

**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**

**PAULA J ROGAN
440½ WINONNA ST
DUBUQUE IA 52001**

**HILLCREST FAMILY SERVICES
2005 ASBURY RD
DUBUQUE IA 52001-3042**

**Appeal Number: 05A-UI-06892-RT
OC: 06/05/05 R: 04
Claimant: Respondent (5)**

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 96.4-5 – Benefits Based on Service for an Educational Institution
Section 96.4-3 – Required Findings (Able and Available for Work)
Section 96.7-2-a-2 – Employer Contributions and Reimbursements
(Same Employment – Benefits Not Charged)
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Hillcrest Family Services, filed a timely appeal from an unemployment insurance decision dated June 28, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Paula J. Rogan. After due notice was issued, a telephone hearing was held on July 21, 2005, with the claimant not participating. Although the claimant had called in a telephone number where she purportedly could be reached for the hearing, when the administrative law judge attempted to call that number numerous times, the line was always

busy. The employer provided another number for the claimant that the administrative law judge called several times, and, again, that line was busy. Mary Jo Pancratz, Principal of the On-Campus School; Julia Holdridge, Director of Human Resources; and Lynn Helmke, Director of Special Education for the Dubuque Community School District, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Employer's Exhibit One was admitted into evidence.

At approximately 1:30 p.m., the administrative law judge received a message from the claimant indicating that a storm had "knocked out her phone" and she didn't receive a telephone call. Even assuming that the claimant's telephone was inoperable because of a storm, the administrative law judge concludes that it is not necessary to re-open the record and reschedule the hearing, because the administrative law judge hereinafter determines the issues in favor of the claimant and allows benefits.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibit One, the administrative law judge finds: The claimant was, and still is, employed by the employer as a full-time teacher associate in the employer's on-campus school since September 9, 2003. She has not been permanently separated from that position but is temporarily unemployed or not at work because of the end of the school year. The claimant performed services for the employer in the 2004-2005 school year, which ended on or about June 2, 2005. The claimant has been offered a contract by the employer to perform the same services in the ensuing, or new, school year, 2005-2006, as she did in the prior school year, as shown at Employer's Exhibit One. The claimant has signed the contract and returned it to the employer.

The employer is a non-profit organization that carries on a number of different functions, including the operation of a special education school, where the claimant is employed. The employer also conducts an after-school tutoring program. The employer also has four other satellite schools performing similar services. The employer has a 28E Agreement with the Dubuque Community School District to provide educational services for special education students and students with behavioral problems. The employer also provides the services for other school districts. In addition to its educational component, the employer conducts a residential treatment program and other family oriented programs. Out of a budget of approximately \$12 million, the employer spends approximately \$2 million for the operation of its special education schools and satellite schools. This is approximately 17 percent of the employer's budget. Of approximately 350 staff, 115 are employed by the special education school and the satellite schools. This is 33 percent of the employees. The employer maintains approximately 69 full-time equivalency employees (FTE's) in its special education school and four satellite schools, and anticipates hiring an additional 3-4 FTE's, out of 350 FTE's for all of the employer's operations. This is approximately 21 percent of the employer's FTE's.

Pursuant to her claim for unemployment insurance benefits filed effective June 5, 2005, the claimant has received unemployment insurance benefits in the amount of \$1,309.00 as follows: \$127.00 for benefit week ending June 11, 2005, (earnings \$119.00); and \$197.00 per week for six weeks from benefit week ending June 18, 2005, to benefit week ending July 23, 2005. Of that amount, \$190.00 was offset against an overpayment from 2004.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant is temporarily unemployed but still job attached to an education institution between two successive academic years or terms and has reasonable assurance of continued employment and, therefore, would be ineligible to receive unemployment insurance benefits between two academic years or terms. The administrative law judge concludes that the claimant is not employed by an education institution between two successive academic years or terms, although she has reasonable assurance of being employed in the new school year and, therefore, she is not ineligible to receive unemployment insurance benefits between the two successive academic years or terms.
2. Whether the claimant is ineligible to receive unemployment insurance benefits because at relevant times she was not able, available, and earnestly and actively seeking work. She is not ineligible to receive unemployment insurance benefits for these reasons.
3. Whether the claimant was receiving the same employment that she received during her base period and therefore the account of the employer herein should not be charged for any unemployment insurance benefits to which the claimant is entitled. The claimant is receiving the same employment that she received during her base period and, therefore, any unemployment insurance benefits to which the claimant is entitled shall not be charged against the account of the employer herein.
4. Whether the claimant is overpaid unemployment insurance benefits. She is not.

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.

871 IAC 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.

871 IAC 24.52(7) provides:

(7) Head start programs are considered educational in nature; however, the employing unit as a whole must have as its primary function the education of students. When the employing unit is operated primarily for educational purposes then the between terms denial established by Iowa Code section 96.4(5) will apply between two successive academic years or terms and will apply for holiday and vacation periods to deny benefits to school personnel.

a. A nonprofit organization which has as its primary function civic, philanthropic or public assistance purposes does not meet the definition of an educational institution. Community action programs which have a head start school as one component are not an educational institution employer and the between terms denial does not apply.

b. A head start program which is an integral part of a public school system conducted by a board of education establishes an employing unit whose primary function is educational; therefore, the between terms denial would apply.

The administrative law judge concludes that there is not a preponderance of the evidence that the claimant is employed by an educational institution. The employer is a non-profit organization which does provide, as one of part of its services and functions, an organized course of study or training designed to transfer knowledge. It has a 28E Agreement with, among other schools, the Dubuque Community School District and provides educational services to individuals with disabilities, including those individuals with behavioral problems. However, the employer is not a school district, but a non-profit organization and provides other functions as well. It has a residential treatment program and also offers family-oriented programs. These functions are for the purposes of civic, philanthropic, or public assistance purposes. The issue really becomes whether the employer, or employing unit, has as its primary function the education of students. The administrative law judge concludes that it does not. Approximately 17 percent of the employer's budget is devoted to the operation of the special education school and four satellite schools. Approximately 33 percent of the staff of the employing unit, or employer, are utilized in the special education school and its four satellite schools. Only 21 percent of the employer's full-time equivalency (FTE's) employees are used in the employer's special education school and four satellite schools. The remaining budget, staff, and FTE's are devoted to the other functions of the employer, which are not educational. Accordingly, the administrative law judge is constrained to conclude that the employer here, or the employing unit, does not have as its primary function the education of students. Therefore, the between-term denial established by Iowa Code section 96.4-5 does not apply.

It is true that there is a preponderance of the evidence that the claimant has reasonable assurance that she will be returning to the employer and performing the same or similar services in the new, or ensuing, academic school year or term, 2005-2006, that she did in the prior academic school year or term, 2004-2005. This is clearly shown by Employer's Exhibit One, which is an offer of employment for the claimant for the 2005-2006 school year, which offer the claimant has signed and returned. It is also true that the claimant provides services of an instructional capacity. However, the administrative law judge, as noted above, is constrained to conclude that the employer does not have as its primary function the education of students and is therefore not considered an educational institution for the purposes of the between-terms denial of benefits established by 96.4-5. Therefore, the administrative law judge concludes that the claimant is not ineligible to receive unemployment insurance benefits if she is otherwise entitled to such benefits.

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".

The administrative law judge concludes that the claimant has the burden of proof to show that she is able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes, although the claimant did not participate in the hearing, that there is a preponderance of the evidence that the claimant is excused from the provisions requiring her to be available and earnestly and actively seeking work. The evidence establishes that the claimant has been an employee of the employer since September 9, 2003. She performed services for the employer in the prior school year or term, 2004-2005, as a full-time teacher associate, and she intends to perform the same or similar services in the ensuing or new school year, 2005-2006. In fact, the employer has offered the claimant a contract for that employment, and the claimant has signed and returned the contract, as shown at Employer's Exhibit One. The claimant is not now working for the employer because it is during the summer recess or between the two academic years or terms and there is a lack of work from the claimant's regular job, in which the claimant worked full time and will again work full time. Accordingly, the administrative law judge concludes that the claimant is temporarily unemployed but remains job-attached and, as a consequence, she is excused from requirements that she be available and earnestly and actively seeking work. Since the claimant was working in the prior school year and intends to work in the ensuing school year, there is no evidence that the claimant is not able to work. Accordingly, the administrative law judge concludes that the claimant is able to work and is excused from the provisions that require her to be available for work and earnestly and actively seeking work and, as a consequence, the claimant is not ineligible to receive unemployment insurance benefits if she is otherwise entitled to such benefits.

Iowa Code section 96.7-2-a(2) provides:

2. Contribution rates based on benefit experience.

a. (2) The amount of regular benefits plus fifty percent of the amount of extended benefits paid to an eligible individual shall be charged against the account of the employers in the base period in the inverse chronological order in which the employment of the individual occurred.

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.

An employer's account shall not be charged with benefits paid to an individual who left the work of the employer voluntarily without good cause attributable to the employer or to an individual who was discharged for misconduct in connection with the individual's employment, or to an individual who failed without good cause, either to apply for available, suitable work or to accept suitable work with that employer, but shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The amount of benefits paid to an individual, which is solely due to wage credits considered to be in an individual's base period due to the exclusion and substitution of calendar quarters from the individual's base period under section 96.23, shall be charged against the account of the employer responsible for paying the workers' compensation benefits for temporary total disability or during a healing period under section 85.33, section 85.34, subsection 1, or section 85A.17, or responsible for paying indemnity insurance benefits.

The administrative law judge concludes that the claimant was receiving the same employment from the employer during her base period as she is now. Although the claimant is not at present working for the employer, she is still in the employment of the base period employer working under the same terms and conditions as she has during the base period. The claimant remains job-attached. Accordingly, the administrative law judge concludes that any unemployment insurance benefits to which the claimant is entitled shall not be charged against the account of the employer herein and the account of the employer herein shall be relieved of any charges for any unemployment insurance benefits to which the claimant is entitled.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,309.00 since filing for such benefits effective June 5, 2005. The administrative law judge concludes that the claimant is entitled to these benefits and is not overpaid such benefits. However, these benefits shall not be charged against the account of the employer herein.

DECISION:

The representative's decision of June 28, 2005, reference 01, is modified. The claimant, Paula J. Rogan, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she is able to work and is not subject to the requirements that she be available and earnestly and actively seeking work because she is temporarily unemployed but remains job-attached. Since the claimant is receiving the same employment from the employer as she did during her base period, the employer shall not be charged for any unemployment insurance benefits to which the claimant is entitled, and the employer's account shall be relieved of any such charges. The employer is not an educational institution and therefore the between-terms or academic-years denial does not apply. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

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