

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOHELEN E ROBERSON

Claimant

APPEAL NO. 09A-UI-05199-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HARVEYS BR MANAGEMENT CO INC

HARVEYS CASINO RESORTS

Employer

OC: 12/14/08

Claimant: Appellant (1)

Iowa Code § 96.5(7) – Vacation Pay

Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant filed an appeal from the February 26, 2009, reference 03, decision that deducted vacation pay from benefits without having held a fact-finding interview pursuant to 871 IAC 24.9(2)b. After due notice was issued, a telephone conference hearing was held on April 29, 2009. Claimant participated. Employer participated through Thleen McElroy. Department's Exhibit D-1 was received.

ISSUE:

The issue is whether claimant's appeal was timely and if so, whether she received vacation pay at separation, if that amount is deductible from benefits, and if so, for what period.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: No fact-finding was held for the severance pay or vacation pay issues but a written notice dated February 17, 2009 was mailed to claimant at her post office box in Macedonia near Council Bluffs, Iowa asking that her response to the issues be received at Iowa Workforce Development (IWD) in Des Moines, Iowa by February 24, 2009. She mailed a detailed response and dispute on February 24, 2009. The agency representative's decision deducting severance and vacation pay from benefits and the related overpayment were mailed on February 26, 2009. When claimant received the decisions, she believed she had already responded and no further action was needed. When she discovered otherwise, she immediately filed an appeal on March 27, 2009.

Claimant's was separated on October 30, 2008. She was paid eight weeks' severance pay for the period ending December 27, 2008. She was also paid the balance of unused paid time off (PTO), which includes non-prorated time for sick leave, vacation, holidays and any other type of leave.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the claimant's appeal is timely. The administrative law judge determines it is.

Iowa Code § 96.6-2 provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Since there was no fact-finding interview held, the claimant filed what she reasonably and in good faith believed to be a timely appeal from adverse vacation and severance pay decisions but it was not received or if received, was not treated as an appeal. Immediately upon receipt of information to that effect, a second appeal was filed. Therefore, the appeal shall be accepted as timely.

For the reasons that follow, the administrative law judge concludes the vacation pay was deducted for the correct period.

The following are the pertinent statutes and administrative rules governing deductibility of various types of remuneration from benefits:

Iowa Code § 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(96) provides:

Vacation pay.

24.16(1) If the employer properly notifies 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, a sum equal to the wages of the individual for a normal workday shall be applied to the first and each subsequent workday of the designated vacation period until the amount of the vacation pay is exhausted.

24.16(2) If the employer makes the original designation of the vacation period in a timely manner, the employer may extend the vacation period by designating the period of the extension in writing to the department before the period of extension begins.

24.16(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 during 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.

24.16(4) Unless otherwise specified by the employer, the amount of the vacation pay shall be converted by the department to eight hours for a normal workday and five workdays for a normal workweek.

This rule is intended to implement Iowa Code § 96.5(7).

871 IAC 24.17(96) provides:

Vacation pay procedure.

24.17(1) Employer notice specified vacation or holiday pay only. The Form 65–5317, Notice of Claim, the Form 62–2048, Request for Federal Wage and Separation Information, and the Form 62–2049, Request for Wage and Separation Information on Federal Employment Additional Claim, which are returned by the employer for the purpose of notification of vacation pay, shall be used as notification to the department that vacation pay is applicable. The Forms 65–5317, 62–2048, and the 62–2049 received in the administrative office shall be routed to the appropriate office for the following action:

a. Upon receipt of the vacation information, the unemployment insurance representative shall immediately issue the appropriate decision concerning the vacation pay to the employer and to the claimant. The unemployment insurance representative shall then check the current status of the claim on the computer record to ascertain if any weeks have been reported.

b. The representative shall compare the amount of vacation reported by the employer with the computer record. If the computer record shows any discrepancies, the representative shall initiate immediate action to set up an overpayment or underpayment as appropriate.

c. If the computer record shows that the claimant has not reported or claimed for some or all of the weeks indicated for the vacation period, the unemployment insurance representative shall take no further action on the weeks not claimed.

d. The claimant shall be instructed to only report vacation pay applicable to the first week. The claimant shall also be instructed that vacation pay designated by the employer in excess of one week may result in an overpayment of benefits.

24.17(2) Reserved.

This rule is intended to implement Iowa Code § 96.5(7).

871 IAC 24.13(96) provides:

Deductible and nondeductible payments.

24.13(1) *Procedures for deducting payments from benefits.* Any payment defined under subrules 24.13(2) and 24.13(3) made to an individual claiming benefits shall be deducted from benefits in accordance with the following procedures until the amount is exhausted; however, vacation pay which is deductible in the manner prescribed in rule 24.16(96) shall be deducted first when paid in conjunction with other deductible payments described in this rule unless otherwise designated by the employer: The individual claiming benefits is required to designate the last day paid which may indicate payments made under this rule. The employer is required to designate on the Form 65–5317, Notice of Claim, the amount of the payment and the period to which the amount applies. If the individual or the employer does not designate the period to which the amount of the payment applies, and the unemployment insurance representative cannot otherwise determine the period, the unemployment insurance representative shall determine the week or weeks following the effective date of the claim to which the amount of the payment applies by dividing the amount of the payment by the individual's average weekly wage during the highest earnings quarter of the individual's base period. The amount of any payment under subrule 24.13(2) shall be deducted from the individual's weekly benefit amount on the basis of the formula used to compute an individual's weekly benefit payment as provided in rule 24.18(96). The amount of any payment under subrule 24.13(3) shall be fully deducted from the individual's weekly benefit amount on a dollar–for–dollar basis.

24.13(2) *Deductible payments from benefits.* The following payments are considered as wages and are deductible from benefits on the basis of the formula used to compute an individual's weekly benefit payment as provided in rule 24.18(96):

a. *Holiday pay.* However, if the actual entitlement to the holiday pay is subsequently not paid by the employer, the individual may request an underpayment adjustment from the department.

b. *Commissions.* However, the commission payment is only deductible when based on service performed by the individual during the period in which the individual is also claiming benefits.

c. *Incentive pay.* However, the incentive payment is only deductible when based on service performed by the individual during the period in which the individual is also claiming benefits.

d. Strike pay. However, the strike pay is only deductible when it is a payment received for services rendered and the individual is otherwise eligible for benefits.

e. Remuneration other than cash. The cash value of all remuneration payable in any medium other than cash, board, rent, housing, lodging, meals, or similar advantage, is only deductible when based on service performed by the individual during the period in which the individual is also claiming benefits.

f. Stand-by pay. When an individual is paid to hold oneself in readiness for a call to specific work for an employer but is not called, since the work is given to another, the payment is stand-by pay which is deductible from benefits when earned by the individual during the period when the individual is claiming benefits.

g. Tips or gratuity. However, the amount of the tips or gratuity is only deductible when based on service performed by the individual during the period in which the individual is also claiming benefits.

24.13(3) 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:

a. Wage interruption insurance payment. Any insurance payment received or due from wage interruption insurance because of fire, disaster, etc.

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).

c. Wages in lieu of notice, separation allowance, severance pay and dismissal pay.

d. Workers' compensation, temporary disability only. The payment shall be fully deductible with respect to the week in which the individual is entitled to the workers' compensation for temporary disability, and not to the week in which such payment is paid.

e. Pension, retirement, annuity, or any other similar periodic payment made under a plan maintained and contributed to by a base period or chargeable employer. An individual's weekly benefit amount shall only be reduced by that portion of the payment which is the same percentage as the percentage contribution of the base period or chargeable employer to the plan.

24.13(4) Nondeductible payments from benefits. The following payments are not considered as wages and are not deductible from benefits:

a. Self-employment income. However, the individual must meet the benefit eligibility requirements of Iowa Code § 96.4(3).

b. Bonuses. The bonus payment is only nondeductible when based on service performed by the individual before the period in which the individual is also claiming benefits.

c. Remuneration for work performed by the individual claiming benefits in exchange for county relief in the form of groceries, rent, etc.

- d. Payment for unused sick leave.
- e. National guard duty pay. This includes reserve unit drill pay for any branch of the armed service.
- f. Supplemental unemployment benefit plans approved by the department. See 871—subrule 23.3(1), paragraph “e,” for criteria and employer procedure for obtaining department approval.
- g. Pension to the blind.
- h. Payment for terminal leave. Any payment received by military personnel for unused leave upon discharge.
- i. Compensation for military service—connected disability from the Department of Veterans Affairs.
- j. Payments to the surviving spouse of a regular or disability pension based on the work of the deceased spouse.
- k. Deferred wage compensation. Remuneration received by the individual for wages earned in a period prior to the individual’s claim for benefits shall not be deductible during the period in which the individual is claiming benefits.
- l. Witness and jury fees. These fees are reimbursement for expenses and are not considered as wages.
- m. Supplemental security income. This payment is nondeductible because it is financed by income taxes and not social security taxes and is based on need factors such as age, mental or physical disability, and personal income, and not on previous employment.
- n. Federal social security benefit and social security disability payments.
This rule is intended to implement Iowa Code §§ 96.3(3), 96.5, 96.5(5), 96.11(1), and 96.19(38).

The terms “paid time off” is not defined by either Iowa statute or rule. The term “vacation” or “vacation pay” and “sick leave” are also not defined in either Iowa Code chapter 96 or in the agency rules.”

The general policy underlying the deductibility of “vacation pay” from benefit eligibility is “that even though one is unemployed during certain weeks, he or she is not entitled to unemployment benefits for weeks if receiving or having received vacation pay therefor.” *Lefebure Corp. v. Iowa Dept. of Job Service*, 341 N.W.2d 768, 771 (Iowa 1983); see also, 14 A.L.R.4th 1175 §2(a) (1982). Thus, “vacation pay” is deductible because it is considered a form of “wage,” which the statute further defines as any “remuneration for personal services . . .” Iowa Code § 96.19(41). The statute also provides for the deductibility of other types of “wage substitute” or “wage replacement” payments, including “wages in lieu of notice, separation allowance, severance pay, or dismissal pay . . . compensation for temporary disability under the workers’ compensation law of any state or under a similar law of the United States . . . [o]r a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment made under a plan maintained or contributed to by a base period or chargeable employer [with certain exceptions.] Iowa Code § 96.5(5).

The two relevant rules at issue are 871 IAC 24.13 and 871 IAC 24.16(1) and (2). Rule 24.13 specifies categories of payments of which are either deductible or non-deductible from benefit eligibility; most notably, a payment for "sick leave" is a non-deductible payment. 871 IAC 24.13(4)(d). Rule 24.16 deals specifically with the deduction of vacation pay. There can be several different approaches to the analysis. First, it could be argued that if a certain type of payment is not one of the specific types of payment itemized under rule 24.13(2) or (3), it cannot be deducted from benefit eligibility. Conversely, it could be argued that if the payment is not one of the specific types of payment itemized under rule 24.13(4) that it cannot be exempted from deductibility. The statute allows room for interpretation beyond strict construction of the term "vacation pay" by applying the vacation pay deductibility provisions to payments which are designated "as, *or in the nature of*, vacation pay, or vacation pay allowance, or *as pay in lieu of vacation...*" Iowa Code § 96.5(7)b [emphasis added].

Is PTO equivalent to vacation pay? A payment for unused PTO at the time of separation is not necessarily "personal leave with pay granted to an employee for an absence due to personal reasons." For an employee whose employer has a PTO program, it is quite possible that PTO might be used to pay someone who is granted such a leave during their employment, but that does not mean accumulated PTO without a specific application is EPL. Furthermore, the rule governing EPL must be read in context and as a whole and states EPL "is also referred to as casual pay or random pay." This suggests something completely different from PTO, which is a time-off policy provided as a substitute for providing employees separate designated periods of vacation leave and sick leave. The purpose behind the deductible payment provisions of the unemployment law is to prevent claimants from receiving benefits for any week or portion thereof in which they are also receiving a wage substitute payment from their employer. The law allows employers to designate the period of time to which a lump sum payment is allocated so that claimants have to exhaust their wage substitute payments before drawing benefits. Viewed in this way, PTO is just vacation pay by another name, especially since most employers with vacation policies allow employees to use vacation to cover an absence due to sickness if the employer does not have a sick leave policy or if the employee has exhausted sick leave. Given that the legislature has been very specific in defining a laundry list of deductible and non-deductible forms of remuneration, and PTO is neither defined nor listed under either rule, it can reasonably be considered to be a payment "in the nature of" or "as pay in lieu of vacation" under the statute. Accordingly, because the employer characterized the payment as vacation pay, designated a time period to which the pay is to apply and those calculations are accurate, the entire amount was correctly deducted from the first week of benefits following the separation.

DECISION:

The February 26, 2009, reference 03, decision is affirmed. The claimant's appeal is timely. The vacation pay was deducted for the correct period.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/pjs