BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building, 4TH Floor
Des Moines, Iowa 50319
eab.iowa.gov

NANCY S CLARK

Claimant

: **APPEAL NUMBER:** 23B-UI-18117
: **ALJ HEARING NUMBER:** 22A-UI-18117

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: 96.3-7, 96.6-2

D E C I S I O N

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. With the following modification, 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** with the following **MODIFICATION**:

As initial matter we find the Claimant's brief timely for the reasons set forth therein.

The Board makes the following additions to the Findings of Fact.

During the benefit week ending May 9, 2020 the Claimant reported $1,500 as vacation.

While working for Abbe Center for Community Health as a billing specialist the Claimant earned $18 an hour, receiving time-and-a-half when she worked over 40 hours in a week.

Since the Claimant concedes the Employer's wage figures are correct, and since her hourly rate and overtime rate are fixed simple arithmetic yields the following hours of work for the Claimant during the weeks in question:

Week	Hours Worked (calculated)
11/7/2020	40.0
11/14/2020	40.0
11/21/2020	40.0
11/28/2020	30.3
12/5/2020	40.0
12/12/2020	40.2
12/19/2020	40.1
12/26/2020	40.0
1/2/2021	40.0
1/9/2021	40.2
1/16/2021	45.4
1/23/2021	40.0
1/30/2021	40.0
2/6/2021	40.0
2/13/2021	33.1
2/20/2021	40.0
2/27/2021	33.1
3/6/2021	40.2
3/13/2021	40.0
3/20/2021	40.0
3/27/2021	33.1
4/3/2021	34.3
4/10/2021	18.3

These calculated hours worked are consistent those reported by the Employer in Exhibit 2-11. Because of vacation and holiday some of the calculated hours are somewhat different than reported in the exhibit. Of course, Exhibit 2-11 is the more accurate. But both methods of discovering the hours worked reveal that for every week, but the last, the Claimant was working in excess of 30 hours each week.

The Board makes the following modifications to the Reasoning and Conclusions of Law.

The Board strikes from the second to the last paragraph of page 6 of the Administrative Law Judge's decision sentences four, five, and six.

Since this is a federal benefits case the Board does not rely on the Administrative Law Judge's quotation from, and discussion of state law criteria for finding fraud or misrepresentation found on pages nine and ten. These discussions are only relevant to the extent that they are consistent, *in general terms*, with the federal definition of eligibility fraud. Again, that definition requires "false information being provided with the intent to receive benefits for which an individual would not otherwise be eligible."

Baker Duty

The Claimant alleges a failure to develop the record. The Claimant had an attorney throughout the proceeding and *he also* had a duty to develop the record. The Administrative Law Judge's duty in such circumstances is not as pronounced as it is when dealing with *pro se* persons. After all, an attorney might have tactical reasons for not delving into something which aggressive ALJ queries would hinder. Moreover, the focus of the Claimant's argument is on the ALJ failing to address the credibility of the investigator. The argument is "The failure of the ALJ to address these veracity issues in the decision is a failure to develop the record." Obviously, the decision is the decision and the record is the record. The decision is issued *after* the record is closed. Developing the record takes place while the record is open. The claim that failing to discuss every last possible aspect of the record constitutes a failure to get enough information *into* the record is illogical.

By the way, we find the investigator for IWD to be perfectly credible on what we rely on the investigator's testimony for. Indeed, the Claimant does not contest what that person testified to – the Claimant's overpayment. It is clear that the Claimant is overpaid as a result of inaccurate reporting of wages. This is what we rely on the agency witness to establish. The overpayment, which is uncontested. The issue of the Claimant's intent – did she intentionally underreport wages for the purpose of receiving benefits – is not affected by the investigator's credibility. We give that investigator's opinion on whether the Claimant committed misrepresentation or fraud no weight whatsoever. That opinion is a conclusion regarding the Claimant's intent, and we are the final decision makers on that issue. The investigator is just a witness at the hearing, and her opinion on whether the Claimant is credible, or whether the Claimant lied, etc. is not relevant. Again, we give that opinion **no** weight. The only thing we rely on the investigator for is the description of the process, the amount of the underreporting, the amount of the benefits, and the information generally supplied to complaints. *We* decide *de novo* if the Claimant is lying or committed fraud or committed misrepresentation.

The fact of the underreporting, the amount and persistence of the underreporting, the information supplied on how to report, the disregard of that information by Claimant, and the incredible nature of the Claimant's reasons for underreporting, are the key factors in our imposition of the 15% penalty for eligibility fraud. These factors do not in any way depend on the credibility of the investigator. Neither does the Claimant's evidence of her emotional state.

Claimant credibility

Looking to the Claimant's credibility we find that the Claimant's claim that her underreporting of wages was just an error or a misunderstanding is not credible. In this fraud case the State has the burden of proving fraud, and we find that the State has proven that the Claimant knowingly and intentionally underreported her wages for the purpose of collecting benefits to which she had no legal rights. In short, the State has proven Claimant lied about her wages in order to get unemployment benefits.

In addition to the factors identified by the Administrative Law Judge the Claimant's credibility is undermined by the fact that she was making $18 an hour, but consistently reporting wages in the neighborhood of $230 a week. This, of course, would indicate around 13 hours of work for the week. The Claimant *knew* she worked a lot more than 20 hours a week. She was a billing specialist. The credible evidence establishes that a billing specialist would not think she could earn $230 a week, at $18 an hour, while working substantially more than 13 hours a week.

Looking to the 23 weeks from November 7 through April 10, the Claimant worked forty or more hours in 17 weeks. In every week but the last the Claimant was working in excess of 30 hours. But in the week ending 11/21 she reports $400 which is far too small to be the pay for 40 hours at $18 an hour. In fact, if you work 40 hours, as the Claimant did that week, and earn $400, as the Claimant reported, then it is **obvious** that you are earning $10 an hour. Yet the Claimant knew she earned considerably more than this. Then starting in December, she starts reporting in the $230 range. Just looking at the first three weeks in December she worked over 40 hours each of these three weeks and yet reported earnings of $225, $230, and $225. Again, it is **obvious** that someone working 40 hours a week would earn $400 if they were paid just $10 an hour. So, a glance tells one that $230 for a 40-hour week is not even making $6 an hour – less than a third of the $18 hours rate the Claimant made. Indeed, it is not even minimum wage. The Claimant, of course, knew how many days she was working each week. Yet for week after week she reported earning what would be less than $6 an hour, when she knew how many hours she worked, and knew she made $18 an hour. True, some weeks she reported more than $6 an hour, but after those first three weeks she never again reported enough earnings to be even $10 an hour given the hours of work. We do not find credible that the Claimant, a billing specialist, was so unfamiliar with basic arithmetic that she seriously thought that she worked all day long, for an entire week, and yet somehow only earned $230.

The consistent reporting of earning in the $230 range raises questions not only for the reasons mentioned by the Administrative Law Judge but also when looking at hours of work. For example, the week ending 11/28 the Claimant actually worked 30.3 hours as reported on Exhibit 2-11. She earned $545.20 (i.e. $18 an hour). *She* reported $288. Then the next week she starts her practice of reporting $225 and $230 a week. Yet over the next three weeks she works over 40 hours, but reports *less in wages*. She works more, but reports fewer earnings – and continues to report that reduced figure consistently for the rest of her claim.

Finally, the Claimant argues that she must have been getting the wrong numbers off her pay stubs. But they were bi-weekly. It is not credible that she would take a number from a bi-weekly pay stub and report that as her *weekly* wage. Also, while pay stubs are bi-weekly reporting to IWD was weekly. So, Claimant's story is that in the off-weeks she reported a bi-weekly figure as a weekly figure, and did so based on *previous* pay stubs. This does not make sense.

Based on these factors, as well as those set out in the opinion of the Administrative Law Judge, we conclude, that the Claimant is not a credible witness. The State has proven through the greater weight of the credible evidence that the Claimant intentionally underreported her wages for the purpose of collecting unemployment benefits. We have considered the Claimant's evidence on her emotional state. Reviewing the entire record, the evidence shows that the Claimant was capable of forming the requisite intent to commit fraud and misrepresentation. Despite the evidence of emotional challenges during the relevant time, we find that the State has proven fraud and misrepresentation through an intentional decision by the Claimant to falsely report fewer wages than she actually earned in order to collect unemployment benefits.

Statute of Limitations Claim

The Claimant's attorney argues that Iowa Code section "96.9(4)(b)" constitutes a "statute of limitations" on overpayment assessment and/or recovery. Although the Claimant's attorney cites to Iowa Code §96.9(4)(b) that provision does not mention a two-year period directly. But Iowa Code §96.9(4)(a)(1)(b) does. Reading these two paragraphs together the two-year period in §96.9(4)(a)(1)(b) is indirectly referred to in §96.9(4)(b) so we will discuss both – that is, we will discuss subsection four of section nine of the Employment Security Law.

In addressing this argument, we look to the literal terms of the statute. The Employment Security Law is broadly construed to carry out its beneficial purpose, but this does not alter the literal terms of the statute. Guidance to construction simply does not come into play when reading plain English. *See e.g. Estate of Ryan v. Heritage Trail Assoc.,* 745 N.W.2d 724, 730 (Iowa 2008)("When the statute's language is plain and its meaning is clear, we look no further. … [W]e resort to the rules of statutory construction only when the terms of [a] statute are ambiguous."); *Moulton v. Iowa 't Sec. Comm'n,* 239 Iowa 1161, 34 N.W.2d 211, 216 (Iowa 1948)(In unemployment cases "[w]hile the statute under consideration is to be liberally construed in order to effect its beneficent purpose, yet construction should not be carried beyond the limits of its plain legislative intent."). Unlike the Employment Security Law, the Iowa Civil Rights Act explicitly provides that it "be construed broadly to effectuate its purposes." Iowa Code § 216.18(1). The Iowa Supreme Court has explained "our duty in construing this statute, even with the instruction to construe it broadly, requires first that we provide 'a fair interpretation as opposed to a strict or crabbed one—which is what courts are supposed to provide anyway.' Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 233 (2012) [hereinafter Scalia & Garner]. Such a provision doesn't allow courts to ignore the ordinary meaning of words in a statute and to expand or contract their meaning to favor one side in a dispute over another. We effectuate the statute's 'purposes' by giving a fair interpretation to the language the legislature chose; nothing more, nothing less." *Vroegh v. Iowa Dept. Of Corrections,* 972 NW 2d 686 702 (Iowa 2022). As instructed by the Iowa Supreme Court just last year, we do the same this year.

First of all, as a general matter, section nine of chapter 96 deals with the administration of the unemployment compensation fund. The section nowhere uses the word "overpayment" and is not about conditions for payment of benefits. Generally, that Code section discusses how the unemployment compensation fund is to be administered, including which funds may be available for payment of benefits, or for payment of expenses in administering the Employment Security Law. We'd expect a limitation on overpayments to use the word "overpayment," "overpaid" or even the word "over" somewhere. Section nine uses none of these words. In contrast, Iowa Code §96.3 deals with payment of benefits, and in subsection 7 addresses recovery of overpayments. The relevant language states: "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." Iowa Code §96.3(7). If there was to be a statute of limitation on overpayment assessment or recovery here is the place to put it. But the only time limitation found anywhere is section 3 is "subsequently." In fact, subsection 8 refers to back pay awards, and states "[i]f an individual receives benefits for a period of unemployment and subsequently receives a payment for the same period from the individual's employer in the form of or in lieu of back pay, the benefits shall be recovered." Iowa Code §96.3(8). Again, the only time limit is "subsequently." In this context a two-year time limit would be highly unworkable as many awards of backpay are not made until well after two years after the period in question. As far as *collection* of overpayments (which we recognize differs from assessment of an overpayment), the Department is only *allowed* to purge uncollected overpayments after ten years have elapsed since the overpayment decision. Iowa Code §96.11(13). This then belies any two-year limit on *collection* of overpayments. So even before examining the precise language of Iowa Code §96.9 the Claimant's argument is contrary to the structure of the statute and the specific language of §96.3.

Iowa Code section 96.9(4)(a) says:

> 4. *Money credited under section 903 of the Social Security Act.*

a. (1) Money credited to the account of this state in the unemployment trust fund by the secretary of the treasury of the United States pursuant to section 903 of the Social Security Act may not be requisitioned from this state's account or used except for the payment of benefits and for the payment of expenses incurred for the administration of this chapter. Such money may be requisitioned pursuant to **subsection 3 of this section for the payment of benefits.** Such money **may also be requisitioned and used for the payment of expenses incurred for the administration** of this chapter but only pursuant to a specific **appropriation by the legislature** and only if the expenses are incurred and the money is requisitioned after the enactment of an appropriation law which:

(a) Specifies the purposes for which such money is appropriated and the amounts appropriated therefor;

(b) Limits the period within which such money may be obligated to a period ending not more than two years after the **date of the enactment of the appropriation law**; and

(c) Limits the amount which may be obligated during a twelve-month period beginning on July 1 and ending on the next June 30 to an amount which does not exceed the amount by which the aggregate of the amounts transferred to the account of this state pursuant to section 903 of the Social Security Act exceeds the aggregate of the amounts used by this state pursuant to this chapter and charged against the amounts transferred to the account of this state during the same twelve-month period.

(2) For purposes of this subsection, amounts used by this state for administration shall be chargeable against transferred amounts at the exact time the obligation is entered into. The use of money appropriated under this subsection shall be accounted for in accordance with standards established by the United States secretary of labor

Section nine creates two funds. There is the unemployment compensation fund created in subsection one, and the reserve fund created in subsection eight. One of the monies included in the unemployment compensation fund is "[a]ll money credited to this state's account in the unemployment trust fund pursuant to section 903 of the Social Security Act…" Iowa Code §96.9(1)(e). This particular source of money is then addressed in subsection four, cited to us by the Claimant's lawyer. Subsection four of section nine states that "[m]oney credited to the account of this state in the unemployment trust fund by the secretary of the treasury of the United States pursuant to section 903 of the Social Security Act" can only be used for "the payment of benefits" and also "for the payment of expenses incurred for the administration" of the Employment Security Law. Iowa Code §96.9(4)(a)(1). Subsection four provides that the money can be "requisitioned" for payment of benefits as set out in subsection 96.9(**3**). In addition, the SSA §903 money "may also be requisitioned and used for the payment of expenses incurred for the administration of this chapter but only pursuant to a specific appropriation by the legislature…" Iowa Code §96.9(4)(a)(1). So the SSA §903 money can be requisitioned for either benefits or administration. Requisitioning for benefits is governed by subsection **three**. Subsection four – the one cited to us – goes on to set out conditions for the requisitioning for **administration**. First, as

we said, a requisition for administrative expenses must be "pursuant to a specific appropriation by the legislature…" The sentence goes on and states the requisition for administration must be "pursuant to a specific appropriation by the legislature and only if the expenses are incurred and the money is requisitioned after the enactment of an appropriation law which" meets three conditions. Again, these conditions describe the limitations on the General Assembly's appropriation bill which is a condition precedent to requisitioning SSA §903 money for the purpose of paying administrative expenses. It is here the two-limitation period appears. The law states the requirement that SSA §903 funds used for administrative purposes must be "requisitioned after the enactment of an appropriation law which:…Limits the period within which such money may be obligated to a period ending not more than two years after the date of the enactment of the appropriation law." Iowa Code §96.4(a)(1)(b).

This is, of course, consistent with the Social Security Act, which states that if certain accounting conditions are met and there still "there remains in the employment security administration account any amount over the amount provided in section 901(f)(3)(A), such excess amount… shall be transferred (as of the beginning of the succeeding fiscal year) to the accounts of the States in the Unemployment Trust Fund." 42 U.S.C. 1103 (section 903 of the SSA). This federal law also states that "[e]xcept as provided in paragraph (2), amounts transferred to the account of a State pursuant to subsections (a) and (b) shall be used only in the payment of cash benefits to individuals with respect to their unemployment, exclusive of expenses of administration." 42 U.S.C. 1103(c)(1). So section 903 moneys can be used to pay benefits without limitation, temporal or otherwise. The referenced paragraph two allows the money to be used for administration under specified conditions. The limitations on using money for administration include that "[a] State may, pursuant to a specific appropriation made by the legislative body of the State, use money withdrawn from its account in the payment of expenses incurred by it for the administration of its unemployment compensation law and public employment offices if and only if… the appropriation law did not authorize the obligation of such money after the close of the two-year period which began on the date of enactment of the appropriation law." 42 U.S.C. 1103(c)(2). This is the only time limitation found in section 903, and it applies only to the use of a distribution for paying administrative expenses, and the time limit is keyed to the appropriation bill. No time limit applies to using 903 money for benefits, and those benefits can be paid without a specific appropriation bill. Section 903 distributions are known as Reed Act distributions. *See generally* UIPL 39-97, Attachment 1 (DOLETA 9/12/1997)
https://www.dol.gov/sites/dolgov/files/ETA/advisories/UIPL/1997/UIPL39-97_Attach1.pdf

Iowa Code section 96.9(4)(b) says:

> b. Money requisitioned as provided in this subsection for the payment of **expenses of administration** shall be deposited in the employment security **administration fund**, but, until expended, shall remain a part of the unemployment compensation fund. The treasurer of state shall maintain a separate record of the deposit, obligation, expenditure, and return of funds so deposited. Any money so deposited which either will **not be obligated within the period specified by the appropriation law** or remains unobligated at the end of the period, and any money which has been obligated within the period but will not be expended, shall be returned promptly to the account of this state in the unemployment trust fund.

