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

WILLIAM Y LEWIS	:	
Claimant	:	**HEARING NUMBER:** 19BUI-08323
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
MODERN PIPING INC	:	
Employer	:	

SECTION: 10A.601 Employment Appeal Board Review

D E C I S I O N

FINDINGS OF FACT:

A hearing in the above matter was held November 14, 2019. The administrative law judge's decision was issued November 22, 2019. The administrative law judge's decision has been appealed to the Employment Appeal Board. The Board finds that the decision and record below failed to address issues critical to an accurate resolution of this case.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 10A.601(4) (2019) provides:

> 5. Appeal board review. The appeal board may on its own motion affirm, modify, or set aside any decision of an administrative law judge on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it. The appeal board shall permit such further appeal by any of the parties interested in a decision of an administrative law judge and by the representative whose decision has been overruled or modified by the administrative law judge. The appeal board shall review the case pursuant to rules adopted by the appeal board. The appeal board shall promptly notify the interested parties of its findings and decision.

Pursuant to this authority we review this case and determine to remand it for further proceedings consistent with this decision.

The decision below focused on the question of the Claimant had a subjective feeling that he would rather not have had gone to unpaid training in order to remain in the apprenticeship program. As we have **repeatedly** explained in past:

> 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.
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> > 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).
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> *Efkamp v. IDJS*, 383 N.W.2d 566, 569-70 (Iowa 1986). It is black letter law, then, that the governing CBA is the contract of hire for every worker in a bargaining unit**. 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. **Even if the worker is not a union member or voted against certification, once the Union is certified then it is the exclusive bargaining agent for the worker, and the governing CBA is the worker's contract of hire so long as the worker is in the covered bargaining unit. 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).

Davis v. Modern Piping, 19B-UI-07541 (EAB 11/7/2019); *see also Davis v. Modern Piping Inc.,* 19B-UI-08214-EAB (12-9-2019)*; Lewis v. Modern Piping Inc,* 19B-UI-07540-EAB (11-5-2019); *Rammelsberg v. Pipe Pro Inc,* 19B-UI-06247-EAB (9-25-2019); *Eden v. Day Mechanical Systems Inc*, 19B-UI-05609-EAB (9-12-2019); *Stonger v. Frank Millard & Co Inc*, 19B-UI-05919-EAB (9-10-2019); *Walker v. Frank Millard & Co Inc,* 19B-

UI-04801-EAB (8-5-2019); *Myrick v. Bowker Mechanical Contractors*, 19B-UI-03842-EAB (7-18-2019*); Scott v. Frank Millard & Co Inc*, 19B-UI-03654-EAB (7-15-2019); *Gayewski C. Frank Millard & Co Inc*, 19B-UI-03701-EAB (7-3-2019); *Sheremet v. Frank Millard & Co Inc,* 19B-UI-03702-EAB (7-3-2019); *Nosek v. Bowker Mechanical Contractors*, 19B-UI-03841-EAB (7-1-19); *Pasker v. Bowker Mechanical Contractors*, 19B-UI-03840-EAB (7-1-2019); *Betenbender v. Bowker Mechanical Contractors*, 19B-UI-03839-EAB (7-1-2019); *Johnston v. Winger Contracting Company,* 19B-UI-03620-EAB (6-20-2019); *Harms v. Winger Contracting Co*, 19B-UI-03094-EAB (6-18-2019); *Butterbaugh v. Bowker Mechanical Contractors*, 19B-UI-02749-EAB (5-22-2019).

We **again** emphasize that one need not subjectively choose to be represented by a union in order to surrender the right to individually bargain with the employer. A worker can scorn the union, vote against the union, oppose unionization on principle, and if that worker is in a covered collective bargaining unit then the federally certified union is that worker's exclusive bargaining agent, period. As *Efkamp* – an Iowa Supreme Court case – makes clear a worker consents to the terms of the CBA through this exclusive bargaining agent. This means that in a case where a leave of absence for training is negotiated between the union and the employer then the training leave of absence would be negotiated with the legal consent of *each and every worker in the collective bargaining unit* even if they join the unit after the agreement is negotiated.

Furthermore, as we have explained in the past, a worker who takes a job under the union contract and understands that a leave of absence will be part and parcel of the apprenticeship program the worker has signed up for, and that this leave will be unpaid, then the worker has *also* subjectively consented to the unpaid leave of absence.

In this case the Claimant argues that the CBA between the local union and the employer does not itself address absences for training. Yet the Claimant clearly is going training based on a requirement of some sort. The issue is where does this requirement come from. Is the Employer demanding the Claimant attend training and the Claimant is only complying because the *Employer* will fire him if he does not? Or is the Claimant attending training because he voluntarily entered into an apprenticeship program and knew at the time he entered into the program that he would be attending unpaid periods of training in order to remain an apprentice? And is that requirement the result of unilateral action by the employer or a bi-lateral agreement between the employer and the Claimant's exclusive bargaining agent. And let us be clear: agreements incorporated into the CBA, and requirements resulting from the exercise of authority by the Joint Apprenticeship and Training Committee (JATC) which authority is created by the CBA, are the result of the agreement reflected in the CBA. So we need the relevant portions of the CBA, and all relevant portions of master contracts and other agreements which are incorporated in the CBA, and we need those governing orders, rules, policies, or by-laws of the JATC that apply to the issue of training requirements for a plumbing apprentice like the Claimant. Further, there is an apprenticeship agreement referred to in the testimony and if any such thing exists in a non-oral form that should also be presented, or at least described in detail, in the hearing. The Administrative Law Judge should have addressed at a minimum **whether the Claimant himself personally understood when he started the apprenticeship program that he would be required to attend training during an unpaid leave of absence**. We remind the Claimant that on the issue of availability he has the burden of proof, but the Employer is free to offer exhibits as well.

We note that we have previously ruled that a Claimant on a training leave of absence is not temporarily unemployed under Iowa Code §96.4(3). We have then gone on to find that regardless of whether the leave is with consent, the worker who devoted 100% of his time to the training is not able and available and/or earnestly and actively seeking work and so not eligible for benefits. This would remain true if the Claimant was willing to work a part-time after-hours schedule since any claimant must be available to the same extent as when the wage credits were earned. This being the case we might be able to reverse the Administrative Law Judge based on this separate and independent reason for denying benefits. But under the circumstances we prefer a complete record, and so choose to remand.

The record of the hearing before the administrative law judge only addresses primarily the question of subjective feelings of consent from the Claimant. As the Iowa Court of Appeals noted in *Baker v. Employment Appeal Board*, 551 N.W. 2d 646 (Iowa App. 1996), the administrative law judge has a heightened duty to develop the record from available evidence and testimony given the administrative law judge's expertise. Since the Employment Appeal Board is unable to adequately make a decision based on the record now before it, this matter must be remanded for a new hearing in order that evidence may be obtained from the parties.

In conducting the new hearing the Administrative Law Judge and the parties should make sure to get evidence on the relevant terms of any applicable collective bargaining agreement (having the agreement as an exhibit would be best and simplest); the relevant terms of all documents incorporated into the CBA; the relevant rules, by-laws etc. of any entity ultimately deriving its authority from the CBA (*e.g.* the JATC); whether the Claimant was on notice when he started the apprenticeship program that periodic mandatory unpaid training was required; the apprenticeship agreement mentioned in the testimony (if possible); and any other relevant matter. The Administrative Law Judge should also make sure to seek information on whether there was a plant shutdown, vacation, inventory, lack of work, or emergency that caused the Claimant to be unemployed during the week in question. We caution the parties that under Iowa Code §96.4 the phrases "lack or work" and "shutdown" refer to conditions affecting the Employer's workforce at the relevant location(s) in general. Iowa Code §96.19(38)(c). Finally, we quote from the most current version of Handbook 382 of the Department of Labor Employment & Training Administration, entitled *Handbook For Measuring Unemployment Insurance Lower Authority Appeals Quality*:

> C. Uniformity of Legal Interpretations The parties to an appeal, claims determination personnel, and the public Expect reasonable consistency of principle, reasoning, and result in appeals decisions involving similar sets of facts. In attaining such a goal, decisions of higher tribunals are considered as binding upon lower tribunals, while those of coordinate tribunals may be considered as persuasive, but not binding.
> …
> Following the previous interpretation of higher tribunals does not mean blind obedience by lower tribunals. The lower tribunal, for example, should compare the facts before it with those in the higher tribunal's case in order to determine if sufficient similarity of circumstances exists for it to apply the rule of the higher authority's decision.

DOLETA Handbook 382 3rd Ed., p. 6 (2011) (https:// wdr.doleta.gov/ directives/ attach/ ETAH/ET_Handbook_No_382_3rd_Edition.pdf). The Administrative Law Judges of the Department, as

a group, perform their duties in a most exemplary and impressive fashion, and we have confidence of their appropriate consideration of the quoted handbook.

DECISION:

The decision of the administrative law judge dated November 22, 2019 is not vacated at this time. This matter is remanded to an administrative law judge in the Workforce Development Center, Appeals Section. The administrative law judge shall conduct a new hearing following due notice. After the hearing, the administrative law judge shall issue a decision that provides the parties appeal rights.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv