

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

RICHARD J PETERS
311 1ST AVE
CLINTON IA 52732

POLTERGEIST PUB INC
POLTERGEIST PUB
1111 5TH AVE N
CLINTON IA 52732

Appeal Number: 04A-UI-02243-B4T
OC: 02/20/04 R: 02
Claimant: Respondent (4)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-3-a – Whether claimant refused to accept suitable work
Section 96.4-3 – Whether claimant is able and available for work.
Section 96.19-38 – Whether claimant is partially unemployed.
Section 96.3-7 – Whether claimant is overpaid benefits

STATEMENT OF THE CASE:

An appeal was filed on behalf of the employer from an unemployment insurance decision dated February 20, 2004, reference 02, that held, in effect, Richard J. Peters did not accept an offer of work with Poltergeist Pub Inc. on January 10, 2004 because the job offer did not provide wages of at least 100 percent of his average weekly wage.

A telephone conference hearing was scheduled and held on April 7, 2004 pursuant to due notice. Richard J. Peters participated. David Haas, President participated on behalf of Poltergeist Pub, Inc.

Official notice was taken of the unemployment insurance decision, bearing reference 02, together with the pages attached thereto (8 pages in all). Employer's Exhibit One consisting of 8 pages was admitted into evidence.

FINDINGS OF FACT:

The administrative law judge, having examined the entire record in this matter, finds that: Richard J. Peters was employed with American River Transportation; MJ Construction and Fabrication and Nanran Inc., During the first quarter of 2003 and the fourth quarter of 2002. The claimant filed an initial claim for benefits having an effective date of April 6, 2003 and subsequently filed an additional claim for benefits having an effective date of January 18, 2004. The claimant's weekly benefit amount was determined to be \$292.00 per week and a maximum benefit allowable was determined to be \$7,592.00.

In addition, it was determined that the claimant's average wage was \$774.08.

Following the termination of the claimant's employment with the entities he had been employed with during the fourth quarter of 2002 and the first quarter of 2003, the claimant received unemployment insurance benefits.

On or about November 13, 2003, the claimant made application for employment with Poltergeist Pub, Inc., and spoke with David Haas, President. The claimant was hired as a part-time bartender and commenced working from 10-50 hours per week on an on-call basis. David Haas did not normally schedule a work shift for any of his employees but rather allowed them to accept work hours that they desired to have. The claimant continued to work from 30-50 hours per week until on or about January 19, 2004. On said date, work was available to the claimant, but he chose not to sign up as a bartender for that period of time. The claimant is now living with a relative at the address shown on the notice of hearing and has problems taking care of the relative. The claimant has intentionally limited his availability by not accepting job opportunities that were available to him at Poltergeist Pub, Inc. The claimant continued in his employment choosing hours that he desired to work from January 24, 2004 through April 3, 2004 and has received benefits in the amount of \$2,948.00. The claimant has continued in his part-time/on-call job as a bartender up to the date of the hearing held in this matter.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5-3-a provides:

An individual shall be disqualified for benefits:

3. Failure to accept work. If the department finds that an individual has failed, without good cause, either to apply for available, suitable work when directed by the department or to accept suitable work when offered that individual. The department shall, if possible, furnish the individual with the names of employers which are seeking employees. The individual shall apply to and obtain the signatures of the employers designated by the department on forms provided by the department. However, the employers may refuse to sign the forms. The individual's failure to obtain the signatures of designated employers, which have not refused to sign the forms, shall disqualify the individual for benefits until requalified. To requalify for benefits after disqualification under this

subsection, the individual shall work in and be paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

a. In determining whether or not any work is suitable for an individual, the department shall consider the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness, prior training, length of unemployment, and prospects for securing local work in the individual's customary occupation, the distance of the available work from the individual's residence, and any other factor which the department finds bears a reasonable relation to the purposes of this paragraph. Work is suitable if the work meets all the other criteria of this paragraph and if the gross weekly wages for the work equal or exceed the following percentages of the individual's average weekly wage for insured work paid to the individual during that quarter of the individual's base period in which the individual's wages were highest:

(1) One hundred percent, if the work is offered during the first five weeks of unemployment.

(2) Seventy-five percent, if the work is offered during the sixth through the twelfth week of unemployment.

(3) Seventy percent, if the work is offered during the thirteenth through the eighteenth week of unemployment.

(4) Sixty-five percent, if the work is offered after the eighteenth week of unemployment.

However, the provisions of this paragraph shall not require an individual to accept employment below the federal minimum wage.

Iowa Code Section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Code Section 96.19-38 provides:

"Total and partial unemployment".

a. An individual shall be deemed "totally unemployed" in any week with respect to which no wages are payable to the individual and during which the individual performs no services.

b. An individual shall be deemed partially unemployed in any week in which, while employed at the individual's then regular job, the individual works less than the regular full-time week and in which the individual earns less than the individual's weekly benefit amount plus fifteen dollars.

An individual shall be deemed partially unemployed in any week in which the individual, having been separated from the individual's regular job, earns at odd jobs less than the individual's weekly benefit amount plus fifteen dollars.

c. An individual shall be deemed temporarily unemployed if for a period, verified by the department, not to exceed four consecutive weeks, the individual is unemployed due to a plant shutdown, vacation, inventory, lack of work or emergency from the individual's regular job or trade in which the individual worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated.

Section 871 IAC 24.24(15)i entitled suitable work provides: in determining what constitutes suitable work the department shall consider among other factors the following: (i) whether the work offer meets the percentage criteria established for suitable work which is determined by the number of weeks which have elapsed following the effective date of the most recent new or additional claim for benefits filed by the individual.

The claimant has continuously worked at a part-time job with Poltergeist Pub, Inc., as a bartender from November 13, 2003 up through and including the date of the hearing held in this matter. Under such circumstances the claimant cannot be considered partially unemployed because work continues to be available for him under the same terms and conditions as he was originally hired.

Section 871 IAC 24.23(19) provides:

Availability for work is unduly limited because the claimant is not willing to accept work in such claimant's usual occupation and has failed to establish what other types of work that can and will be performed at the wages most commonly paid in the claimant's locality.

Section 871 IAC 24.23 (26) provides:

Whether 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 of hire. Such claimant cannot be considered partially unemployed.

Such is the case in the instant matter. The claimant remains employed in his part-time job as a bartender under the same circumstances as his initial contract of hire on November 13, 2003. The claimant is therefore not entitled to partial unemployment benefits.

The evidence in the record did not establish that the claimant was made an offer of work on January 19, 2004 or that he refused to accept same with Poltergeist Pub, Inc. Work has continuously been available to the claimant had he chosen to accept the job opportunities that were available. The claimant has limited his availability for work within the intent and meaning of Iowa Code Section 96.4-3.

The administrative law judge concludes that Richard J. Peters is unavailable for work under the provisions of Iowa Code Section 96.4-3 effectively on and after January 19, 2004. Unemployment insurance benefits should be denied.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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 administrative records of the Department disclose that the claimant has received benefits in the amount of \$2,948.00 to which he is not entitled by reason of the instant decision. Richard J. Peters is therefore overpaid benefits in said amount within the intent and meaning of Iowa Code Section 96.3-7.

DECISION:

The unemployment insurance decision dated February 20, 2004, reference 02, is modified. Richard J. Peters is found unavailable for work within the intent and meaning of Iowa Code Section 96.4-3 effectively on and after January 19, 2004 within the intent and meaning of Iowa Code Section 96.4-3. The decision under consideration is therefore amended in favor of the employer.

kjf/b