These two paragraphs are read together, so that the **administrative funds** must be expended "within the period specified by the appropriation law" and, as we saw in paragraph "a", this period may not end later than two years after the enactment of the appropriation law when the Reed Act money was encumbered.

Now Claimant's attorney says "By statute all funds must be dealt with by two years after appropriation." He cites to "Section 96.9(4)(b)." But the Claimant's benefits were not obligated pursuant to subsection 96.9(4). The provision on using money for benefits has no time limit. Even if it did transferring money from one government account to another government account has absolutely nothing to do with paying out money to claimants. Further, there is no way to determine what, if any, of the Claimant's benefits came from Reed Act funds anyway. Again, what paragraph b refers to is funds requisitioned "for the payment of expenses of administration." It provides that such administration-earmarked funds shall be deposited in the employment security administration fund, which shall be part of the unemployment compensation fund. The administration fund is the one "from which administration expenses under this chapter shall be paid." Iowa Code §96.1A(38). The treasurer is required to maintain a separate record of transactions in this administrative account. Money deposited in the administrative account, under §96.9(4)(b), which is not obligated during the period specified by the appropriation law, or money which is obligated but will not be spent before the authorized appropriation period is up, will be returned to the overall unemployment trust fund. In short, it's "use it or lose it" for administrative funds. They must be used for administration during the authorized period or else they will be returned to the trust fund. Completely unaddressed by this paragraph is payment of benefits, overpayment of benefits, or collection of benefit overpayments.

The only §96.9(4) time limit is a limit on the *appropriation bill* that appropriates money for *administrative purposes,* **not** for the payment of benefits. Iowa Code §96.9(4)(a)(1)(b). The appropriation bill must not allow for the appropriation to be "obligated" for any period later than two years after the effective date of the appropriations bill. What has this to do with limiting benefit overpayment assessment? Absolutely nothing. Is the money discussed by this limitation related to benefits? It is not. Was the money paid to a claimant? It was not. Is the two-year limit triggered by payment of benefits? It is not. Are benefit payments to claimants made pursuant to an appropriation bill? They are not. In fact, looking to subsection 3 of section nine, which *does* discuss benefits, "[e]xpenditures of such moneys from the benefit account and refunds from the clearing account shall not be subject to any provisions of law requiring specific appropriations or other formal release by state officers of money in their custody." Iowa Code §96.9(3). As noted Reed Act moneys can, under both state and federal law, be used to pay benefits without qualification, temporal or otherwise. Further, if IWD requisitions money for payment of benefits, but overestimates how much they will need and has money left over, then IWD is authorized to spend the money on benefits in the future – it is *not* "use it or lose it." Iowa Code §96.9(3)("Any balance of moneys requisitioned from the unemployment trust fund which remains unclaimed or unpaid in the benefit account after the expiration of the period for which such sums were requisitioned shall either be deducted from estimates for, and may be utilized for the payment of, benefits during succeeding periods, or, in the discretion of the department, shall be redeposited…"). Moreover, all of these provisions deal with accounting of government moneys. There is no statute, regulation, rule, or legal doctrine which would allow a claimant to keep money she should not have gotten in the first place just because there was some accounting irregularity (none is proven in this case) at the agency level. We could go on and on, because this limitation of a legislative enactment used to authorize requisitioning of Reed Act money for the purpose of administration of the Employment Security Law has absolutely nothing to say about payment of benefits to a claimant, or recovery of an overpayment. It is completely irrelevant to this case. This case and the cited laws both deal with unemployment in some way. Money is involved. That is about it.

In addition to all this, the money at stake in this case is federal money. It was not transferred to the state account under the Reed Act provision, and so Code subsection 96.9(4) has nothing to say about it.

Frankly, the Claimant's statute of limitations argument lacks basis in law and fact and nor is there a reasonable argument for extending or expanding a law that states that the use of Reed Act money in expenditures for administration of the benefit system must be within two years following an appropriation bill, into a statute of limitation on assessing overpayment of benefits.

Finally, the overpayment in this case dates to November 29, 2020 at the earliest. The claims decision in this matter was dated September 26, 2022. The Claimant received the decision on October 13, 2022. October of 2022 is within the claimed two-year limitation period – but, of course, there is no legal basis for asserting such a two-year period anyway.

Equity

On equitable defenses they do not apply. Further, even if they did apply, the Claimant has completely failed to establish their elements, and does not even argue what facts, other than mere delay in discovering the Claimant's ineligibility, support the application of the doctrines.

No Equitable Powers

The EAB is empowered to hear unemployment appeals, and to affirm, reverse, or modify the decision of IWD administrative law judges. Iowa Code §10A.601; Iowa Code §96.6 *compare with e.g.* Iowa Code §216.15(9). Under Code §96.6 the only issues before IWD administrative law judges, and hence the EAB, pertain to benefits. *Id.* There is no explicit grant of remedial authority apart from determining the benefits issue. The EAB is not given the authority to grant remedial relief, or equitable relief, and such authority cannot be implied by general grants of power. *City of Des Moines v. Iowa Dep't of Transp. & Iowa Transp. Comm'n*, 911 N.W.2d 431, 445, 449 (Iowa 2018); *C.f. Chauffeurs, Loc. U. 238 v. Civil Rights Com'n*, 394 N.W.2d 375 (Iowa 1986) (refusing to imply punitive damage remedial authority despite broad grant of remedial power).

In addition, it is beyond question that "[a]dministrative agencies do not have inherent powers; they have only those powers that are expressly conferred or necessarily inferred from some power expressly granted." *State v. Horton*, 509 N.W.2d 452, 453 (Iowa 1993); *accord City of Des Moines*, 911 N.W.2d at 440; *Brakke v. Iowa Dept. Natural Resources*, 897 N.W.2d 522, 533-34 (Iowa 2017); *Cincinnati Ins. Companies v. Kirk*, 801 NW 2d 856, 859 (Iowa App. 2011); *Wallace v. Iowa State Bd. of Educ.*, 770 N.W.2d 344, 348 (Iowa 2009); *Basik Five Trust v. Culver*, No. 6-919/06-0165 (Iowa App. 1/18/2007) (affirming refusal to act by agency); *Quaker Oats Co. v. Cedar Rapids Human Rights Commission*, 268 N.W.2d 862, 868 (Iowa 1978). In short, "[a]n administrative body may not make law or change the legal meaning of the common law or the statutes." *Holland v. State*, 253 Iowa 1006, 115 N.W.2d 161, 164 (1962). This long-standing principle of administrative law was codified in Iowa when the legislature gave agencies the authority, in specified circumstances, to waive legal requirements. The Code explicitly limits any such authority: "this section does not authorize an agency to waive any requirement created or duty imposed by statute." Iowa Code §17A.9A(1). The waiver power of agencies had to be so limited in order to comply with the constitutional nondelegation principle which provides that "an agency cannot exercise a nondelegated lawmaking power held by the legislature or judicial branch." *SVC Employees Int'l Union v. v. Bd. of Regents*, 928 NW 2d 69, 91 (Iowa 2019).

The EAB is granted no specific equitable power. Thus, an estoppel or laches remedy is not available before the EAB. Even if they were, they are not proven on this record.

Merits of Estoppell Claim

In particular, estoppel has no application. In *Galvin v. Iowa Beef Proc*., 261 N.W.2d 701 (1978) the Iowa Court cast doubt on anyone having to pay back benefits received in good faith while an appeal was pending. Shortly after *Galvin* the legislature made express that overpayments are to be recovered "unless the recovery would be contrary to equity or good conscience." 67 G.A. ch. 1059, §3. According to the Iowa Supreme Court this amendment was "enacted in response to *Galvin*" and "might well" alter *Galvin* even with excusing only good faith overpayments. *Hiserote Homes, Inc. v. Riedemann*, 277 N.W.2d 911, 915 (Iowa 1979). But the statutory good faith exception prevailed for but a single year. In 1979 the good faith provision was struck and the first unnumbered paragraph (now letter "a") made to read simply that "the benefits shall be recovered." Iowa Code §96.3(7)(2021) *as amended by* 68 G.A. ch 33, §§1-5. What the legislature did over 40 years ago was strike "unless the recovery would be contrary to equity or good conscience." The provision now reads:

> 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**.

Iowa Code §96.3(7)(a)(2021). *Galvin* has been statutorily reversed for many years. As more recently explained by the Iowa Court of Appeals, "[t]his provision requires repayment notwithstanding [a Claimant]'s lack of fault in incurring the overpayment." *Powell v. Employment Appeal Bd*., 861 NW 2d 279, 281 (Iowa 2014). Thus even Claimant who receive benefits in good faith (and the Claimant in the case before us does not fall in this category) must repay benefits they should not have gotten.

Thus in *Sievertsen v. Employment Appeal Board*, 483 N.W.2d 818 (Iowa 1992) a claimant needed to satisfy the $250 earnings requirement to be eligible for benefits in a second benefit year. "Claimant endeavored to obtain the required $250 in covered wages through employment at Marycrest College as a carpenter. At the time, he was a full-time student at Marycrest. The record reflects that claimant specifically asked DES representatives whether this employment would serve to qualify him for continued unemployment eligibility and was given the assurance that it would." *Sievertsen* at 819. After Mr. Sievertsen had collected benefits with the imprimatur of the agency the agency realized it had made an error of law. Then Mr. Sievertsen was then socked with an overpayment. The Supreme Court concluded that, despite the error a by the agency and the fact that the claimant had been pre-approved to apply for benefits, there was no basis for preventing recovery of the overpayment. The Court specifically rejected the notion that the agency could be estopped. The Court cited to Iowa Code §96.3(7), and found "[w]e believe that the authorities cited preclude a finding that the Department of Employment Services is estopped from recouping the payments made to the claimant for which he was ineligible under the controlling regulations." *Sievertsen* at 819.

Even setting aside this limitation on using estoppel in unemployment overpayment cases, still the elements of estoppel are not satisfied. The elements of equitable estoppel are (1) a false representation or concealment of material facts; (2) lack of knowledge of the true facts on the part of the actor; (3) the intention that it be

acted upon; and (4) reliance thereon by the party to whom made, to his prejudice and injury. *ABC Disposal Systems, Inc. v. Department Of Natural Resources*, 681 N.W.2d 596, 606 (Iowa 2004). Estoppel is generally to be proved by the person asserting it by clear and convincing evidence. *Johnson v. Johnson*, 301 N.W.2d 750 (Iowa 1981). The burden is even greater when estoppel is asserted against the government. The Iowa Supreme Court has instructed as recently as May of 2020 that "as a general rule, equitable estoppel will not lie against a government agency." *Endress v. Iowa Department of Human Service*, 944 N.W.2d 71, 94 (2020) (*quoting ABC Disposal Sys*., Inc. v. Dep't of Nat. Res., 681 N.W.2d 596, 607 (Iowa 2004)). The *ABC* case quoted in *Endress* was expounded upon by the Iowa Supreme Court in *Fennelly v. A-1 Machine & Tool Co.*, 728 NW 2d 163, 180 (Iowa 2006) where Justice Cady explained that the required special circumstances that would allow governmental estoppel include that the "party raising the estoppel proves affirmative misconduct or wrongful conduct by the government or a government agent." *Fennelly* at 180. The rule is that "the doctrine of estoppel may be raised against the government only if, in addition to the traditional elements of estoppel, the party raising the estoppel proves affirmative misconduct or wrongful conduct by the government or a government agent." *Poyner v. Iowa District Court for Montgomery County*, slip op. at p. 3 (Iowa App. 7/10/2003) (quoting 28 Am. Jur. 2d Estoppel & Waiver § 140 at 559 (2000)). Hence the elements and their resolution in this case are:

1. False representation	None appears in the record
2. Lack knowledge of true facts	No false statement, so this is not satisfied
3. Intention that falsity be acted upon	No false statement so this not satisfied
4. Detrimental Reliance	No false statement.
5. Wrongful government conduct	None is alleged or proven.

Estoppel will not lie.

Merits of Laches Claim

As for laches, in order to be entitled to dismissal due to delay the person asserting laches must prove **(1) The agency took longer than a rational agency in the exercise of its expert discretion**, *Thurn v. Thurn*, 310 N.W.2d 539 (Iowa App. 1981); *Henderson v. Millis*, 373 N.W.2d 497 (Iowa 1985); *State ex rel. Holleman v. Stafford*, 584 N.W.2d 242, 245-46 (Iowa 1998)(unreasonable delay) **(2) There is prejudice which can be identified with such specificity that the finder of fact can assess the loss of evidence compared to any remaining evidence**, *Chicago R & R. P. Co. v. Iowa City*, 288 N.W.2d 536 (Iowa 1980); *Davidson v. Van Lengen*, 266 N.W.2d 436 (Iowa 1978); *Brewer v. State*, 446 N.W. 2d 805 (Iowa 1989)(prejudice required); *State ex rel. Holleman v. Stafford*, 584 N.W.2d 242, 245 (Iowa 1998)(same); *Markey v. Carney*, 705 NW 2d 13, 22 (Iowa 2005)(same) **(3) a cause and effect relationship between the delay and the loss of evidence**. *Chicago R & R. P. Co. v. Iowa City*, 288 N.W.2d 536 (Iowa 1980); *Davidson v. Van Lengen*, 266 N.W.2d 436 (Iowa 1978).

Mere passage of time is insufficient to establish laches. *COPEC v. Wunschel*, 461 N.W.2d 840, 846 (Iowa 1990); *Brewer v. State*, 446 N.W. 2d 805 (Iowa 1989); *Henderson v. Millis*, 373 N.W.2d 497, 505 (Iowa 1985); *In Re Marriage of Ivins*, 308 N.W.2d 75 (Iowa 1981);*Thurn v. Thurn*, 310 N.W.2d 539 (Iowa App. 1981).

Laches is an affirmative defense which must be proved by clear, convincing and satisfactory evidence. *Markey v. Carney*, 705 N.W.2d 13, 22 (Iowa 2005); *In re Marriage of Leege*, 494 N.W.2d 453, 456 (Iowa App. 1992); *COPEC v. Wunschel*, 461 N.W.2d 840, 846 (Iowa 1990); *Brewer v. State*, 446 N.W. 2d 805 (Iowa 1989); *State v. Peterson*, 347 N.W.2d 398 (Iowa 1984); *Smith v. Fort Madison Community School District*, 334 N.W.2d 701 (Iowa 1983); *Chicago R & R. P. Co. v. Iowa City*, 288 N.W.2d 536 (Iowa 1980).

The Claimant again falls down on all elements. The delay here was primarily caused by the Claimant's failure to report her wages properly. Further the period of time between the Claimant's initial claim and the overpayment decision here involved a historically high number of claims filed with the agency. Under these circumstances, the Claimant has failed to prove that the agency took longer than a rational agency to detect that she had misreported her wages. On prejudice the Claimant does not identify any lost evidence, and indeed concedes her reporting was inaccurate. There is no evidence the Claimant points out that was lost as a result of delay, and so the second and third elements of laches are not proven. And this assumes laches applies to an overpayment assessment where there is no time limitation mentioned in the statute.

Clean Hands Doctrine

Finally, on the equitable defenses the Claimant is stopped at the threshold of equity. Estoppel and laches are doctrines of equity. And equity demands clean hands:

> The equity maxim of clean hands…expresses the principle that where a party comes into equity for relief he or she must show that his or her conduct has been fair, equitable, and honest as to the particular controversy in issue. A complainant will not be permitted to take advantage of his or her own wrong or claim the benefit of his or her own fraud or that of his or her privies.
> …
> What underlies the maxim is the principle that "equity will not aid an applicant in securing or protecting gains from wrongdoing or in escaping its consequences." Id. at 605-06

Opperman v. M. & I. Dehy, Inc., 644 N.W.2d 1, 6 (Iowa 2002) (quoting 27A Am. Jur. 2d Equity § 126, at 605 (1996)); *accord Moser v. Thorp Sales Corp.*, 256 N.W.2d 900, 908 (Iowa 1977) ("Parties whose misleading tactics, concealments, misrepresentations and defaults exacerbate the situation cannot invoke estoppel and laches."). We have affirmed the Administrative Law Judge's finding that the State has proven this Claimant was guilty of fraud and misrepresentation. She cannot take advantage of that wrongful conduct to keep the money she received just because she got away with the wrongful conduct for a while. By claiming the benefits of her own wrongdoing the Claimant falls squarely within the clean-hands doctrine. She has no clean hands and may not call upon the forces of equity. Even if we did have equitable powers this Claimant is not in a place to invoke them.

Recusal

The Claimant's attorney cites to 873 IAC 4.38(1)(d), (e) and (g) seeking recusal. But there is no chapter 873. Since the argument refers to the worker's compensation law we assume he means 87**6**. We find the citation odd since both IWD, and DIA have recusal rules. Since the Administrative Law Judge works for the

Department of Inspections and Appeals a recusal would be under rule 481 IAC 10.9. The IWD recusal rules are found at 871 IAC 26.7. The Claimant has not complied with the correct procedure with either of these, and in any event has not established grounds based merely on the idea that the Administrative Law Judge *used to* work for Iowa Workforce in the recent past. *E.g.* 481 IAC 10.9(c)("A private party is a client or has been a client of the ALJ within the past two years;"); 71 IAC 26.7(d)("The presiding officer has acted as counsel to any person who is a private party to that proceeding within the past two years;").

_____
James M. Strohman

_____
Ashley R. Koopmans

_____
Myron R. Linn

RRA/fnv