

IOWA DEPARTMENT OF INSPECTIONS & APPEALS  
Division of Administrative Hearings  
Lucas State Office Building  
Des Moines, Iowa 50319

**Appeal Number: 07-IWDUI-007**  
**OC: 07/02/06**  
**Claimant: Appellant (2)**

DECISION OF THE ADMINISTRATIVE LAW JUDGE

**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 written 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.

**JOSEPH D OPSAL**  
**2890 TREELINE DRIVE**  
**BETTENDORF IA 52722-7187**

STATE CLEARLY

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

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.

DAN ANDERSON, IWD

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(Administrative Law Judge)

February 2, 2007

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(Decision Dated & Mailed)

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Section 96.4-3 - Able and Available  
871 IAC 24.22 – Benefit Eligibility Conditions  
871 IAC 24.23(23) – Availability Disqualifications/Employed  
Section 96.6-2 – Final Decision

STATEMENT OF THE CASE:

The claimant filed an appeal from an Iowa Workforce Development Department decision dated December 29, 2006, reference 04, which held the claimant ineligible for benefits effective July 2, 2006, because the claimant was employed and does not meet the availability requirements of the law.

The hearing was held pursuant to due notice on January 29, 2007, by telephone conference call. The claimant participated. Larry Finley, Investigator, participated on behalf of Iowa Workforce Development, Investigation and Recovery.

## FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, finds that: The claimant filed a claim for unemployment insurance benefits effective July 3, 2005, and a second year claim, effective July 2, 2006. The department audited the claimant's claim for the second quarter of 2006. The department issued a decision that the claimant is overpaid benefits \$624 dated January 19, 2007, reference 03 that is NOT subject to review in the hearing held in this matter.

The second quarter 2006 audit caused Investigator Finley to review the claimant's unemployment claims for the third quarter. Finley noted when the claimant filed his most recent claim, July 2, 2006, he listed employment with St. Ambrose College of Davenport, Iowa. A notice of claim was mailed to St. Ambrose, and a representative for the College protested the claimant's claim, as "still employed – full-time".

A department representative conducted a telephone fact-finding interview regarding the St. Ambrose College protest. The representative recorded a claimant statement that he was still employed part-time, same terms and conditions as hired, able and available to work all hours. The College did not participate. The department issued a decision dated July 26, 2006, reference 02 that held the claimant was eligible to receive benefits effective July 2, 2006, as he is currently employed with the same employer, as before he filed his current claim. The department relieved the College from any benefit charges by reason of the current unemployment claim. There was no appeal from this decision.

The claimant began employment with St. Ambrose College on June 20, 2006. He worked forty-two hours and earned gross wages of \$332 for the week ending June 24, 2006, and he worked forty-hours and earned gross wages of \$309 for the week ending July 1, 2006. The claimant's weekly benefit amount is \$349 for his 2005 claim, and \$410 for his 2006 claim.

The claimant worked a range from a low of forty hours each week to a high of sixty hours from his date of hire to December 12, 2006, and he earned a range of gross wages from a low of \$309 to a high of \$539 for the same period.

At the conclusion of the department audit, Investigator Finley elected to disqualify the claimant from receiving benefits for the two (2) weeks ending, July 1, 2006 (on his 2005 claim), and the twenty-three (23) weeks ending December 12, 2006 (on his 2006 claim), not because he under-reported his wages or his gross wages exceeded his weekly benefit entitlement, but because he was working to such a degree for St. Ambrose College that it took him out of the labor market making him ineligible for benefits.

## REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is able and available for work.

### **Iowa Code Section 96.4-3 provides:**

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while

employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

**871 IAC 24.22(96) Benefits eligibility conditions.** For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) *Able to work.* An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

(2) *Available for work.*

**871 IAC 24.23(96) Availability disqualifications.** The following are reasons for a claimant being disqualified for being unavailable for work.

24.23(23) The claimant's availability for other work is unduly limited because such claimant is working to such a degree that removes the claimant from the labor market.

#### **Iowa Code Section 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.

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.

The administrative law judge concludes that the claimant is NOT disqualified from receiving unemployment benefits for the twenty-three week period ending December 16, 2006, because the July 26, 2006 department decision is final regarding the claimant's employment with St. Ambrose College, and his availability for work on this issue. The department had an opportunity to explore the claimant's availability for work issue regarding the claimant's employment with St. Ambrose College during the fact-finding interview, but it determined the claimant's employment was part-time rather than full-time as protested by the employer. While the claimant may have been responsible for the department determination, it is unclear why the department representative failed to glean more facts, such as the number of hours worked and/or gross earnings.

A final adjudicatory decision of an administrative agency is subject to the application of issue preclusion. City of Des Moines Police Department b Iowa Civil Rights Commission, 343 N.W. 2d 836 (Iowa 1984). When no party appealed the July 26 decision, it became final, and the doctrine of "issue preclusion" applies to the availability issue in this case under review. Although the department and the employer may have "missed-the-boat" regarding the real nature of the claimant's employment relationship, the law does not allow the department a "second-bite at the apple" in this matter.

While Investigator Finley's reasoning that the College may not have appealed the July decision, because it was relieved of benefit charges on the claimant's current claim, this does not excuse the department for failing to be more thorough in its initial review. In addition, the department could have elected to disqualify the claimant in any week that he was overpaid benefits due to him earning excessive wages.

DECISION:

The decision of the representative dated December 29, 2006, reference 04, is REVERSED. The claimant is NOT disqualified from receiving benefits for the 23-week period ending December 16, 2006, as the department decision dated July 26, 2006 has become final, and it precludes a review of the eligibility issue.

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