

IOWA DEPARTMENT OF INSPECTIONS AND
APPEALS
DIVISION OF ADMINISTRATIVE HEARINGS
LUCAS STATE OFFICE BUILDING
Des Moines, Iowa 50319

DECISION OF THE ADMINISTRATIVE LAW JUDGE

**BURRELL GARDNER
707 EAST COLLEGE
TOLEDO IA 52342**

**IOWA WORKFORCE DEVELOPMENT
INVESTIGATION AND RECOVERY
1000 EAST GRAND AVENUE
DES MOINES IA 50319-0209**

DAN ANDERSON, IWD

Appeal Number: 04-IWDUI-188
OC: 05/25/03
Claimant: Appellant (1-R)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to the Department. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

October 29, 2004

(Decision Dated & Mailed)

Section 96.3-7 - Recovery of Overpayments
Section 96.5-7b - Vacation Pay
871IAC24.16 - Vacation Pay

STATEMENT OF THE CASE:

The claimant appealed a representative's decision dated September 27, 2004, reference 03, which held that he was overpaid benefits \$134.00 for the week ending December 20, 2003, due to either failing to report or incorrectly reporting vacation pay from Sac & Fox Tribe (Meskwaki Bingo).

The hearing was held pursuant to due notice on October 25, 2004, by telephone conference call. The claimant participated. Neil Anderson, Investigator, participated on behalf of Investigations and Recovery, Iowa Workforce Development.

FINDINGS OF FACT:

Having heard the testimony and having examined the evidence in the record, the administrative law judge finds: The claimant last worked for the Sac & Fox Tribe (Meskwaki Bingo Casino & Hotel) in May 2003 due to a lay-off from employment. The claimant filed a claim for benefits effective May 25, 2003. The employer did not protest the claimant's claim in any manner.

A wage cross match audit for the fourth quarter of 2003, showed that the claimant received unemployment benefits in December during the same period that Meskwaki paid wages to him. An employer's representative submitted a form to the department, which showed that it paid the claimant vacation pay of \$503 that it designated for the week ending December 20, 2003.

The claimant filed a claim for unemployment benefits for the week ending December 20, 2003. The claimant did not report any wages for the week ending December 20, and he received a benefit of \$134. Investigator Anderson concluded the claimant was not entitled to any benefit for the week due to receiving excessive vacation pay.

Anderson mailed a notice to the claimant on September 2, 2004 regarding the \$134 overpayment, but he did not respond.

The claimant reported to work on December 31, 2003, and received his vacation paycheck of \$503.

Anderson learned that there were a number of Meskwaki employees who had overpayment issues like the claimant due to receiving vacation pay, and he contacted the employer about the matter. Anderson learned the employer had a "use it or lose it" vacation policy regarding accumulation of hours during a given year. The employer paid out the accumulated vacation to the claimant and other employees in December in conjunction with the lay-off and return to work rather than having any employee lose it.

A Marshalltown workforce center representative advised the claimant that he did not have to report the vacation pay.

The claimant did not receive any notice from the department regarding a waiver of the repayment of the \$134 extended benefit (TEUC). The claimant is requesting a waiver on this issue.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is overpaid benefits \$134 due to receiving vacation pay.

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(96) 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 of 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 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.

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 Section 96.5(7).

871 IAC 24.17(96) Vacation Pay procedure.

24.17(1)

a. Upon receipt of the vacation information, the unemployment insurance representative shall immediately issue the appropriate decision concerning 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.

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.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The division of job service in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the division a sum equal to the overpayment.

If the division determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant is overpaid benefits \$134 for the week ending December 20, 2003 due to receiving vacation pay from the Sac & Fox Tribe (Meskwaki Bingo Casino & Hotel) pursuant to Iowa code sections 96.5-7 and 96.3-7. There is no evidence that the employer properly notified Iowa Workforce Development within ten days after notification of the claim of the payment of vacation pay. Therefore, the vacation pay, \$503, is attributed to the week designated by the employer for December 20, 2003. The claimant is overpaid benefits for the week designated by the employer even though he actually received the pay in a latter week according to department rule. While it does appear that the employer did a poor job of communicating the payment of the vacation pay, it did so in accordance with its policy.

While it appears that the claimant had an issue with the employer about paying-out the \$503 vacation pay (not giving him a choice in the matter), he chose to accept the payment and cash the check. Although a department representative gave the claimant miss-advice, the no-fault overpayment does not relieve the claimant of the obligation to repay.

The administrative law judge further concludes that the waiver of the repayment of the \$134 overpayment is remanded to Unemployment Appeals for a telephone hearing. The claimant did not receive a department notice that he may request a waiver, and he submitted an oral appeal to do so in this hearing.

DECISION:

The decision of the representative dated September 27, 2004, reference 03, is AFFIRMED. The claimant is overpaid benefits \$134.00. The waiver issue is REMANDED to Unemployment Appeals.

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