

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANDREA L EPPING
Claimant

APPEAL NO. 10A-UI-17037-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NATIONAL HOSPICE MANAGEMENT INC
Employer

OC: 05/17/09

Claimant: Appellant (2)

Section 96.5-7 – Vacation Pay/ Paid Time Off PTO
871 IAC 24.13(3)(b) – Excused Personal Leave

STATEMENT OF THE CASE:

Andrea L. Epping (claimant) appealed a representative's December 13, 2010 decision (reference 03) that concluded the claimant was ineligible for benefits for the four weeks ending June 13, 2009 due to receipt of vacation pay from National Hospice Management, also doing business as Beacon of Hope Hospice, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 24, 2011. This appeal was consolidated for hearing with one related appeal, 10A-UI-17038-DT. The claimant participated in the hearing. The employer failed to respond to the hearing notice and provide a telephone number at which a witness or representative could be reached for the hearing and did not participate in the hearing. Based on the evidence, the arguments of the claimant, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Did the claimant receive vacation pay properly allocated and deducted from her benefit eligibility?

FINDINGS OF FACT:

The claimant started working for the employer on October 31, 2005. She most recently worked full-time as administrator of the employer's Davenport, Iowa branch. She was paid on a salary basis, plus some hourly pay for on-call work. The claimant's last day of work was May 19, 2009. At that time, she was given a final paycheck in the amount of \$6,329.56, of which \$5,586.80 (representing about 154 hours of pay) was a payout of her accrued paid time off bank.

The claimant established an unemployment insurance benefit year effective May 17, 2009. She filed weekly claims for four weeks, ending June 13, 2009. She reported all of the salary and paid time off she received in her final check on her first weekly claim effective May 23, 2009, and so received no benefits for that week.

The employer does not offer separate vacation time, but rather provides “paid time off” or PTO to cover sick time, vacation time, and any other need for an absence from work. There is no breakdown as to what portion is attributable to what category; an employee can take as much of the available PTO as she wishes for whichever suits her.

A notice of the filing of this claim was sent to the employer’s representative on May 26, 2009, and the employer’s representative responded on June 3 reporting that \$5,586.80 was paid out to the claimant as accrued vacation. The employer’s representative did not separately mark the portion on the form designating the amount as “vacation pay,” and did not designate a “from date” or a “thru date” for the allocation of the “vacation pay.” The Agency representative who subsequently reviewed the filing allocated the payment through the four-week period beginning May 17 and ending June 13.

REASONING AND CONCLUSIONS OF LAW:

If vacation pay was or will be received by the claimant and was properly allocated to a period of unemployment, it must be deducted from the claimant’s unemployment insurance benefit eligibility; the vacation pay paid or owed “shall be attributed to, or deemed to be payable to the individual with respect to, the first and each subsequent workday in such period until such amount so paid or owing is exhausted.” Iowa Code § 96.5-7. If the vacation time would normally cover more than one week and the employer wishes to have the vacation pay distributed evenly throughout the period to which the vacation pay could be allocated, it must make a timely report to the Agency making that designation. 871 IAC 24.16(3).

Iowa Code section 96.5-7 provides:

An individual shall be disqualified for benefits: ...

7. Vacation pay.

a. When an employer makes a payment or becomes obligated to make a payment to an individual for vacation pay, or for vacation pay allowance, or as pay in lieu of vacation, such payment or amount shall be deemed "wages" as defined in section 96.19, subsection 41, and shall be applied as provided in paragraph "c" hereof.

b. When, in connection with a separation or layoff of an individual, the individual's employer makes a payment or payments to the individual, or becomes obligated to make a payment to the individual as, or in the nature of, vacation pay, or vacation pay allowance, or as pay in lieu of vacation, and within ten calendar days after notification of the filing of the individual's claim, designates by notice in writing to the department the period to which the payment shall be allocated; provided, that if such designated period is extended by the employer, the individual may again similarly designate an extended period, by giving notice in writing to the department not later than the beginning of the extension of the period, with the same effect as if the period of extension were included in the original designation. The amount of a payment or obligation to make payment, is deemed "wages" as defined in section 96.19, subsection 41, and shall be applied as provided in paragraph "c" of this subsection 7.

c. Of the wages described in paragraph "a" (whether or not the employer has designated the period therein described), or of the wages described in paragraph "b", if the period therein described has been designated by the employer as therein provided, a

sum equal to the wages of such individual for a normal workday shall be attributed to, or deemed to be payable to the individual with respect to, the first and each subsequent workday in such period until such amount so paid or owing is exhausted. Any individual receiving or entitled to receive wages as provided herein shall be ineligible for benefits for any week in which the sums, so designated or attributed to such normal workdays, equal or exceed the individual's weekly benefit amount. If the amount so designated or attributed as wages is less than the weekly benefit amount of such individual, the individual's benefits shall be reduced by such amount.

d. Notwithstanding contrary provisions in paragraphs "a", "b", and "c", if an individual is separated from employment and is scheduled to receive vacation payments during the period of unemployment attributable to the employer and if the employer does not designate the vacation period pursuant to paragraph "b", then payments made by the employer to the individual or an obligation to make a payment by the employer to the individual for vacation pay, vacation pay allowance or pay in lieu of vacation shall not be deemed wages as defined in section 96.19, subsection 41, for any period in excess of one week and such payments or the value of such obligations shall not be deducted for any period in excess of one week from the unemployment benefits the individual is otherwise entitled to receive under this chapter. However, if the employer designates more than one week as the vacation period pursuant to paragraph "b", the vacation pay, vacation pay allowance, or pay in lieu of vacation shall be considered wages and shall be deducted from benefits.

e. If an employer pays or is obligated to pay a bonus to an individual at the same time the employer pays or is obligated to pay vacation pay, a vacation pay allowance, or pay in lieu of vacation, the bonus shall not be deemed wages for purposes of determining benefit eligibility and amount, and the bonus shall not be deducted from unemployment benefits the individual is otherwise entitled to receive under this chapter.

871 IAC 24.16(3) provides:

(3) If the employer fails to properly notify the department within ten days after the notification of the filing of the claim that an amount of vacation pay, either paid or owed, is to be applied to a specific vacation period, the entire amount of the vacation pay shall be applied to the one-week period starting on the first workday following the last day worked as defined in subrule 24.16(4). However, if the individual does not claim benefits after layoff for the normal employer workweek immediately following the last day worked, then the entire amount of the vacation pay shall not be deducted from any week of benefits.

First, the administrative law judge notes that the employer's representative did not properly make an allocation of the "vacation pay" to any period of time; and so even treated as vacation pay, under the rule all of the pay would all be allocated to the first week of the claim, the week ending May 23, 2009.

Further, the payment was not in fact "vacation pay." The law specifically states that payment for unused sick leave is not considered wages for unemployment insurance purposes, which means it is not deductible from benefits. 871 IAC 24.13(4) d. The evidence establishes the employer's PTO time is a hybrid or mixture of vacation and sick leave. There is no breakdown of the percentage of vacation and sick leave time that has been attributed to the PTO time.

Therefore, there is no way to divide the unused “vacation” pay from the unused “sick leave” pay; arguably, it could all have been used as “sick leave.”

The closest Agency rule addressing the hybrid “PTO” leave is a rule regarding “excused personal leave.” Iowa Administrative Code 871 IAC 24.13(3)(b) provides as follows:

Fully deductible payments from benefits. The following payments are considered as wages; however, such payments are fully deductible from benefits on a dollar-for-dollar basis:

b. Excused personal leave. Excused personal leave, also referred to as casual pay or random pay, is personal leave with pay granted to an employee for absence from the job because of personal reasons. It shall be fully deductible only when taken in conjunction with a scheduled period of vacation in which case it shall be treated as vacation and be fully deductible in the manner prescribed in rule 24.16(96).

Paid time off (PTO) is at least a close equivalent to “excused personal leave,” essentially paid time that an employee accrues and that can be used for sick leave, vacation leave, or other personal time off. Therefore, under this rule PTO would only be treated as vacation pay if the time off is taken during the employment. Here also PTO would not be treated as vacation pay if it is paid out in connection with the separation from employment, and therefore would not be deductible from the claimant’s unemployment insurance benefit eligibility. While certainly in good faith, the employer erroneously reported the PTO as vacation pay in the employer’s response to the notice of claim.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the claimant did not receive “vacation pay” that was deductible from her unemployment insurance benefits. Effective May 19, 2009, benefits are allowed without offset for vacation pay, if the claimant is otherwise eligible.

DECISION:

The representative’s December 13, 2010 decision (reference 03) is reversed. The claimant did not receive deductible “vacation pay;” no deduction shall be made for the PTO pay she received. Benefits are allowed, provided the claimant is otherwise eligible, effective May 17, 2009.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw