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

JOHN J GAYEWSKI Claimant and **FRANK MILLARD & CO INC** Employer	:	**HEARING NUMBER:** 19BUI-03701 **EMPLOYMENT APPEAL BOARD DECISION**

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, 96.4-3

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer appealed 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. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Claimant, John Gayewski, was hired on April 17, 2017 by Frank Millard & Co. Inc. (Employer) as a full-time plumbing/pipe fitter apprentice. A contractual requirement of the job was that he had to attend apprenticeship training classes. The Claimant was aware of this at the time he took the job as a pipe fitter apprentice. As part of the collective bargaining agreement between the union and the Employer, the Employer contributes to a fund so that workers in the apprenticeship program may attend training classes multiple times during the course of the year. The training classes increase the workers' knowledge which benefits both the worker and the Employer.

Union Local 125 gave the Employer and Claimant a calendar of classes. The Employer authorized the Claimant to attend an apprenticeship training class for the week ending April 6, 2019. He attended apprenticeship training for the week ending April 6, 2019.

REASONING AND CONCLUSIONS OF LAW:

Voluntary Period of Unemployment: Iowa Administrative Code 871-24.23(10) states that a claimant is not eligible for benefits during any week that "[t]he claimant requested and was granted a leave of absence" because "such period is deemed to be a period of voluntary unemployment." In the same vein rule 24.22(2)(j) states "[a] leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee-individual, and the individual is considered ineligible for benefits for the period." This is comparable to rule 24.26(11) which provides that "the granting of a written release from employment by the employer at the employee's request …would constitute a period of voluntary unemployment by the employee and the employee would not meet the availability requirement…"

Here the Claimant is in an apprenticeship program, and understands that to be in the program he will need occasional time off work to attend training. In fact, the program is part of the contract of hire negotiated through the Claimant's exclusive representative, the Union. Further, the Claimant submitted himself to the program by choosing to start work in the apprenticeship program. The Employer has agreed to the training leave of absence, but without pay from the Employer.

The Union as the exclusive bargaining representative has the power to consent for the workers in the bargaining unit. Of course, "[i]n most respects a collective bargaining agreement cannot supplant a statutory scheme for unemployment compensation." *E.g. Efkamp v. IDJS*, 383 N.W.2d 566 (Iowa 1986); *accord Central Foam Corp. v. Barrett,* 266 N.W.2d 33, 35 (Iowa 1978); *Crane v. Iowa Dept. of Job Service*, 412 N.W.2d 194 (Iowa App. 1987). But in the specific circumstance whether a worker is allowed to disagree with negotiated terms of a CBA and quit, the Court has held that the Union consents to the terms of the contract of hire through the CBA.

> It does not however follow that collective bargaining agreements are irrelevant to the question of whether a worker could reasonably refuse to work for a reduced wage. On that question we note and approve the following:
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> > [S]ince the majority of the employees in an appropriate collective bargaining unit by selecting a union to represent them, make that union the exclusive bargaining agent for all of the employees in the union ... the rights of the individual worker to deal with his employer is surrendered to the bargaining agent.... 76 Am.Jur.2d Unemployment Compensation § 65 (1975).

Efkamp v. IDJS, 383 N.W.2d 566, 569-70 (Iowa 1986). Thus in the sense that the *statute* uses voluntary, i.e. in the sense of volition, the worker has through the Union agreed to the period of training, and to the terms of that training, and any period of unemployment is **not** through no fault of the worker and his representative, the Union. So could the worker quit rather than attend training and claim that the term of the contract of hire requiring the unpaid training was contrary to his will, and thus a change in the contract of hire? Not under *Efkamp* he couldn't. Under *Efkamp* this is an agreed to term of the contract of hire. This means even if the worker is providing no services during this period, and also receiving no wages, then it is a voluntary period of unemployment and the worker is not able and available for work. *See Amana Refrigeration v. IDJS*, 334 N.W.2d 316, 319 (Iowa App. 1983); 871 IAC 24.23(10); 871 IAC 24.22(2)(j). Within the meaning of our law the leave of absence while on training was exactly "[a] leave of absence negotiated with the consent of

both parties…" 871-24.22(2)(j). It was negotiated between the Employer and the exclusive bargaining agent of the workers in the bargaining unit, the claimant joined the unit when he was hired, and under rule 24.22(2)(j) "the individual is considered ineligible for benefits for the period." The worker is not unemployed through not "fault" (i.e. volition) of his own as the term is used in the Employment Security Law because "[t]he word 'fault,' as used in this context, is not limited to something worthy of censure but must be construed as meaning failure of volition." *Amana Refrigeration v. IDJS*, 334 N.W.2d 316, 319 (Iowa App. 1983)(*citing Moulton v. Iowa Employment Security Commission*, 239 Iowa 1161, 1172-73, 34 N.W.2d 211, 217 (1948)); *accord Wolf's v. IESC,* 59 N.W.2d 216, 220 (Iowa 1953). It is no different than those workers hired on condition that they obtain a professional license. The worker isn't paid to attend school, even if school hours conflict with work time, and nor would they be considered eligible for unemployment during this volitional leave of absence. If the leave is a known and agreed term at the beginning of the term of employment, or indeed at the formation of the *current* contract of hire (here the CBA) then it was negotiated with the consent of both parties and a voluntary period of unemployment under our law.

General Unemployment Principles: We would reach the same conclusion even if we did not view this as a voluntary period of unemployment. We agree with the Administrative Law Judge that the Claimant was off work and so experienced a week of total unemployment. So we must focus on the job status with the Employer.-

The Department of Labor has issued a guidance letter on apprenticeship training. Training and Employment Guidance Letter 12-09, which remains active, addresses the payment of unemployment compensation during subsidized work-based training initiatives for workers, such as registered apprenticeship programs. The TEGL first describes general unemployment principles, and then set out the implications of those principles. We quote at length:

> *Implications*. Because UC may only be paid to individuals with respect to their unemployment, it may not be paid to individuals who have not experienced unemployment during the week claimed. Similarly, UC may not be paid as a subsidy for employment (e.g. to make up the difference in hourly wages between the individual's former job and the individual's new, lower paying job) or as a stipend since it is not a payment "with respect to unemployment," but is instead a payment with respect to being employed. …
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> *UC may be paid to individuals in training notwithstanding the requirement that they be able and available for work.* Federal UC law has always been interpreted as requiring states, as a condition of participation in the Federal-State UC program, to limit the payment of UC to individuals who are able and available (A&A) for work. (For additional information, see 20 CFR 604.5.) However, a state may consider an individual available for work "for all or a portion of the week claimed, provided that any limitation placed by the individual on his or her availability does not constitute a withdrawal from the labor market." Thus it would be **possible** for a state to consider individuals in workbased training (for example, 20 hours a week) A&A **as long as they were available for work during some portion of the week**.
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> *UC may be paid to individuals in training approved by the state UC agency.* Federal law prohibits denial of UC to individuals participating in training with the approval of the state agency based on state law provisions relating to availability for work, active search for work, or refusal of work.

> However, individuals who are participating in employer sponsored "on-the-job training" are not "unemployed" and thus may not be paid UC unless they are not working full time during the week the on-the-job training takes place. **In TEGLs Nos. 21-08 and 21-08, Change 1, the Department encouraged states to broaden their definition of approved training and to implement procedures that would facilitate individuals' participation in training.** In TEGL No. 2-09, the Department provided information about recommended policies for approved training.
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> *Individuals working part-time may be eligible for UC*. Each state's UC law includes provisions for UC payments to individuals who are partially unemployed. Depending on state law requirements concerning monetary and non-monetary eligibility, individuals who are earning part-time wages may be eligible for UC **as long as they are unemployed for some part of the week being claimed**.

TEGL, 12-09 p. 6-7 (emphasis added). The upshot is that there are specific conditions which will allow payment of unemployment. Partial unemployment, approved training, and temporary unemployment are all exceptions to the able, available, and work-seeking requirements. None apply here.

Partial Unemployment: If the worker is working part of the week, and is partially unemployed, then the worker would not have to be available under Iowa Code §96.4(3) and *TEGL 12-09* makes clear this would be consistent with Federal law. But this Claimant was not partially unemployed. He drew no wages at all, and performed no services. We must view him as totally, not partially unemployed.

Approved Training: As mentioned by TEGL 12-09 a broad concept of approved training might allow collection of benefits during a week of classroom training without meeting the requirements of Iowa Code §96.4(3). But Workforce has not implemented such a broad concept and there has been no approval of the training in this case. Thus the Claimant is not excused from the requirements by being on approved training. The fact is, Workforce recently tightened up the criteria for Department Approved Training. 871 IAC 24.39(2). Formerly, under a more expansive approach, training as in this case was commonly approved, and the unemployment fund ending up paying for such ongoing apprenticeship training since employers are not charged for benefits paid for approved training. Effective February 7, 2018 rule 24.39(2) requires that DAT "be completed 104 weeks or less from the start date," that it be at "a college, university or technical training institution," and that the claimant be "enrolled and attending the training program in person as a full-time student." No doubt these requirements explain why the training here has not been granted DAT status. This being the case we cannot act *as if* it had been approved for DAT.

Temporary Unemployment. Under Code §96.4(3) a worker who is temporarily unemployed need not meet the availability and job seeking requirements. But the definition of temporary unemployment is statutory:

> c. 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 §96.19(38)(c). Being off for training does not fit this paragraph. The statute does not say temporary unemployment is being unemployed due to causes "such as" or "similar to" or "akin to" plant shut downs, to lack of work, to a plant-wide vacation, or a plant-wide inventory. It says "due to a plant shutdown." The plant is not shut down. The Claimant is off work that's all. The plant is there, the work is there, there's no lack of work, there is no emergency, no inventory or plant-wide vacation. The Claimant is on a leave of absence to attend training. And the Employer didn't announce it, the Union did. If this is akin to anything it is most akin to be a full-time student for a week who is not available for work that week. 871 IAC 24.23(5). Whatever you call it, it is not any of the listed categories of temporary unemployment and does not meet the statutory definition. We thus cannot find the Claimant is excused from the availability and job seeking requirements by being temporarily unemployed.

Upshot: The benefit account of the unemployment compensation fund is not a job training fund. Workers are paid out of this account for being unemployed, not for being underpaid, and not to receive training other than Department Approved Training. Here the Claimant was not partially unemployed, temporarily unemployed, or on Department approved training. He met none of the exceptions to being able and available and actively seeking work. He thus is disallowed benefits even if we do not treat this as an agreed leave of absence.

What This Case Is Not: The Employment Security Law is not a general law for righting perceived wrongs. This law is in place to pay unemployment benefits as a wage replacement for those who are unemployed and either looking for work, or excused from looking for work. If a worker is rendering service to an employer, and yet receives no or inadequate wages, then that may be an issue under the Fair Labor Standards Act, or Iowa's Wage Payment Collection Law. But payment of unemployment benefits to a worker who is neither available for work, nor temporarily unemployed, is not a remedy for enforcing perceived violations of the FLSA or the IWPCL. We, of course, do not suggest that such claims would necessarily lie here. 29 C.F.R. §785.27-§785.29; *Willets v. City of Creston*, 433 N.W.2d 58, 62 (Iowa Ct. App. 1988)(wages must be due under applicable contract for Ch. 91A violation to occur). We only make clear that any such wrong, if there be any, would not be cognizable in this forum.

No Overpayment: Finally, since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule:

> 871 IAC 23.43(3) Rule of two affirmances.
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> a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.
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> b. However, if the decision is subsequently reversed by higher authority:
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> (1) The protesting employer involved shall have all charges removed for all payments made on such claim.
> (2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
> (3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

Thus the Employer's account may not be charged for any benefits paid so far to the Claimant for the weeks in question, but **the Claimant will not be required to repay benefits already received.**

DECISION:

The administrative law judge's decision dated May 31, 2019 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was not able and available for week for the week ending April 6, 2019. Accordingly, he is denied benefits for that week.

No remand for determination of overpayment need be made under the double affirmance rule, 871 IAC 23.43(3), but still the Employer's account may not be charged.

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RRA/fnv