

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BOBBIE A BURGUND
Claimant

APPEAL NO. 12A-UI-05298-N

**ADMINISTRATIVE LAW JUDGE
DECISION**

OPTIMAE LIFESERVICES INC
Employer

OC: 04/08/12
Claimant: Respondent (1)

Section 96.6(2) – Timeliness of Protest

STATEMENT OF THE CASE:

Optimae Lifeservices, Inc. filed an appeal from a representative's decision dated May 1, 2012, reference 01, which held that the protest concerning Bobbie A. Burgund's separation on April 3, 2012, was not timely filed. After due notice was issued, a hearing was held in Burlington, Iowa, on July 24, 2012. The employer participated by Ms. Connie Dusek, regional human resource manager, and Ms. Krista Martin, human resource representative. Additional witnesses, Ms. Barb Whitten and Ms. Renee Johnson were not called to testify. The claimant participated. Employer's Exhibits A, B, and C and Agency Exhibit D-1 were received into evidence.

ISSUE:

At issue in this matter is whether the employer filed a timely protest as required by law.

FINDINGS OF FACT:

The administrative law judge, having considered all of the evidence in the record, finds that: The claimant's notice of claim was mailed to the employer's address of record on April 11, 2012, and received by the employer in the ordinary course of the mail. The notice of claim contained a warning that any protest must be postmarked or returned not later than April 23, 2012. The employer did not effect a valid protest until April 25, 2012, which is after the ten-day period (and weekend dates) had expired.

It is the employer's position that Ms. Martin, in the absence of Ms. Dusek, faxed the protest on its due date, April 23, 2012, but the Agency contacted Ms. Martin and informed her that the protest could not be accepted because the signatures of the interview participant and the individual certifying the protest were not the same. It is the employer's position that Ms. Martin then corrected the names and signatures of the participant and the person certifying the protest and re-faxed it to the Agency on April 25, 2012. It is the employer's further position that when they heard nothing from Workforce Development for a period of time, the protest was re-faxed for a third time to the Agency on May 9, 2012. The evidence in the record does not show that Ms. Martin received a positive confirmation for a fax to Workforce Development on April 23, 2012. Exhibit D-1, the employer's protest in this matter, shows a fax date of April 25, 2012, at 11:36 a.m. The protest is stamped as "late" by the Agency. The document does not contain a

corrected participant/certifier name or signature and contains an explanation explaining its late submission, stating, "Connie Dusek was out of office when this was due! Kris Martin from Des Moines Co. took this over. Sorry it is late but here are the facts." The notation on the late fax was signed by Kris Martin.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.6-2 provides in pertinent part:

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.

Another portion of this same Code section dealing with timeliness of an appeal from a representative's decision states that such an appeal must be filed within ten days after notification of that decision was mailed. In addressing an issue of timeliness of an appeal under that portion of this Code section, the Iowa Supreme Court held that this statute prescribing the time for notice of appeal clearly limits the time to do so, and that compliance with the appeal notice provision is mandatory and jurisdictional. Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979).

The administrative law judge considers the reasoning and holding of that court in that decision to be controlling on this portion of that same Iowa Code section which deals with a time limit in which to file a protest after notification of the filing of the claim has been mailed. The employer has not shown any good cause for not complying with the jurisdictional time limit. Therefore, the administrative law judge is without jurisdiction to entertain any protest regarding the separation from employment.

The evidence in this matter is disputed. The employer's witnesses assert that an initial protest was sent to Iowa Workforce Development on April 23, 2012, and that the Agency rejected the initial protest because the name of the person being interviewed and the person that certified the information on the protest were not the same. It is the employer's further position that Ms. Martin then re-faxed the protest on April 25, 2012, after properly identifying the person doing the certification and the interview on the form. The administrative law judge notes that Agency Exhibit D-1 shows a confirmation receipt date for the fax as 11:36 a.m. on April 25, 2012, and that the form received by the Agency on April 25, 2012, beyond the statutory time limit, did not contain any corrected names of the person being interviewed or certifying the document but contained no identification of those individuals at all. The administrative law judge also notes that Exhibit D-1 was marked as "late" by the Agency upon its receipt and that the form itself contained an explanation from Ms. Martin as to why she had not submitted the protest timely. The explanation makes no reference to being instructed by the Agency to resubmit the document. As there is no evidence in the record establishing a positive confirmation report for the alleged submission on April 23, 2012, and Exhibit D-1 does not reflect the testimony of Ms. Martin regarding the proper submission of identification of the person being interviewed or certifying the document, the administrative law judge concludes the employer has not sustained its burden of proof in establishing a timely submission of the protest on the claim of Bobbie Burgund.

The administrative law judge concludes the employer failed to effect a timely protest within the time period prescribed by the Iowa Employment Security Law, and the delay was not due to any

Agency error or misinformation or delay or other action of the United States Postal Service pursuant to 871 IAC 24.35(2). The administrative law judge further concludes that the employer has failed to effect a timely protest pursuant to Iowa Code section 96.6-2, and the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the claimant's termination of employment. See Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979); Franklin v. IDJS, 277 N.W.2d 877 (Iowa 1979) and Pepsi-Cola Bottling Company v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990).

DECISION:

The representative's decision dated May 1, 2012, reference 01, is affirmed. The employer has failed to file a timely protest, and the decision of the representative shall stand and remain in full force and effect. Benefits are allowed, provided the claimant satisfies all other conditions of eligibility.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw