i)(3) does not apply, and thus that issue needs also be addressed. We note for the Employer that it could request relief from charges based on the argument that the Claimant is still employed at part-time work, even if the Claimant does have base period wages from other employers that is not for on-call work. 871 IAC 24.52(13).

On remand the Administrative Law Judge should elicit testimony on, and make a determination of, whether or not the Claimant is still employed in a part-time job at the same hours and wages as contemplated in the contract for hire, and whether the Claimant was employed exclusively on an on-call basis during his base period. We note that these issues are about whether the Claimant is “unemployed,” not whether he is “able and available” for work and thus we affirm on the able and available issue today. 871 IAC 24.22(f)(only need to be available to same extent as in base period, *i.e.*, a part-time worker need only be available for part-time work.) We caution the Claimant, however, that during the period that he is collecting benefits he must continue to look for work at other employers and that “[s]ubstitute workers ...who hold themselves available for **one employer** and who do not accept other work, are not available for work within the meaning of the law and are **not** eligible for benefits.” 871 IAC 24.22(i)(3)(emphasis added). There is currently no evidence here of such limitation by the Claimant during the period he is claiming for benefits, and so we do affirm on availability at this time.

We find that availability and being unemployed are sufficiently distinct issues in this case that the notice of hearing which only addressed able and available, and not the issue of being unemployed, was not adequate, and this is another reason why we remand. *Silva v. Employment Appeal Bd.* 547 N.W.2d 232 (Iowa App. 1996).

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. 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 as laid out above.

DECISION:

The decision of the administrative law judge dated October 17, 2014 is not vacated at this time, and remains in force unless and until the Department makes a differing determination pursuant to this remand. 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.

Kim D. Schmelt

RRA/fnv

Ashley R. Koopmans