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

ANGELA N WRIGHT	:	
	:	**HEARING NUMBER:** 15B-UI-07499
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
QWEST CORPORATION	:	
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: 96.5-1, 96.3-7

D E C I S I O N

The Employer appealed the issue of the chargeability of the overpayment in 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 on the **chargeability** of the overpayment. The Employment Appeal Board **REVERSES** on the overpayment chargeability issue as set forth below.

As a result the Claimant is still not eligible for benefits but now will also be responsible for paying back the overpayment.

FINDINGS OF FACT:

The Administrative Law Judge findings of fact are adopted by the Board as its own with the exception of the final sentence of those findings of fact. In addition the Board makes the following findings of fact.

> The Claimant filed for unemployment insurance benefits with an effective date of June 7, 2015. She claimed for benefits after the separation from employment. On June 17, 2015, the Employer faxed multiple pages to the fact finder including a cover letter with the phone number of the Employer's representative.

The Employer provided documents for the June 19, 2015 fact-finding interview. Those documents included documentation of attendance problems the Claimant had, and of communications between the Claimant and the Employer about those problems. The attached information included the Employer's attendance policies, the termination letter of May 21, the May 18 letter to Claimant warning her she must report by May 21 or be terminated for failure to report, and documentation of prior absences with dates and reasons for missing work.

REASONING AND CONCLUSIONS OF LAW:

The Administrative Law Judge conclusions of law are adopted by the Board as its own with the exception of the conclusions in the last sentence of the conclusions of law. In lieu of this sentence the Board makes the following conclusions of law

As an initial matter we make clear that the Claimant was disqualified based on the separation from employment, and that **the disqualification decision still stands**. Indeed, the disqualification decision was not appealed by the Claimant. Our decision today has no effect on the disqualification issue since we have no jurisdiction over it.

What was appealed to the Board was the Administrative Law Judge's determination to charge the Employer for the overpayment based on the Administrative Law Judge's decision that the Employer failed to participate in fact finding. The regulations, cited by the Administrative Law Judge, set out the standard for determining participation:

> 24.10(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. **A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation.** At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. **In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7)**.

871 IAC 24.10(1). If the Employer met this standard of participation then the Claimant has to pay back the overpayment. Otherwise the Employer's account is chargeable for this amount and the Claimant is relieved of having to pay it back.

The written information the Employer submitted was sufficient to meet the standard of the regulation for the information that must be supplied if participation is to be in writing. The information required need only be such that "if unrebutted [it] would be sufficient to result in a decision favorable to the employer." 871 IAC 24.10(1). "In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7)." 871 IAC 24.10(1). The details of the Claimant's attendance record, as far as those can be known by the Employer, were supplied at the fact finding with much of the same supporting documentation that was supplied at hearing. We note that normally *details* about why an employee missed worked are known to the employee, not the employer, especially where we are dealing with a no-call no-show as here. *See Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187, 191 (Iowa 1984) (Finding unexcused under the law absences for "oversleeping, delays caused by tardy babysitters, car trouble, and no excuse.") The Employer nevertheless at fact finding supplied information on the nature of the absences (no call/no show) such as was reasonably available to the Employer, and also this information included some of the Claimant's explanations for absences immediately preceding the no call/no show. In particular the information showed that the Claimant was repeatedly no call/no show and was no call/no show for the final absence and the information suggests this was for personal reasons of lack of transportation and family problems. But regardless, not calling renders the absences unexcused for failure to report and the Employer information includes that the Claimant just failed to call in the absences in question. Just as these details were sufficient to disqualify after the hearing, so the information that was made available at the fact finding clearly meet the standard that the reasons for the discharge, if unrebutted, would lead to a finding for the Employer. The Employer thus satisfied the documentation requirement.

As for personal participation, we find for the Employer on two bases. First, the contact information supplied by the Employer was sufficient to meet the requirement of the regulation to give the names of persons to contact for rebuttal, even assuming this requirement applies to written participation cases. The cover letter specifically listed the representative to call. Since the Employer gave the name and number of a representative to contact with questions this was sufficient to meet the requirement of giving the contact information for an employee "who may be contacted, if necessary, for rebuttal." 871 IAC 24.10(1).

Second, we also conclude that the Employer satisfied the contact requirement because the rule simply does not require both sending in a number and participating in writing. In particular the regulation states "[t]he most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal." 871 IAC 24.10(1). The second quoted sentence repeats the phrase "live testimony" which is a clear reference to the first quoted sentence. In conjunction the most natural meaning is that if the Employer participates in person the Employer should either supply the "live testimony" of "a witness with firsthand knowledge," but that if the employer representative who is on the phone is not such a person then such a first-hand witnesses' contact information must be supplied. In other words, there is no content requirement for live participation and instead the name of a first-hand witness must be provided – the content requirement is geared to the knowledge of the person who will available for testifying. The next sentence then says "[a] party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation…" This sentence immediately follows the sentence about supplying a number for a first-hand witness. The phrase "may also participate" makes clear that written participation is an alternative to live participation where the live witnesses must be available. For written participation the content requirement is then expressly set out rather than being tied to the live first-hand witness requirement. Content for written participation is controlled by specifying what is to be placed in writing, not by the identity of the person

sending in the writing. Content for live participation is controlled by specifying who is to be available to participate. This reading of the rule - that writing is an alternative to supplying a witness phone number – is the most natural reading of the rule. Not only that, but it is the only one that makes logical sense. Why would the agency allow for written participation if the live witness has to be immediately available and sitting by the phone? What is saved? Not time surely, nor trouble. Reading the rule as requiring live participation on demand even when participation is by writing would vitiate the clear purpose of the rule: to encourage employers who cannot participate orally to nevertheless supply the information needed for an accurate decision. This also empowers the Benefits Bureau to maintain the policy it employs, out of necessity, of denying almost all continuances at fact finding. If on demand live participation were required, then a denial of all continuances as seems to be done would cause a due process problem. This is avoided with the written participation rule, thus benefiting the parties by allowing for speedy resolution. Indeed while the Administrative Law Judge seems to take the illogical view that both types of participation are required when writing is chosen, from what is in this record it appears that the Benefits Bureau did not since the written instructions from the Benefits Bureau describes in detail how to participate, and how to participate in writing, but says nothing about any first-hand witness phone number requirement. Thus it appears that the Bureau that actually held the fact finding interviews did not expect an employer who elects for written participation to be sitting by the phone ready and waiting for live participation.

The Employer has satisfied the requirement of participation set out by regulation. The Employer is relieved of charges for the overpayment. The Claimant will be charged the overpayment.

DECISION:

The administrative law judge's decision dated August 7, 2015 is **REVERSED ON THE ISSUE OF OVERPAYMENT CHARGING**. The overpayment entered in the amount of $3,520 is chargeable to the Claimant and not to the Employer's account. The Claimant **remains disqualified** on the terms set out by the Administrative Law Judge as that decision was not appealed to the Board.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv