

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

SCOTT A ALLEN
1014 23RD AVE
ROCK ISLAND IL 61201

PUTNAM MUSEUM
1717 W 12TH ST
DAVENPORT IA 52804

Appeal Number: 04A-UI-02291-RT
OC: 01/18/04 R: 12
Claimant: Appellant (3)

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 96.5-5 – Other Compensation (Severance Pay or Other Payments)

STATEMENT OF THE CASE:

The claimant, Scott A. Allen, filed a timely appeal from three unemployment insurance decisions as follows: 04A-UI-02288-RT, an appeal from a decision dated February 26, 2004, reference 01, determining that he was not eligible to receive unemployment insurance benefits for the two weeks ending February 7, 2004 because of severance pay; Appeal 04A-UI-02290-RT, an appeal of a decision by an authorized representative of Iowa Workforce Development dated February 26, 2004, reference 02, determining that he was overpaid \$193.00 for one week between February 1, 2004 and February 7, 2004 because of severance pay; and 04A-UI-02291-RT, which was an appeal of a decision by an authorized representative of Iowa Workforce Development dated February 26, 2004, reference 03, determining that the claimant was overpaid \$177.00 for one week between February 8, 2004 and February 15, 2004 because of vacation pay. After due notice was issued, a telephone hearing was held on

March 22, 2004, with the claimant participating. The three appeals were consolidated into one hearing with the consent of the claimant. The employer, Putnam Museum, did not participate in the hearing because the employer did not call in a telephone number, either before the hearing or during the hearing, where any witnesses could be reached for the hearing, as instructed in the notice of appeal. Department Exhibit One was admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer until his last day of full work on January 20, 2004. The claimant came to work on January 21, 2004 but did not work that day because he was laid off for a lack of work. That was the claimant's first day of unemployment.

Pursuant to his separation, the claimant received a check in the net amount of approximately \$1,000.00, or a gross amount in the amount of \$1,156.91, which combined all of the claimant's vacation pay, severance pay, and holiday pay into one check. The claimant's gross pay was \$618.00 net every two weeks or \$309.00 for one week. The claimant did not know how much vacation he had accrued nor did he know how many days he was paid severance pay or holiday pay. The claimant only knew that his gross check was approximately \$1,156.91. This is equal to the employer's designated payments on Department Exhibit One. The employer designated vacation pay from May 5, 2003 to February 1, 2004 in the amount of \$177.16, but this is impossible and makes no sense since the claimant worked throughout most of that time. This must have been the time during which the vacation pay was accumulated. The employer designates the severance pay in the amount of \$767.15 to be taken from January 22, 2004 to February 7, 2004 but vacation pay should have been taken first. Finally, the employer designates holiday pay of \$212.60 that merely says for various dates. However, the total payments of \$1,156.91 nearly agrees with the claimant's net check he received for a combination of all of these matters. The claimant filed for unemployment insurance benefits effective January 18, 2004 and received \$1,544.00 as follows: \$193.00 per week for eight weeks from benefit week ending February 7, 2004 to benefit week ending March 27, 2004. Of that amount \$370.00 was offset against overpayments for incorrectly reported vacation pay and severance pay, leaving the claimant having received unemployment insurance benefits in the amount of \$1,174.00. For benefit weeks ending January 24 and 31, 2004, the claimant received no benefits reporting vacation pay in a sufficient amount that nullified benefits.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant received severance pay or other pay and vacation pay and if so, whether it was properly deducted for the correct period and whether the claimant is overpaid unemployment insurance benefits. The claimant did receive severance pay and other pay and vacation pay, but it was not deducted for the correct period and the claimant is overpaid unemployment insurance benefits.

Iowa Code Section 96.5-5 provides:

An individual shall be disqualified for benefits:

5. Other compensation. For any week with respect to which the individual is receiving or has received payment in the form of any of the following:

a. Wages in lieu of notice, separation allowance, severance pay, or dismissal pay.

b. Compensation for temporary disability under the workers' compensation law of any state or under a similar law of the United States.

c. A governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment made under a plan maintained or contributed to by a base period or chargeable employer where, except for benefits under the federal Social Security Act or the federal Railroad Retirement Act of 1974 or the corresponding provisions of prior law, the plan's eligibility requirements or benefit payments are affected by the base period employment or the remuneration for the base period employment. However, if an individual's benefits are reduced due to the receipt of a payment under this paragraph, the reduction shall be decreased by the same percentage as the percentage contribution of the individual to the plan under which the payment is made.

Provided, that if the remuneration is less than the benefits which would otherwise be due under this chapter, the individual is entitled to receive for the week, if otherwise eligible, benefits reduced by the amount of the remuneration. Provided further, if benefits were paid for any week under this chapter for a period when benefits, remuneration or compensation under paragraph "a", "b", or "c", were paid on a retroactive basis for the same period, or any part thereof, the department shall recover the excess amount of benefits paid by the department for the period, and no employer's account shall be charged with benefits so paid. However, compensation for service-connected disabilities or compensation for accrued leave based on military service, by the beneficiary, with the armed forces of the United States, irrespective of the amount of the benefit, does not disqualify any individual, otherwise qualified, from any of the benefits contemplated herein. A deduction shall not be made from the amount of benefits payable for a week for individuals receiving federal social security pensions to take into account the individuals' contributions to the pension program.

Iowa Code Section 96.5-7 provides:

An individual shall be disqualified for benefits: ...

7. Vacation pay.

a. When an employer makes a payment or becomes obligated to make a payment to an individual for vacation pay, or for vacation pay allowance, or as pay in lieu of vacation, such payment or amount shall be deemed "wages" as defined in section 96.19, subsection 41, and shall be applied as provided in paragraph "c" hereof.

b. When, in connection with a separation or layoff of an individual, the individual's employer makes a payment or payments to the individual, or becomes obligated to

make a payment to the individual as, or in the nature of, vacation pay, or vacation pay allowance, or as pay in lieu of vacation, and within ten calendar days after notification of the filing of the individual's claim, designates by notice in writing to the department the period to which the payment shall be allocated; provided, that if such designated period is extended by the employer, the individual may again similarly designate an extended period, by giving notice in writing to the department not later than the beginning of the extension of the period, with the same effect as if the period of extension were included in the original designation. The amount of a payment or obligation to make payment, is deemed "wages" as defined in section 96.19, subsection 41, and shall be applied as provided in paragraph "c" of this subsection 7.

c. Of the wages described in paragraph "a" (whether or not the employer has designated the period therein described), or of the wages described in paragraph "b", if the period therein described has been designated by the employer as therein provided, a sum equal to the wages of such individual for a normal workday shall be attributed to, or deemed to be payable to the individual with respect to, the first and each subsequent workday in such period until such amount so paid or owing is exhausted. Any individual receiving or entitled to receive wages as provided herein shall be ineligible for benefits for any week in which the sums, so designated or attributed to such normal workdays, equal or exceed the individual's weekly benefit amount. If the amount so designated or attributed as wages is less than the weekly benefit amount of such individual, the individual's benefits shall be reduced by such amount.

d. Notwithstanding contrary provisions in paragraphs "a", "b", and "c", if an individual is separated from employment and is scheduled to receive vacation payments during the period of unemployment attributable to the employer and if the employer does not designate the vacation period pursuant to paragraph "b", then payments made by the employer to the individual or an obligation to make a payment by the employer to the individual for vacation pay, vacation pay allowance or pay in lieu of vacation shall not be deemed wages as defined in section 96.19, subsection 41, for any period in excess of one week and such payments or the value of such obligations shall not be deducted for any period in excess of one week from the unemployment benefits the individual is otherwise entitled to receive under this chapter. However, if the employer designates more than one week as the vacation period pursuant to paragraph "b", the vacation pay, vacation pay allowance, or pay in lieu of vacation shall be considered wages and shall be deducted from benefits.

e. If an employer pays or is obligated to pay a bonus to an individual at the same time the employer pays or is obligated to pay vacation pay, a vacation pay allowance, or pay in lieu of vacation, the bonus shall not be deemed wages for purposes of determining benefit eligibility and amount, and the bonus shall not be deducted from unemployment benefits the individual is otherwise entitled to receive under this chapter.

871 IAC 24.16(3) provides:

(3) If the employer fails to properly notify the department within ten days after the notification of the filing of the claim that an amount of vacation pay, either paid or owed, is to be applied to a specific vacation period, the entire amount of the vacation pay shall be applied to the one-week period starting on the first workday following the last day worked as defined in subrule 24.16(4). However, if the individual does not claim benefits after layoff for the normal employer workweek immediately following the last

day worked, then the entire amount of the vacation pay shall not be deducted from any week of benefits.

Because of the paucity of information or facts available in this matter, it is impossible to separate severance pay, other pay, and vacation pay. The employer did not participate in the hearing and the claimant testified credibly that he received one check in the net amount of approximately \$1,000.00 for a combination of severance pay, vacation pay, and holiday pay. The gross amount was \$1,156.91, which is the total amount as reported by the employer on its protest, which is Department Exhibit One. The claimant testified that he earned \$618.00 in gross pay every two weeks or \$309.00 per week, or \$61.80 per day. The claimant therefore received in severance pay, other pay, and vacation pay, \$1,156.91 for 18.7 days. Because of the paucity of information, the administrative law judge is compelled to assign first the vacation pay beginning with the first day of unemployment following the claimant's last day of work, which was January 20, 2004. The claimant testified that he came to work on January 21, 2004, but did not work that day and was told that he was laid off. That would be his first day of unemployment. Accordingly, the claimant received a combination of vacation pay, severance pay, and other pay, beginning on January 21, 2004 and continuing for 18.7 days through February 9, 2004 when the remaining amount was prorated to him in the amount of \$44.00 for February 9, 2004. The claimant's weekly benefit amount is \$193.00 and since he received an excess of that for 4 weeks, benefit weeks ending January 24, to benefit week ending February 14, 2004, the claimant is not entitled to any unemployment insurance benefits for those weeks. Further, for benefit week ending February 21, 2004 since the claimant received \$44.00 in severance pay, other pay, and vacation pay, the claimant would be entitled to unemployment insurance benefits for that week in the amount of \$149.00. Accordingly, the administrative law judge concludes that the claimant did receive severance pay as well as vacation pay and other pay, but it was not properly deducted for the correct period and the claimant is not entitled to any unemployment insurance benefits until benefit week ending January 24, 2004 when he was entitled to benefits in the amount of \$149.00 (\$193.00 - \$44.00). Further, since the claimant received unemployment insurance benefits in the amount of \$193.00 for benefit week ending February 7 and \$193.00 for benefit week ending February 14, 2004, the claimant is overpaid \$386.00. The claimant was also credited with a full \$193.00 for benefit week ending February 21, 2004 because that total amount was offset against the overpayment when he should have only received or been credited for \$149.00 so the claimant is overpaid an additional \$44.00 or a total of \$430.00. Since \$370.00 has been offset already against the claimant's total overpayment, he has therefore been overpaid an additional \$60.00. The administrative law judge further concludes that this amount, \$60.00, must be recovered in accordance with the provisions of Iowa law.

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.

DECISION:

The representative's decision of February 26, 2004, reference 03, is modified. The claimant, Scott A. Allen, did receive vacation pay, other pay, and severance pay, but it was not correctly deducted for the proper period and as a result the claimant is totally overpaid \$430.00, but since \$370.00 has been offset, the claimant is still overpaid in the amount of \$60.00. This needs to be offset from the claimant's next benefit payment.

kjf/b