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

SUSAN KAHN Claimant, and AMERISTAR CASINO COUNCIL BLUFFS INC Employer.	:	HEARING NUMBER: 09B-UI-11163 EMPLOYMENT APPEAL BOARD DECISION

N O T I C E

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: 96.7-2-a(6)

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The claimant appealed this case to the Employment Appeal Board. The 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 are adopted by the Board as its own. The Board sets out its Conclusions of Law below which are in lieu of those of the Administrative Law Judge. The administrative law judge's decision is **AFFIRMED** with the following **MODIFICATION**:

The Employment Appeal Board modifies the administrative law judge's decision by amending the conclusions of law to read as follows:

Normally an appeal of a representative's decision is governed by Iowa Code §96.6:

> 2. Initial determination. ... 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.

Under this provision the Employer would have had ten days after the claim's representative decision to file its appeal. As we have found the claims representative decision was issued on March 11, 2008. The earliest possible date for the Employer's appeal was no where near ten days after this. If we were to apply §96.6(2) we would find the appeal untimely.

This case, however, involves special circumstances that implicate specific statutory provisions. The Employer never received a copy of the March 11, 2008 decision. Under such circumstances this case falls under the rule of Iowa Code §96.7(2)(a)(6) which states:

> Within forty days after the close of each calendar quarter, the department **shall notify each employer of the amount of benefits charged** to the employer's account during that quarter. The notification shall show the name of each individual to whom benefits were paid, the individual's social security number, and the amount of benefits paid to the individual. An **employer which has not been notified as provided in section 96.6, subsection 2**, of the allowance of benefits to an individual, may within **thirty days** after the date of mailing of the notification appeal to the department for a hearing to determine the eligibility of the individual to receive benefits. The appeal shall be referred to an administrative law judge for hearing and the employer and the individual shall receive notice of the time and place of the hearing.

The rules of Iowa Workforce Development further provide:

> 871–26.4 Commencement of unemployment benefits contested case.
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> …
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> 26.4(2) An appeal from an initial decision concerning the allowance or denial of benefits shall be filed, by mail, facsimile or in person, not later than ten calendar days, as determined by the postmark or the date stamp, after the decision was mailed to the party at its last–known address and shall state the following:
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> a. The name, address and social security number of the claimant;
> b. A reference to the decision from which appeal is taken; and
> c. The grounds upon which the appeal is based.
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> 26.4(3) Notwithstanding the provisions of subrule 26.4(2), a contributory employer, which has not previously received a notice of the filing of a valid claim for benefits, may appeal an individual's eligibility to receive benefits within **30 days from the mailing date of the quarterly statement of benefit charges.**

Under these provisions we must have two things to find the appeal timely: (1) non-receipt of the claims representative decision and (2) an appeal filed within 30 days of the quarterly statement of charges. We have ruled, in accord with the Administrative Law Judge, that the Employer did not receive the claims representative decision and that the first requirement is satisfied. We turn now to the second.

The quarterly statement of charges in this case was mailed on Friday, May 9, 2008. Under §96.7(2)(a)(6) this was the last possible day for mailing of quarterly statements as May 9 is 40 days after March 30. The Employer had 30 days to file an appeal. Thirty days from May 9, 2008 is Sunday, June

8, 2008. As this was a Sunday then under Iowa Code §4.1(32) the Employer had until Monday, June 9, 2008 to file its appeal.

Two documents in the record vie for the title of the Employer's appeal. One is Exhibit B which is dated June 4, 2008 and received by Workforce on June 6, 2008. If this is an appeal then it is timely. The other contender is Exhibit D which is dated June 13, 2008. If this is the earliest appeal then it is not timely. The case thus boils down to whether Exhibit B is an appeal.

The rules of Workforce do describe what an appeal should contain. We assume for the purposes of analysis that the requirements for an appeal set out in rule 26.4(2) also apply to appeals under rule 26.4(3) although this is by no means clear. Even applying the 26.4(2) requirements an appeal should contain the claimant's name, the claimant's address, the claimant's social security number, a reference to the decision, and the grounds upon which the appeal is based. The June 4, 2008 letter sets out all these matters with the *possible* exception of the grounds for the appeal. By requesting relief from the charges the letter does clearly challenge the decision and also it gives "poor job performance" as the reason for the separation.

The rule in Iowa has long been that:

> To decide whether [a] statutory provision is mandatory or directory, we look to the purpose the legislature intended it to serve. If the duty imposed by the provision is essential to the main objective of the whole statute, the provision is mandatory, and failure to perform the duty will invalidate subsequent proceedings under the statute. But when the duty is not essential to the main statutory objective, the provision is directory, and failure to perform the duty under it will not affect the validity of subsequent proceedings unless prejudice is shown.

State v. Grimes, 569 N.W.2d 378, 381 (Iowa 1997) (quoting Downing v. Iowa Dep't of Transp., 415 N.W.2d 625, 628 (Iowa 1987) (citations omitted)). "Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by the failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it will still be sufficient, if that which is done accomplishes the substantial purposes of the statute." Hawkeye Lumber Co. v. Board of Review of City of Oskaloosa, 161 Iowa 504, 143 N.W. 563 (1913). The grounds requirement is imposed for the orderly and prompt conduct of business by Workforce Development. It does not go to the essence of the Department's duty in this case. In fact, the appeal merely triggers the Department's next step of issuing a notice of hearing. Under Iowa Code §17A.12 the notice of hearing is the key document for setting out the issues in the contested case. If the notice of hearing does not list an issue then it cannot be considered regardless of what "grounds" might have been stated in the appeal. Silva v. Employment Appeal Board, 547 N.W.2d 232, 235 (Iowa 1996). In an appeal that is to trigger a contested case the main purpose of a grounds requirement is to assist the Department in formulating the contents of the notice of hearing. Indeed the appeal letter need not even be sent to the opposing party. 871 IAC 26.4(1). The letter of June 4, 2008 does state "poor job performance" as the reason for the separation and this, ordinarily, would be sufficient to identify discharge for misconduct as the issue for the hearing. The notice of hearing in this case did identify termination for misconduct as one of the issues for hearing. (We note that since Silva the longstanding

practice of the Department is to notice both termination for misconduct and quit for good cause whenever separation is an issue). Termination for misconduct is exactly what the Claimant argues to be the issue in this case. (See Request for Rehearing, p. 12). It is plain that the appeal has served its main purpose – notifying the Department that an appeal of a specific case has been made – and the appeal is in substantial compliance with the rule. Since the Claimant made no showing of prejudice due to the failure to state more specific grounds that failure is not a fatal defect in the June 4, 2008 appeal.

This conclusion is bolstered by two other points. First, the provision describing what is to be in an appeal is in a regulation not a statute. Given that this rule is for the purpose of regularizing Workforce's internal procedures we feel more confident in our conclusion by the fact that Workforce's own Administrative Law Judge reached the same conclusion. Second, the grounds requirement seems particularly inappropriate in appeals filed under §96.7(2)(a)(6). Under that section the Employer gets the additional time to appeal only if it has not received a copy of the claims representative decision. But it is the claims representative decision the Employer seeks to appeal and that "grounds" would have to address. The statement of charges gives no clue what grounds for appeal might be. (Ex A). How then can the rule require a statement of grounds, other than "we disagree", where the Employer has not even seen the decision? The most that could be expected would be a restatement of whatever was put in the protest. Yet the protest is already on file and requiring a restatement of the protest in the appeal would be pointless. Obviously, the grounds requirement has even less than its usual force when applied to appeals from a statement of charges. The Employer's letter of June 4, 2008 is adequate under any reasonable standard to constitute an appeal from the statement of charges for the purposes of Iowa Code §96.7(2)(a)(6).

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John A. Peno

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Elizabeth L. Seiser

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Monique F. Kuester

RRA/fnv