

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JACK L WHITCHELO
Claimant

HAWKEYE COMMUNITY COLLEGE
Employer

APPEAL 17R-UI-12794-DG-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 08/06/17
Claimant: Respondent (1)**

Iowa Code § 96.4(5) – Reasonable Assurance

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated August 30, 2017, (reference 01) that held claimant eligible for unemployment insurance benefits. A hearing was held on September 27, 2017 and the administrative law judge entered a decision on that date which modified the decision in favor of the appellant, but did not deny benefits. Claimant appealed that decision to the Unemployment Appeal Board and the matter was remanded for another hearing. After due notice, that hearing was scheduled for and held on January 22, 2018. Claimant participated personally and was represented by Dave Nagel, Attorney at Law. Employer participated by Janine Knapp, Assistant Director of Human Resources. Claimant's Exhibits A-C were admitted into evidence.

ISSUE:

Does the claimant have reasonable assurance of continued employment in the next school term or year?

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time instructor for Hawkeye Community College beginning on February 1, 2017 through April 20, 2017. Claimant was hired to work no more than 25 hours a week at \$45.00 an hour. Claimant testified that he made approximately \$4,000.00 working for employer in 2017. Claimant has no other regular non-educational institution employment wage credits in the base period.

Claimant began working for employer in 2008. He taught several different classes for employer each year and made approximately \$20,000.00 each year.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant does not have reasonable assurance of returning to work the following academic term or year.

Iowa Code section 96.4(5)a 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:

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.

Public Law 94-566 provides:

(c) An individual who performs services for an educational institution or agency in a capacity (other than an instructional, research, or principal administrative capacity) shall not be eligible to receive a payment of assistance or a waiting period credit with respect to any week commencing during a period between two successive academic years or terms if:

(1) Such individual performed such services for any educational institution or agency in the first of such academic years or terms; and

(2) There is a reasonable assurance that such individual will perform services for any educational institution or agency in any capacity (other than an instructional, research, or principal administrative capacity) in the second of such academic years or terms.

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:

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:

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.

Iowa Admin. Code r. 871-24.52(9) provides in part:

(9) Vacation period and holiday recess. With respect to any services performed in any capacity while employed by an educational institution, unemployment insurance payments shall not be paid to any individual for any week which commences during an established and customary vacation period or holiday recess if such individual performs service in the period immediately before such vacation period or holiday recess and there is a reasonable assurance that such individual will perform service in the period immediately following such vacation period or holiday recess. However, the provision of subrule 24.52(6) could also apply in this situation.

Iowa Code section 96.4(5)d 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:

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.

Iowa Admin. Code r. 871-24.51(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.

The U.S. DOL issued Program Letter No. 5-17 on December 22, 2016, that sets out guidance for the department interpretation of the Federal Unemployment Tax Act (FUTA) as it applies to institutions of higher education and part-time, adjunct or contingent faculty. It sets out three factors required for a reasonable assurance determination. First, a genuine offer of employment from a person with authority may be written, oral or implied. Second, the employment offered must be in the same capacity (e.g. professional or non-professional) as held in the previous term. Third, the economic conditions offered may not be “considerably less” than in the prior term. The letter defined “considerably less” as not earning at least 90 percent of the amount earned in the earlier academic year or term. It goes on to examine whether contingencies within the offer are within the employer’s control as a means to determine if the claimant has reasonable assurance of continued employment. Circumstances such as enrollment, funding and seniority are not considered to be within the employer’s control. The letter requires analysis of the “totality of circumstances” to determine whether it is “highly probable” that there is a job available for claimant the following academic term. It also requires weight be given to the contingency of the offer and if it is “highly probable” that the contingency will be met. https://wdr.doleta.gov/directives/corr_doc.cfm?docn=8999

Where a claimant did not work over the summer for a community college which held a summer session, the Court still denied benefits because of the “summer vacation.” *Merged Area VII v. Iowa Dep’t of Job Serv.*, 367 N.W.2d 272, 274, 275 (Iowa Ct. App. 1985).

In this case, the claimant does not have reasonable assurance of continued employment for the 2017-2018, school year. Employer is offering considerably less work and pay as compared to previous year’s wages. Claimant made \$1,8840.00 in 2016, but he was only given an opportunity to make approximately \$4,000.00 in 2017. Employer does not have any work scheduled for him in 2018 as of the date of the hearing, and the class he would be teaching has no one enrolled. Based on the totality of the circumstances from the evidence offered at the hearing, it is not highly probable that claimant will be offered any work in the spring 2018 term. Additionally, the wages he could be making would be considerably less than what he had been making for employer over the past Eight years. The claimant should be considered unemployed, and he is eligible for benefits.

DECISION:

The August 30, 2017, (reference 01) unemployment insurance decision is affirmed. The claimant does not have reasonable assurance of returning to work the following academic year or term. Benefits are allowed.

Duane L. Golden
Administrative Law Judge

Decision Dated and Mailed

dlg/scn