

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

MICHELLE C PERERA

Claimant

APPEAL NO. 20A-UI-04863-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SIOUX CITY COMMUNITY SCHOOL DIST

Employer

OC: 03/15/20

Claimant: Appellant (4)

Iowa Code Section 96.4(3) – Able & Available

Iowa Code Section 96.19(38)(c) – Temporary Layoff

Iowa Code Section 96.4(5) – Between Academic Terms Disqualification

Iowa Code Section 96.3(7) – Recovery of Overpaid Benefits

Public Law 116-136, Section 2104(b) – Federal Pandemic Unemployment Compensation

STATEMENT OF THE CASE:

Michelle Perera filed a timely appeal from the May 26, 2020, reference 01, decision that denied benefits effective March 15, 2020, based on the deputy's conclusion that Ms. Perera was not partially unemployed within the meaning of the law. After due notice was issued, a hearing was held on June 23, 2020. Ms. Perera participated. Stefanie Verros represented the employer. The parties waived formal notice on the issue of whether the claimant is disqualified for benefits based on the between-academic-terms disqualification provision set forth at Iowa Code section 96.4(5). Exhibits A through H were received into evidence. The administrative law judge took official notice of the following Agency administrative records: KCCO, DBRO, KPYX and WAGE-A.

ISSUES:

Whether the claimant has been able to work and available for work since March 15, 2020.

Whether the claimant has been temporarily and/or partially unemployed since March 15, 2020.

Whether the claimant is disqualified for benefits based on the between-academic-terms disqualification provision set forth at Iowa Code section 96.4(5).

Whether the employer's account may be charged for benefits for the period beginning March 15, 2020.

Whether the claimant is overpaid regular benefits.

Whether the claimant is overpaid Federal Pandemic Unemployment Compensation.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Michelle Perera is employed by Sioux City Community School District as a part-time food service worker at North Middle School. Ms. Perera began her employment in August 2018 and last performed work for the employer on Friday, March 13, 2020. Ms. Perera's usual work hours have been 8:30 a.m. to 11:45 a.m., Monday through Friday. Her wage is \$15.55 per hour. Tina

Young is Food Service Supervisor at the middle school and is Ms. Perera's immediate supervisor. Ms. Perera's usual duties rotate between cooking, setting up the lunchroom for service, and serving food to students. The nature of the work requires that Ms. Perera be present at the workplace in order to perform the work duties.

On March 15, 2020, the District sent a broadcast message that the District was temporarily closing schools due to concern about community spread of COVID-19. The closure announcement was initially effective until April 14, 2020, but the District later made the closure effective through the end of the school year. The school year ended June 2, 2020.

On Monday, March 16, 2020, Ms. Young contacted Ms. Perera to tell her to be on the lookout for email correspondence containing information regarding the District's plans for her employment.

On March 23, 2020, the employer gave Ms. Perera a choice of returning to work to perform modified food service duties or remaining off work. The District planned to continue serving lunch to students, but instead of serving students in the cafeteria, food service staff would prepare food and then travel in buses to designated distribution sites. Students would collect their bagged lunch from the bus and take it home. Food service staff were already accustomed to wearing gloves when handling food. The District planned to implement social distancing in the workplace wherever possible and to provide masks for food service staff to wear. The pay would remain the same. The work hours would remain substantially the same. The duties would be modified, but the changes would not be substantial. Ms. Perera elected to remain off work out of concern for her health. Three years ago, Ms. Perera was diagnosed with coronary artery disease. Ms. Perera underwent placement of stents in two blocked arteries. At that time, Ms. Perera's doctor identified a third artery with a 50 percent blockage, but indefinitely delayed stent placement in that artery until Ms. Perera has a 75 percent blockage in that artery. After Ms. Perera spoke with Ms. Young, Ms. Perera contacted her doctor to request a note supporting her need to remain off work in connection with community spread of COVID-19. Ms. Perera's doctor refused to provide the requested note. The doctor told Ms. Perera that she was not ill and, therefore, he would not provide the note. Ms. Perera concedes was healthy, but adds that she intended to remain healthy. On March 16, 2020, Ms. Perera notified the employer that she was electing to remain off work. The District continued to have the modified food service work available through the end of the school year.

On Tuesday, March 24, 2020, Rich Luze, Food Service Director, contacted Ms. Perera to see whether she wanted to use paid time off in connection with her time away from work. Ms. Perera advised at that time that she wished to commence using paid time off. The employer applied 3.75 hours of daily PTO, \$58.31, to March 24, 26 and 27. The employer also paid Ms. Perera the equivalent of her daily wages, \$58.31, for March 25 as "emergency day" payment. Under the District's policies, Ms. Perera was entitled to one day of emergency pay per year. Ms. Perera continued to use paid time off until April 9, 2020, when she notified the District that she had applied for unemployment insurance benefits and no longer needed to use the paid time off benefit.

On April 1, 2020, the District had notified Ms. Perera that she could apply for benefits under the Families First Coronavirus Response Act (FFCRA). Ms. Perera elected not to apply.

The District paid Ms. Perera the equivalent of her daily wages, \$58.31, as holiday pay for April 10, 2020. The District's Spring Break was scheduled for Friday, April 10 through Monday, April 13. This period would include Good Friday and Easter.

While Ms. Perera continued her voluntary absence from work, a food service staff member tested positive for COVID-19 on or about May 2, 2020. Ms. Perera is Facebook “friends” with the employee who tested positive. That coworker announced her positive test on Facebook on May 2. Ms. Perera had worked in the same kitchen with the coworker. Ms. Perera assumes she would have continued to work in close proximity with the coworker if she had returned to work to perform the modified food service duties. On May 4, the District notified affected employees of the positive test for COVID-19 and directed affected employees to self-quarantine until May 11, 2020.

In mid-May 2020, the employer sent Ms. Perera a questionnaire regarding whether and to what extent she intended to return to the employment during the 2020-2021 academic year. Ms. Perera selected the response that indicated she would like to return to her position for the upcoming school year and promptly returned the form. From that point, there was a mutual understanding that Ms. Perera would be returning at the start of the 2020-2021 academic year to perform the same or similar duties.

Ms. Perera established a claim for unemployment insurance benefits that was effective March 15, 2020. Sioux City Community School District is the sole base period employer. Iowa Workforce Development set Ms. Perera’s weekly benefit amount at \$164.00. At that time of the June 23, 2020 appeal hearing, Ms. Perera had made weekly claims for 14 weeks between March 15, 2020 and June 20, 2020. Ms. Perera reported zero wages and received \$164.00 in benefits for the three weeks that ended March 21, March 28 and April 4, 2020. Ms. Perera reported \$233.00 in wages for the week that ended April 11, 2020 and received no benefits for that week. Ms. Perera reported zero wages and received \$164.00 in benefits for the weeks the three weeks that ended April 18, April 25 and May 2, 2020. Ms. Perera reported \$58.00 in wages for the week that ended May 9, 2020 and received \$147.00 in benefits for that week. Ms. Perera reported zero wages for the week that ended May 16, 2020 and received \$164.00 in benefits for that week. The regular benefits paid out so far total \$1,295.00. Ms. Perera reported zero wages for the four weeks that ended May 23, 2020, May 30, June 6, and June 13, 2020, but has not received benefits for those weeks. Ms. Perera reported \$59.00 in wages for the week that ended June 20, 2020, but has not received benefits for that week.

REASONING AND CONCLUSIONS OF LAW:

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:

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".

Iowa Admin. Code r. 871-24.22(2) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work,

and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

Iowa Admin. Code r. 871-24.23(10) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

...

(29) Failure to work the major portion of the scheduled workweek for the claimant's regular employer.

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 Section 96.19(38)(c).

In connection with the Covid-19 pandemic and passage of the Public Law 116-136, the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act), Iowa Workforce Development published on its website a list of Covid-19-related scenarios under which a claimant would be eligible for unemployment insurance benefits. The scenarios create limited and temporary exceptions to the able and available requirements set forth at Iowa Code section 96.4(3). These scenarios include circumstances wherein the claimant is without work due to a school closure. These scenarios also include circumstances wherein an immune-compromised claimant has been advised by a medical professional to quarantine. See <https://www.iowaworkforcedevelopment.gov/COVID-19>, updated March 30, 2020.

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 Section 96.19(38)(c).

Iowa Code section 96.7(2)(a)(2)(a), concerning employer liability for benefits, provides, in relevant part, as follows:

(a) 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.

In response to the economic impact of the COVID-19 pandemic, Iowa Workforce Development published on its website Unemployment Insurance Guidance for Employers and Workers. As part of that publication, the Agency announced that claims filed as a direct or indirect result of Covid-19 would not be charged to employers. See <https://www.iowaworkforcedevelopment.gov/COVID-19#ife>, Information for Employers. Based on this Agency pronouncement, the employer's account will not be charged.

The weight of the evidence establishes that Ms. Perera was temporarily laid off during the week of March 15-21, 2020, during which time the employer had no work for her. The lack of work was limited to that one week and was based on the COVID-19 related closure of schools. Ms. Perera is eligible for benefits for the benefit week that ended March 21, 2020, provided she meets all other eligibility requirements. The employer's account will not be charged for the benefits paid to Ms. Perera for that week.

The weight of the evidence establishes that Ms. Perera was on an approved leave of absence beginning March 23, 2020, when she elected to continue off work, rather than return to perform the modified work duties the employer had available for her. Ms. Perera's voluntary decision to remain off work prevented her from meeting the availability requirement and disqualified her for unemployment insurance benefits. Ms. Perera's heart doctor specifically rejected Ms. Perera's assertion that she was at increased risk in connection with the novel coronavirus and declined to provide a note in support of her assertion that she needed to quarantine. The circumstances surrounding Ms. Perera's time off work do not fall within the announced COVID-19 based exemptions to the able and available requirements. Ms. Perera is not eligible for benefits for the period beginning March 22, 2020 through the June 2, 2020 end of the school year. This availability disqualification applies to the benefit weeks between March 28, 2020 and May 30, 2020.

The between academic terms disqualification set forth at Iowa Code section 96.4(5) provides as follows:

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:

a. Benefits based on service in an instructional, research, or principal administrative capacity in 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 during a similar period between two regular terms, whether or not successive, or during a period of paid sabbatical leave provided for in the individual's contract, if the individual has a contract or reasonable assurance that the individual will perform services in any such capacity for any educational institution for both such academic years or both such terms.

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.

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.

d. For purposes of this subsection, "*educational service agency*" means a governmental agency or government entity which is established and operated exclusively for the purpose of providing educational services to one or more educational institutions.

871 IAC 24.51(6) defines "reasonable assurance" as follows:

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(4) provides as follows:

Nonprofessional employee.

a. Unemployment insurance payments which are based on school employment shall not be paid to a nonprofessional employee for any week of unemployment which begins between two successive academic years or terms if the individual has performed service in the first of such academic years or terms and there is a reasonable assurance that such individual will perform services for the second academic year or term. However,

unemployment insurance payments can be made based on non-school-related wage credits pursuant to subrule 24.52(6).

b. The nonprofessional employee may qualify for retroactive unemployment insurance payments if the school employment fails to materialize in the following term or year and the individual has filed weekly or biweekly claims on a current basis during the between terms denial period pursuant to subrule 24.2(1), paragraph “e.”

Ms. Perera is not eligible for benefits effective the benefit week that began May 31, 2020, based on the between academic terms disqualification provision. Prior to the end of the 2019-2020 school year, Ms. Perera had reasonable assurance that she would be returning at the start of the 2020-2021 academic year to perform the same or similar services for the employer. The between academic terms disqualification remains in effect until the first day of the 2020-2021 academic year.

Iowa Code section 96.3(7) provides that if a claimant receives benefits and is deemed ineligible for the benefits, Workforce Development must recovery the benefits and the claimant must repay the benefits, even if the claimant was not at fault in receiving the benefits.

Because his decision affirms the disqualification for benefits for the period beginning March 22, 2020, the \$1,131.00 in regular benefits that Ms. Perera received for seven weeks between March 28, 2020 and May 16, 2020 are an overpayment of benefits that Ms. Perera must repay.

PL116-136, Sec. 2104 provides, in pertinent part:

(b) Provisions of Agreement

(1) Federal pandemic unemployment compensation.--Any agreement under this section shall provide that the State agency of the State will make payments of regular compensation to individuals in amounts and to the extent that they would be determined if the State law of the State were applied, with respect to any week for which the individual is (disregarding this section) otherwise entitled under the State law to receive regular compensation, as if such State law had been modified in a manner such that the amount of regular compensation (including dependents' allowances) payable for any week shall be equal to

(A) the amount determined under the State law (before the application of this paragraph), plus

(B) an additional amount of \$600 (in this section referred to as “Federal Pandemic Unemployment Compensation”).

....

(f) Fraud and Overpayments

(2) Repayment.--In the case of individuals who have received amounts of Federal Pandemic Unemployment Compensation to which they were not entitled, the State shall require such individuals to repay the amounts of such Federal Pandemic Unemployment Compensation to the State agency...

Because Ms. Perera is disqualified for regular benefits for the period beginning March 28, 2020, she is also disqualified for Federal Pandemic Unemployment Compensation for that period. The \$3,600.00 in FPUC benefits Ms. Perera received for six weeks between March 29, 2020 and May 16, 2020 is an overpayment of benefits that Ms. Perera must repay.

DECISION:

The May 26, 2020, reference 01, decision is modified in favor of the claimant/appellant in a limited manner as follows. The claimant was temporarily laid off during the week of March 15-21, 2020 and is eligible for benefits for that week, provided she meets all other eligibility requirements. The employer's account shall not be charged for benefits paid to the claimant for the week that ended March 21, 2020. The claimant was on a leave of absence, was voluntarily unemployed, and was not available for work from the benefit week that began March 22, 2020 through the June 2, 2020 last day of school. Accordingly, the claimant is not eligible for benefits for the benefit weeks between March 22, 2020 and May 30, 2020. Effective the benefit week that began May 31, 2020, the claimant was ineligible for benefits, based on the between academic terms disqualification provision set forth at Iowa Code section 95.4(5). The between academic terms disqualification remains in effect until the first school day of the 2020-2021 academic year. The claimant is overpaid paid \$1,131.00 in regular benefits for seven weeks between March 28, 2020 and May 16, 2020. The claimant is overpaid \$3,600.00 in FPUC benefits for six weeks between March 29, 2020 and May 16, 2020. The claimant must repay the overpaid regular and FPUC benefits.

Note to Claimant: This decision determines you are not eligible for regular unemployment insurance benefits. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision. Individuals who do not qualify for regular unemployment insurance benefits, but who are currently unemployed for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>.



James E. Timberland
Administrative Law Judge

July 17, 2020
Decision Dated and Mailed

jet/scn