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

JASON EDEN	:	
	:	**HEARING NUMBER:** 19BUI-05609
Claimant	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
DAY MECHANICAL SYSTEMS INC	:	
Employer	:	

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: 96.4-3, 24.23-10

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Claimant worked for Employer as an apprentice pipefitter at a union shop that had been in business over ten years. Employer remained in communication with the local union to hire employees when needed and also to get information about when apprenticeship classes would be.

The Employer works is informed in advance by the Union when the Union has scheduled classes, and which apprentices are to attend. The Claimant and similarly situated employees must attend these trainings in order to stay employed in Union jobs. The parties understand that the trainings are made obligatory by the Union and the collective bargaining agreement, for the Claimant to continue with his apprenticeship. The obligations in this relationship arise as a result of the Employer's negotiated agreement with the Union.

Employer stated that they are contacted by the local Union and told of employees who are subject to the training that is to occur that month. Employer then schedules those persons off from work to attend training. The week of June 9, 2019 – June 15, 2019 Claimant attended required training. The Union directly required that Claimant attend the training to continue in his union apprenticeship, and

this mean the Claimant had to attend the training to remain employed as an apprentice with the Employer.

REASONING AND CONCLUSIONS OF LAW:

Voluntary Period of Unemployment: Iowa Administrative Code 871-24.23(10) states that a claimant is not eligible for benefits during any week that "[t]he claimant requested and was granted a leave of absence" because "such period is deemed to be a period of voluntary unemployment." In the same vein rule 24.22(2)(j) states "[a] leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee-individual, and the individual is considered ineligible for benefits for the period." This is comparable to rule 24.26(11) which provides that "the granting of a written release from employment by the employer at the employee's request …would constitute a period of voluntary unemployment by the employee and the employee would not meet the availability requirement…"

Here the Claimant is in an apprenticeship program, and understands that to be in the program he will need occasional time off work to attend training. In fact the program is part of the contract of hire negotiated through the Claimant's exclusive representative, the Union. Further the Claimant submitted himself to the program by choosing to start work in the apprenticeship program. The Employer has agreed to the training leave of absence, but without pay from the Employer.

The Union as the exclusive bargaining representative has the power to consent for the workers in the bargaining unit. Of course, "[i]n most respects a collective bargaining agreement cannot supplant a statutory scheme for unemployment compensation." *E.g. Efkamp v. IDJS*, 383 N.W.2d 566 (Iowa 1986); *accord Central Foam Corp. v. Barrett,* 266 N.W.2d 33, 35 (Iowa 1978); *Crane v. Iowa Dept. of Job Service*, 412 N.W.2d 194 (Iowa App. 1987). But in the specific circumstance whether a worker is allowed to disagree with negotiated terms of a CBA and quit, the Court has held that the Union consents to the terms of the contract of hire through the CBA.

> It does not however follow that collective bargaining agreements are irrelevant to the question of whether a worker could reasonably refuse to work for a reduced wage. On that question we note and approve the following:
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> > [S]ince the majority of the employees in an appropriate collective bargaining unit by selecting a union to represent them, make that union the exclusive bargaining agent for all of the employees in the union ... the rights of the individual worker to deal with his employer is surrendered to the bargaining agent.... 76 Am.Jur.2d Unemployment Compensation § 65 (1975).

Efkamp v. IDJS, 383 N.W.2d 566, 569-70 (Iowa 1986). Thus in the sense that the *statute* uses voluntary, i.e. in the sense of volition, the worker has through the Union agreed to the period of training, and to the terms of that training, and any period of unemployment is **not** through no fault of the worker and his representative, the Union. So could the worker quit rather than attend training and claim that the term of the contract of hire requiring the unpaid training was contrary to his will, and thus a change in the contract of hire? Not under *Efkamp* he couldn't. Under *Efkamp* this is an agreed to term of the contract of hire. This means even if the worker is providing no services during this period, and also receiving no wages, then it is a voluntary period of unemployment and the worker is not able and available for work. *See Amana Refrigeration v.*

IDJS, 334 N.W.2d 316, 319 (Iowa App. 1983); 871 IAC 24.23(10); 871 IAC 24.22(2)(j). Within the meaning of our

law the leave of absence while on training was exactly "[a] leave of absence negotiated with the consent of both parties…" 871-24.22(2)(j). It was negotiated between the Employer and the exclusive bargaining agent of the workers in the bargaining unit, the claimant joined the unit when he was hired, and under rule 24.22(2)(j) "the individual is considered ineligible for benefits for the period." The worker is not unemployed through not "fault" (i.e. volition) of his own as the term is used in the Employment Security Law because "[t]he word 'fault,' as used in this context, is not limited to something worthy of censure but must be construed as meaning failure of volition." *Amana Refrigeration v. IDJS*, 334 N.W.2d 316, 319 (Iowa App. 1983)(*citing Moulton v. Iowa Employment Security Commission*, 239 Iowa 1161, 1172-73, 34 N.W.2d 211, 217 (1948)); *accord Wolf's v. IESC,* 59 N.W.2d 216, 220 (Iowa 1953). It is no different than those workers hired on condition that they obtain a professional license. The worker isn't paid to attend school, even if school hours conflict with work time, and nor would they be considered eligible for unemployment during this volitional leave of absence. If the leave is a known and agreed term at the beginning of the term of employment, or indeed at the formation of the *current* contract of hire (here the CBA) then it was negotiated with the consent of both parties and a voluntary period of unemployment under our law.

General Unemployment Principles: We would reach the same conclusion even if we did not view this as a voluntary period of unemployment. We agree with the Administrative Law Judge that the Claimant was off work and so experienced a week of total unemployment. So we must focus on the job status with the Employer.-

The Department of Labor has issued a guidance letter on apprenticeship training. Training and Employment Guidance Letter 12-09, which remains active, addresses the payment of unemployment compensation during subsidized work-based training initiatives for workers, such as registered apprenticeship programs. The TEGL first describes general unemployment principles, and then set out the implications of those principles. We quote at length:

> *Implications*. Because UC may only be paid to individuals with respect to their unemployment, it may not be paid to individuals who have not experienced unemployment during the week claimed. Similarly, UC may not be paid as a subsidy for employment (e.g. to make up the difference in hourly wages between the individual's former job and the individual's new, lower paying job) or as a stipend since it is not a payment "with respect to unemployment," but is instead a payment with respect to being employed. …
>
> *UC may be paid to individuals in training notwithstanding the requirement that they be able and available for work.* Federal UC law has always been interpreted as requiring states, as a condition of participation in the Federal-State UC program, to limit the payment of UC to individuals who are able and available (A&A) for work. (For additional information, see 20 CFR 604.5.) However, a state may consider an individual available for work "for all or a portion of the week claimed, provided that any limitation placed by the individual on his or her availability does not constitute a withdrawal from the labor market." Thus it would be **possible** for a state to consider individuals in workbased training (for example, 20 hours a week) A&A **as long as they were available for work during some portion of the week**.

> *UC may be paid to individuals in training approved by the state UC agency.* Federal law prohibits denial of UC to individuals participating in training with the approval of the state agency based on state law provisions relating to availability for work, active search for work, or refusal of work. However, individuals who are participating in employer sponsored "on-the-job training" are not "unemployed" and thus may not be paid UC unless they are not working full time during the week the on-the-job training takes place. **In TEGLs Nos. 21-08 and 21-08, Change 1, the Department encouraged states to broaden their definition of approved training and to implement procedures that would facilitate individuals' participation in training.** In TEGL No. 2-09, the Department provided information about recommended policies for approved training.
>
> *Individuals working part-time may be eligible for UC*. Each state's UC law includes provisions for UC payments to individuals who are partially unemployed. Depending on state law requirements concerning monetary and non-monetary eligibility, individuals who are earning part-time wages may be eligible for UC **as long as they are unemployed for some part of the week being claimed**.

TEGL, 12-09 p. 6-7 (emphasis added). The upshot is that there are specific conditions which will allow payment of unemployment. Partial unemployment, approved training, and temporary unemployment are all exceptions to the able, available, and work-seeking requirements. None apply here.

Partial Unemployment: If the worker is working part of the week, and is partially unemployed, then the worker would not have to be available under Iowa Code §96.4(3) and *TEGL 12-09* makes clear this would be consistent with Federal law. But this Claimant was not partially unemployed. He drew no wages at all, and performed no services. We must view him as totally, not partially unemployed.

Approved Training: As mentioned by TEGL 12-09 a broad concept of approved training might allow collection of benefits during a week of classroom training without meeting the requirements of Iowa Code §96.4(3). But Workforce has not implemented such a broad concept and there has been no approval of the training in this case. Thus the Claimant is not excused from the requirements by being on approved training. The fact is, Workforce recently tightened up the criteria for Department Approved Training. 871 IAC 24.39(2). Formerly, under a more expansive approach, training as in this case was commonly approved, and the unemployment fund ending up paying for such ongoing apprenticeship training since employers are not charged for benefits paid for approved training. Effective February 7, 2018 rule 24.39(2) requires that DAT "be completed 104 weeks or less from the start date," that it be at "a college, university or technical training institution," and that the claimant be "enrolled and attending the training program in person as a full-time student." No doubt these requirements explain why the training here has not been granted DAT status. This being the case we cannot act *as if* it had been approved for DAT.

Temporary Unemployment. Under Code §96.4(3) a worker who is temporarily unemployed need not meet the availability and job seeking requirements. But the definition of temporary unemployment is statutory:

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

Iowa Code §96.19(38)(c). Being off for training does not fit this paragraph. The statute does not say temporary unemployment is being unemployed due to causes "such as" or "similar to" or "akin to" plant shut downs, to lack of work, to a plant-wide vacation, emergency, or a plant-wide inventory. It says "due to a plant shutdown." The plant is not shut down. The Claimant is off work that's all. It was "due to…emergency." This is not an emergency. The contrary finding of the Administrative Law Judge does not hold water.

The Union, the Claimant and the Employer all knew in advance that the Claimant was scheduled for apprenticeship class. As a result of the governing union contract an Employer who utilizes union apprentice pipefitters must give them time off work in order to attend union run apprenticeship training, but the time off is not required to be paid.

Here the Union run school emails the Employer which employees need to attend, and the dates of attendance. It is known at the time the Claimant signed up to be an apprentice that he would have to attend regular training, and the dates of training are also known in advance. There is no surprise.

It is true that "[w]hen the legislature has defined words in a statute — that is, when the legislature has opted to 'act as its own lexicographer' — those definitions bind us." *State v. Coleman*, 907 NW 2d 124, 135 (Iowa 2018) (quoting *State v. Fischer*, 785 N.W.2d 697, 702 (Iowa 2010)). When the legislature fails to define a word all this means is that there is no binding legislative definition. The lack of a legislative definition does not render the word meaningless. Unlike Humpty Dumpty we not become the master of such a word nor may we make it mean "just what we choose it to mean." Rather we must construe a word according to its ordinary meaning. "Absent a statutory definition or an established meaning in the law, words in the statute are given their ordinary and common meaning by considering the context within which they are used…Under the guise of construction, an interpreting body may not extend, enlarge or otherwise change the meaning of a statute." *Auen v. Alcoholic Beverages Div.,* 679 NW 2d 586, 590 (Iowa 2004). And while the statute must be liberally construed, this does not come into play when reading plain English. S*ee e.g. Standard Water Control Sys., Inc. v. Jones*, No. 15-0458, 2016 WL 4543505, at *1 (Iowa Ct. App. Aug. 31, 2016) ("We look no further than the language of the statute when it is unambiguous."); *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."); *In re Detention of Fowler*, 784 N.W.2d 184, 187 (Iowa 2010) ("We do not search for meaning beyond the express terms of a statute when the statute is plain and its meaning clear."); *Swiss Colony, Inc. v. Deutmeyer*, 789 N.W.2d 129, 135 (Iowa 2010)("[T]he principle of liberal construction does not vest th[e] court with an editor's pen with the power to add or detract from the legislature's handiwork."); *Moulton v. Iowa Emp'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.") We thus turn to the ordinary meaning of "emergency."

As ordinarily understood an emergency is a serious matter that arises suddenly. If it arises suddenly but is minor – your pen runs out of ink – it is no emergency. If it is serious, but scheduled in advance – your knee replacement surgery scheduled for next January – it is no emergency. Thus the American Heritage Dictionary defines emergency to be "[a]n unexpected situation or sudden occurrence of a serious and urgent nature that demands immediate action." *American Heritage Dictionary, 2nd College Edition*, p. 448 (Houghton Mifflin, Boston: 1982). The 2019 version of the Oxford English Dictionary agrees: "4. a. (The ordinary modern use.) A

juncture that arises or 'turns up'; esp. a state of things unexpectedly arising, and urgently demanding immediate action." *Oxford English Dictionary*, online edition (2019) *accord The Century Dictionary and Cyclopedia,* p. 1897 (The Century Company, New York: 1895). While this is the fourth definition in the OED that dictionary lists definition in order of historical usage, and this one is parenthetically indicated as the "ordinary modern use" by the OED editors. The massive *Webster's Third New International Dictionary* (dating to 1960 despite the moniker "new") gives for "emergency" the definition "an unforeseen combination of circumstances or the resulting state that calls for immediate action." The Iowa Court of Appeals recently explained:

> The term "emergency" is widely understood. Black's Law Dictionary defines an emergency as "[a] sudden and serious event or an unforeseen change in circumstances that calls for immediate action to avert, control, or remedy harm." *Emergency, Black's Law Dictionary* (10th ed. 2009). In *Stych v. City of Muscatine,* the court applied the dictionary definition of the term "emergency" to conclude that it is "a state of things unexpectedly arising, and urgently demanding immediate action." 655 F. Supp. 2d 928, 935-36 (S.D. Iowa 2009) (quoting *Emergency*, Oxford English Dictionary (2d ed. 1989)).

Shipton v. Chickawaw Co. Bd of Health, No. 17-2041, slip op. at 6-7 (Iowa App. 11-21-18) *further review denied* 1-17-19. *See also Bangs v. Keifer,* 174 NW 2d 372, 374 (Iowa 1970).

It is clear that being unforeseen and/or sudden are essential to being an "emergency." The scheduled-in-advance training that everyone including the Claimant knew was part and parcel of being an apprentice at the time he commenced work for the Employer, is not in any sense an emergency. If a college student needs to leave his job because he is starting back to school at Iowa State on August 23, 2021 then when that date comes he can hardly claim any emergency need to be absent. Here the leave of absence to attend the school was scheduled, anticipated, prepared for, expected, understood, a given. It was not an emergency.

None of the conditions of the statute apply. The plant is there, the work is there, there's no lack of work, there is no emergency, no inventory or plant-wide vacation. The Claimant is on a leave of absence to attend training. And the Employer didn't announce it, the Union did. If this is akin to anything it is most akin to be a full-time student for a week who is not available for work that week. 871 IAC 24.23(5). Whatever you call it, it is not any of the listed categories of temporary unemployment and does not meet the statutory definition. We thus cannot find the Claimant is excused from the availability and job seeking requirements by being temporarily unemployed.

Upshot: The benefit account of the unemployment compensation fund is not a job training fund. Workers are paid out of this account for being unemployed, not for being underpaid, and not to receive training other than Department Approved Training. Here the Claimant was not partially unemployed, temporarily unemployed, or on Department approved training. He met none of the exceptions to being able and available and actively seeking work. He thus is disallowed benefits even if we do not treat this as an agreed leave of absence.

What This Case Is Not: The Employment Security Law is not a general law for righting perceived wrongs. This law is in place to pay unemployment benefits as a wage replacement for those who

are unemployed and either looking for work, or excused from looking for work. If a worker is rendering service to an employer,

and yet receives no or inadequate wages, then that may be an issue under the Fair Labor Standards Act, or Iowa's Wage Payment Collection Law. But payment of unemployment benefits to a worker who is neither available for work, nor temporarily unemployed, is not a remedy for enforcing perceived violations of the FLSA or the IWPCL. We, of course, do not suggest that such claims would necessarily lie here. 29 C.F.R. §785.27-§785.29; *Willets v. City of Creston*, 433 N.W.2d 58, 62 (Iowa Ct. App. 1988)(wages must be due under applicable contract for Ch. 91A violation to occur). We only make clear that any such wrong, if there be any, would not be cognizable in this forum.

DECISION:

The administrative law judge's decision dated August 14, 2019 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was not able and available for week for the week ending June 15, 2019. Accordingly, he is denied benefits for that week.

The Claimant is overpaid for the one week ending June 15, 2019.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv