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

PATRICIA M DEVER
210 N ELIZA
MAQUOKETA IA 52060

OPERATION NEW VIEW
ATTN FISCAL OFFICER
1473 CENTRAL AVE
DUBUQUE IA 52001-4853

Appeal Number: 06A-UI-01565-RT
OC: 05/15/05 R: 04
Claimant: Respondent (1)

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 96.4-5 – Benefits Based on Service for an Educational Institution
Section 96.4-3 – Required Findings (Able and Available for Work)
Section 96.7-2-a-2 – Employer Contributions and Reimbursements
(Different Employment - Benefits Charged)
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Operation New View, filed a timely appeal from an unemployment insurance decision dated February 3, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Patricia M. Dever. After due notice was issued, a telephone hearing was held on March 9, 2006, with the claimant not participating. Although the claimant called in a telephone number where she purportedly could be reached for the hearing, when the administrative law judge called the number at 3:33 p.m., he reached the voicemail for "Trish." The administrative

law judge left a message the he was going to proceed with the hearing and that the claimant needed to call before the record was closed and the hearing completed if she wanted to participate in the hearing. She did not. Joy Davis, Administrative Assistant to the Human Resources Director, participated in the hearing for the employer. Employer's Exhibit One was admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibit One, the administrative law judge finds: The claimant was, and still is, employed by the employer as a part-time family advocate at one of the employer's Head Start centers since July 2000. The claimant began as a full-time teacher on March 1, 1993. The employer is a nonprofit community action agency. The employer conducts a Head Start program and a Shared Beginnings preschool program, which contain instructional components. General activities include social behavior, hygiene, nutrition, and various other instructional programs. The teachers of students in the Head Start program and the Shared Beginnings program prepare lesson plans. Pursuant to Iowa Code Chapter 28E, the employer has agreements with three counties in Iowa, Dubuque, Delaware, and Jackson, as well as an agreement with the city of Dubuque, to provide services and programs. However, the employer does not have a 28E Agreement with any school district.

Approximately 32 percent of the employer's five million dollar budget is devoted to its Head Start program and Shared Beginnings program, for approximately 1.6 million dollars. Although the Head Start program and Shared Beginnings program have 60 plus employees out of a total of 100 employees, there are only about 30 full-time equivalency (FTEs) in the employer's Head Start and Shared Beginnings programs, while the employer maintains approximately 40 FTEs in its other programs, out of approximately 100 total employees. The employer's Head Start program and Shared Beginnings programs are not approved as schools by the Iowa Department of Education. Other major programs conducted by the employer which are not instructional include nutrition, weatherization, and LIHEAP (low-income home energy assistance program).

The employer's Head Start program and Shared Beginnings program were closed on December 27, 28, 29, and 30, 2005, for the holidays, and the claimant was off work during that time. The employer has a policy, as shown at Employer's Exhibit One, that requires all employees to take vacation or annual leave for this period as well as other holiday periods. This policy was effective May 13, 2004, but does not apply to the claimant, because she is part-time. The claimant was off work for the four-day holiday recess, as well as the regular holidays, and received no pay. The claimant had every expectation of being reemployed after the holiday recess as she was employed prior to the holiday recess and, in fact, is back at work performing the same services now as she did prior to the holiday recess. During the holiday recess, the claimant had placed no physical restrictions or training restrictions on her ability to work. The claimant had also placed no time or day or location restrictions on her availability for work. The claimant was not seeking work during that period of time, because she was only off work for a few days. The claimant's employment with the employer has remained the same, part-time as a family advocate at one of the employer's Head Start centers. The claimant has no earnings in her base period from any other employer except $54.00 in the fourth quarter of 2004. Pursuant to her claim for unemployment insurance benefits filed effective May 15, 2005, and reopened effective December 25, 2005, the claimant has received unemployment insurance benefits in the amount of $130.00 for benefit week beginning December 31, 2005.

The claimant did receive benefits prior to that, but the employer does not contest those benefits and they are not at issue here.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant is ineligible to receive unemployment insurance benefits because she is still employed by an educational institution but is off work temporarily between two successive academic years or terms or for a holiday recess or break and has reasonable assurance that she will be performing the same work in the new academic year or term or after the holiday break as she did in the prior academic year or term or as she did before the holiday break or recess. The claimant is not ineligible to receive unemployment insurance benefits for this reason because, although the claimant does have reasonable assurance that she will be performing the same work, the employer is not an educational institution, and therefore the "between terms denial" does not apply here.

2. Whether the claimant is ineligible to receive unemployment insurance benefits because, at relevant times, she is, and was, not able, available, and earnestly and actively seeking work. The claimant is not ineligible to receive unemployment insurance benefits for these reasons.

3. Whether the claimant is in the employment of a base period employer and is receiving the same benefits in wages and hours as she received during her base period and therefore the employer should not be charged for the unemployment insurance benefits to which the claimant is entitled. The claimant is not receiving the same employment, at least during the holiday recess or break, as she did previously, and therefore the employer should not be relieved of any charges for unemployment insurance benefits to which the claimant may be entitled.

4. Whether the claimant is overpaid unemployment insurance benefits. She is not.

Iowa Code section 96.4-5-b provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:
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> 5. Benefits based on service in employment in a nonprofit organization or government entity, defined in section 96.19, subsection 18, are payable in the same amount, on the same terms and subject to the same conditions as compensation payable on the same basis of other service subject to this chapter, except that:
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> b. Benefits based on service in any other capacity for an educational institution including service in or provided to or on behalf of an educational institution while in the employ of an educational service agency, a government entity, or a nonprofit organization, shall not be paid to an individual for any week of unemployment which begins during the period between two successive academic years or terms, if the individual performs the services in the first of such academic years or terms and has reasonable assurance that the individual will perform services for the second of such academic years or terms. If benefits are denied to an individual for any week as a result of this paragraph and the individual is not offered an opportunity to perform the services for an educational institution for the second of such academic years or terms, the individual is entitled to retroactive payments of benefits for each week for which the

individual filed a timely claim for benefits and for which benefits were denied solely by reason of this paragraph.

Iowa Code section 96.4-5-c provides:

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

5. Benefits based on service in employment in a nonprofit organization or government entity, defined in section 96.19, subsection 18, are payable in the same amount, on the same terms and subject to the same conditions as compensation payable on the same basis of other service subject to this chapter, except that:

c. With respect to services for an educational institution in any capacity under paragraph "a" or "b", benefits shall not be paid to an individual for any week of unemployment which begins during an established and customary vacation period or holiday recess if the individual performs the services in the period immediately before such vacation period or holiday recess, and the individual has reasonable assurance that the individual will perform the services in the period immediately following such vacation period or holiday recess.

871 IAC 24.51(6) provides:

School definitions.

(6) Reasonable assurance, as applicable to an employee of an educational institution, means a written, verbal, or implied agreement that the employee will perform services in the same or similar capacity, which is not substantially less in economic terms and conditions, during the ensuing academic year or term. It need not be a formal written contract. To constitute a reasonable assurance of reemployment for the ensuing academic year or term, an individual must be notified of such reemployment.

871 IAC 24.52(7) provides:

(7) Head start programs are considered educational in nature; however, the employing unit as a whole must have as its primary function the education of students. When the employing unit is operated primarily for educational purposes then the between terms denial established by Iowa Code section 96.4(5) will apply between two successive academic years or terms and will apply for holiday and vacation periods to deny benefits to school personnel.

a. A nonprofit organization which has as its primary function civic, philanthropic or public assistance purposes does not meet the definition of an educational institution. Community action programs which have a head start school as one component are not an educational institution employer and the between terms denial does not apply.

b. A head start program which is an integral part of a public school system conducted by a board of education establishes an employing unit whose primary function is educational; therefore, the between terms denial would apply.

The administrative law judge concludes that the employer here is not an educational institution as defined at 871 IAC 24.51(1). It is not approved, licensed, or certified to operate as a school by the Department of Education or other government agency. Although the employer does maintain a Head Start program, which is considered educational in nature, the employer does not have as its primary function the education of students. The employer devotes approximately 32 percent of its budget to its Head Start program and Shared Beginnings program and employs approximately 42 percent of its full-time equivalencies (FTEs) in its Head Start and Shared Beginnings programs. Accordingly, the administrative law judge concludes that the employer does not have as its primary function the education of students. Rather, the employer maintains as its primary function civic, philanthropic, or public assistance purposes, including its three major programs of nutrition, weatherization, and LIHEAP (home energy assistance). Community action programs which have a Head Start school as one component are not an educational institution employer. The administrative law judge notes that the Employment Appeal Board in Appeal Numbers 05B-UI-06914 and 05B-UI-06588 has determined that Head Start programs are not educational institutions no matter what the primary function of the employing unit might be. The employer has no 28E Agreement with a school district to provide educational services to the students of the school district. The employer's 28E Agreement with the three counties and the city of Dubuque are for general services and, in any event, they are not community school districts. Accordingly, the administrative law judge concludes that the employer is not an educational institution for the purposes of the "between terms denial" of unemployment insurance benefits for employees of such an educational institution who are off work between two successive academic years or terms or on a holiday break or recess. It is true that the claimant has "reasonable assurance" that she will be performing the same functions after the holiday recess or break or for the new academic year or term as she performed in the prior academic year or term before the holiday recess or break, but that makes no difference here, since the employer is not an educational institution. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

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:
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> 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".

The administrative law judge concludes that the claimant has the burden of proof to show that she is able, available, and earnestly and actively seeking work under Iowa Code section 96.4(3) or is otherwise excused. See New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that although the claimant did not participate in the hearing, there is a preponderance of the evidence that she is temporarily unemployed, as defined by Iowa Code section 96.19(38)(c) because she is unemployed or off work due to a vacation period from her regular job in which she worked part-time and which she will again work part-time. The administrative law judge concludes that even though the

claimant's work is part-time, she is still temporarily unemployed because the employment is her regular employment. 871 IAC 24.23(26) applies only to partial unemployment. Accordingly, the administrative law judge concludes that the claimant is excused from the provisions that require her to be available for work and earnestly and actively seeking work. There is no evidence that the claimant has placed any training restrictions or physical restrictions on her ability to work and therefore the administrative law judge concludes that the claimant is able to work. In summary, the administrative law judge concludes that the claimant is excused from the provisions that require her to be available for work and earnestly and actively seeking work and she is able to work and therefore the claimant is not ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

Iowa Code section 96.7-2-a(2) provides:

> 2. Contribution rates based on benefit experience.
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> a. (2) The amount of regular benefits plus fifty percent of the amount of extended benefits paid to an eligible individual shall be charged against the account of the employers in the base period in the inverse chronological order in which the employment of the individual occurred.
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> However, 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. This provision applies to both contributory and reimbursable employers, notwithstanding subparagraph (3) and section 96.8, subsection 5.
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> An employer's account shall not be charged with benefits paid to an individual who left the work of the employer voluntarily without good cause attributable to the employer or to an individual who was discharged for misconduct in connection with the individual's employment, or to an individual who failed without good cause, either to apply for available, suitable work or to accept suitable work with that employer, but shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.
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> The amount of benefits paid to an individual, which is solely due to wage credits considered to be in an individual's base period due to the exclusion and substitution of calendar quarters from the individual's base period under section 96.23, shall be charged against the account of the employer responsible for paying the workers' compensation benefits for temporary total disability or during a healing period under section 85.33, section 85.34, subsection 1, or section 85A.17, or responsible for paying indemnity insurance benefits.

The administrative law judge concludes that the employer herein, Operation New View, is a base period employer and the claimant is still in the employ of that employer but she is not receiving the same employment at least during the holiday recess or break that she received during the base period. Therefore, the administrative law judge concludes that any unemployment insurance benefits to which the claimant is entitled may be charged against the

account of the employer herein and the account of the employer herein shall not be relieved of any such charges.

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.
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> 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 law judge concludes that the claimant has received unemployment insurance benefits in the amount of $130.00 since reopening her claim for benefits effective December 25, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of February 3, 2006, reference 01, is affirmed. The claimant, Patricia M. Dever, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she is excused from the provisions that require her to be available for work and earnestly and actively seeking work and she is able to work. The claimant is not employed by an educational institution and, therefore, the "between terms denial" for a holiday recess or break or between academic years or terms does not apply to the claimant. Because the claimant is not receiving the same employment during the holiday break or recess that she received during her base period, the employer is not relieved of any charges for unemployment insurance benefits to which the claimant is entitled. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of her holiday recess or break.

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