

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**CHARLES N HERRIG**

Claimant

**APPEAL NO. 09A-UI-01256-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DUBUQUE COMMUNITY SCHOOL DIST**

Employer

**OC: 01/06/08 R: 04  
Claimant: Respondent (2R)**

Section 96.4-3 – Able and Available for Work

Section 96.4-3 – Employed at Same Hours and Wages

IAC 24.23(26) – Same Hours and Wages as Contract of Hire

**STATEMENT OF THE CASE:**

The employer filed an appeal from a representative's decision dated January 28, 2009, reference 04, which held the claimant eligible to receive unemployment insurance benefits beginning November 23, 2008 upon a finding that he was employed part-time or on-call working in the same pattern of employment as in the base period. After due notice, a telephone conference hearing was scheduled for and held on February 25, 2009. The claimant participated personally. The employer participated by Ms. Amy Vander Meulen, Administrative Assistant.

**ISSUE:**

The issue is whether the claimant is still employed part-time or on-call performing services in the same pattern of employment as in the base period or contemplated in the contract of hire.

**FINDINGS OF FACT:**

The administrative law judge having heard the testimony and considered all of the evidence in the record, finds: The claimant began employment with the Dubuque Community School District on January 28, 2008 and continues to work as a part-time school bus driver at the time of hearing. Mr. Herrig was hired to work 22 hours a week and was paid by the hour.

Under the original agreement of hire it was agreed that the claimant would work part-time and work 22 hours per week as a bus driver for the school district. Throughout the claimant's employment he has been employed in the same capacity working 22 hours per week at the same rate of pay. His employment continues in the same manner as contemplated in the original contract of hire and he is not working a reduced workweek basis different from the agreement of hire and the claimant therefore cannot be considered to be partially unemployed.

## REASONING AND CONCLUSIONS OF LAW:

871 IAC 24.23(26) provides:

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

(26) Where a claimant is still employed in a part-time job at the same hours and wages as contemplated in the original contract for hire and is not working on a reduced workweek basis different from the contract for hire, such claimant cannot be considered partially unemployed.

As an employee of an educational institution Mr. Herrig would not be eligible for unemployment insurance benefits for any week which commences during a customary established vacation or holiday recess if he performed his services in the period immediately before the vacation or holiday recess and there was a reasonable assurance of doing so in the period immediately following the holiday or recess.

871 IAC 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.

For the reasons stated herein the administrative law judge concludes Mr. Herrig is not eligible for partial unemployment insurance benefits.

Iowa Code section 96.3-7, as amended in 2008, provides:

### 7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue

of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this states pursuant to section 602.10101.

**DECISION:**

The representative's decision dated January 28, 2009, reference 04, is reversed. The claimant is working part-time performing services in the same pattern of employment as in the base period or agreement of hire for an educational institution. The claimant is not eligible for partial unemployment insurance benefits. As the claimant has received unemployment insurance benefits, any benefits he has received may constitute an overpayment. The administrative law judge remands the matter to the Claims Division for determination as to whether there has been an overpayment, the amount of the overpayment and whether the claimant will have to repay those benefits.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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