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

ROBERT C RAYMER	:	
	:	**HEARING NUMBER:** 14B-UI-12981
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
SPENCER COMM SCHOOL DIST	:	
Employer.		

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.4-5

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Claimant appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Robert Raymer (Claimant) worked full-time for Clay Central and Everly Community School District through June of 2012. After losing that job he worked as a substitute teacher for Spencer Community School District (Employer) from January 2013 through June of 2013. He then worked on a contract to teach driver's education from June 2013 through early July, 2013. The Claimant was not offered a contract as a substitute teacher for the 2013-2014 school year and over the summer of 2013 did not have reasonable assurance of so working. The Claimant did work a few days when called to be a bus driver, but he did not have reasonable assurance over the summer that he would get such work.

REASONING AND CONCLUSIONS OF LAW:

***Between Terms Denial**:*

Iowa Code section 96.4-5-a provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:
>
> 5. Benefits based on service in employment in a nonprofit organization or government entity, defined in section 96.19, subsection 18, are payable in the same amount, on the same terms and subject to the same conditions as compensation payable on the same basis of other service subject to this chapter, except that:
>
> a. Benefits based on service in an instructional, research, or principal administrative capacity in an educational institution including service in or provided to or on behalf of an educational institution while in the employ of an educational service agency, a government entity, or a nonprofit organization shall not be paid to an individual for any week of unemployment which begins during the period between two successive academic years or during a similar period between two regular terms, whether or not successive, or during a period of paid sabbatical leave provided for in the individual's contract, if the individual has a contract or reasonable assurance that the individual will perform services in any such capacity for any educational institution for both such academic years or both such terms.

Reasonable assurance is defined by regulation:

> 24.51(6) Reasonable assurance, as applicable to an employee of an educational institution, means a written, verbal, or implied agreement that the employee will perform services in the same or similar capacity, which is not substantially less in economic terms and conditions, during the ensuing academic year or term. It need not be a formal written contract. To constitute a reasonable assurance of reemployment for the ensuing academic year or term, an individual must be notified of such reemployment.

The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence. We have found credible the Claimant's evidence that by the end of his driver's education job he no longer had reasonable assurance, express or implied, of working as a substitute teacher. Also the bus driver work appears to be fill-in work, not a regular on-call relationship and he did not have reasonable assurance of being a bus driver during the summer before he filled-in. Moreover, as pointed out by the Claimant, the bus driver is significantly different than a teacher job, and pays materially less. It was not, even if the Claimant had known about it over the summer, "in the same or similar capacity, which is not substantially less in economic terms and conditions…" 871 IAC 24.51(6).

On-Call Status

As we pointed out in our previous decision there is no general rule that once someone takes an on-call job that person now is completely unable to collect benefits. There are some special rules that apply to on-call work, but none here deny benefits.

First, "[s]ubstitute workers (i.e., post office clerks, railroad extra board workers), who hold themselves available for one employer and who do not accept other work, are not available for work within the meaning of the law and are not eligible for benefits." 871 IAC 24.22(i)(1); *accord* 871 IAC 24.22(i)(3)("An individual who is willing to accept only on-call work is not considered to be available for work."); 871 IAC 24.52(10)(b)("Substitute teachers who are employed as on-call workers who hold themselves available for one employer and who will not search for or accept other work, are not available for work within the meaning of the law and are not eligible for unemployment insurance payments pursuant to subrule 24.22(2)"i"(1)"). On the other hand, **"[a]n on-call worker (includes a substitute teacher) is not disqualified** if the individual is able and available for work, making an earnest and active search for work each week, placing no restrictions on employment and is genuinely attached to the labor market." 871 IAC 24.22(i)(2)(emphasis added). The Claimant here does not hold himself for "one employer" and does not refuse to "accept other work." He therefore is not considered unavailable under rule 24.22(i). We note that if **all** employees currently doing on-call work are considered not unemployed because, as the Administrative Law Judge wrote, "[w]hen an individual is hired to work on-call, the implied agreement is that they will work only when work is available" then why would we need rule 24.22(i)(1)-(2) and rule 24.52(10)(b) which only remove such workers from coverage if they are not willing to take other work?

Second, "[a]n individual whose wage credits earned in the **base period** of the claim consist **exclusively** of wage credits by performing on-call work, such as a banquet worker, railway worker, substitute school teacher or any other individual whose work is **solely** on-call work **during the base period**, is not considered an unemployed individual …." 871 IAC 24.22(i)(3)(emphasis added). This exemption is reiterated in the special rules for substitute teachers which state that "[s]ubstitute teachers whose wage credits in the **base period** consist **exclusively** of wages earned by performing on-call work are not considered to be unemployed persons pursuant to subrule 24.22(2)"i"(3)." 871 IAC 24.52(10)(c)(emphasis added). Without even looking further we can see that neither of these rules disqualify the Claimant. As directed by the rules we look to his *base period* wages and ask if they are "exclusively" or "solely from on-call work. Here the base period wages clearly are not so limited but include his full-time work at Clay Central and Everly. Reading a little further makes very clear that the Claimant is not automatically disqualified by the fact of doing substitute work alone:

> d. However, **substitute teachers engaged in on-call employment are not automatically disqualified** but may be eligible pursuant to subrule 24.22(2)"i"(3) if they are:
>
> (1) Able and available for work.
> (2) Making an earnest and active search for work each week.
> (3) Placing no restrictions on their employability.
> (4) Show attachment to the labor market. Have wages other than on-call wages with an educational institution in the base period.

871 IAC 24.52(10)(c)(emphasis added). The Claimant undoubtedly meets the 4 requirements to not be disqualified. In particular he does have "wage credits other than on-call wages with an educational institution in the base period." We cannot conclude anything but that on-call substitute teachers can indeed collect benefits so long as they meet these conditions. Since the Claimant does then he can collect benefits. Again, if merely being on-call and having employment that thus anticipates vagaries in work hours means that the on-call worker cannot ever be considered unemployed these carefully crafted rules would all be unnecessary.

Partial Unemployment

Although not discussed by the Administrative Law Judge, we address this issue because it is similar in conception to the on-call rule articulated by the Administrative Law Judge. Department regulations address the situation where a part-time work has variation in hours that is anticipated by the contract:

> Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.
> ….
> (26) Where a claimant is still employed in a part-time job at the same hours and wages as contemplated in the original contract for hire and is not working on a reduced workweek basis different from the contract for hire, such claimant cannot be considered partially unemployed.

871 IAC 24.23(26). We do not think this rule applies here for two reasons. First, except for a few days of driving, the Claimant is asking for full benefits, not partial benefits, and is not arguing he was partially unemployed. Thus a rule saying he cannot be considered partially unemployed is of no import. Second, we do not think the Claimant is employed at the "same hours and wages as contemplated in the original contract for hire" as the Claimant's driving hours and wages were not contemplated at all when the Claimant started to work for Spencer schools. True they are the same as originally contemplated once the Claimant started bus driving. But the Claimant first started the driving job in the benefit year. It is simply inconceivable that this provision denies benefits to a claimant who first takes the part-time job in question during the benefit year. If it did apply this would almost completely nullify the concept of partial unemployment paid while a claimant works a part-time odd job. *C.f.* 871 IAC 24.27.

Charging of Spencer Schools Under Receiving "Same Employment" Rule

Finally, we come to the charging of Spencer Schools. The general rule is "that if the individual to whom the benefits are paid is in the employ of a base period employer at the time the individual is receiving the benefits, and the individual is receiving the same employment from the employer that the individual received during the individual's base period, benefits paid to the individual shall not be charged against the account of the employer." Iowa Code §96.7(2)(a)(2). For school employers this is made more explicit:

> 24.52(13) … The school employer who continues to furnish part-time employment to the claimant may make a protest on the basis that the individual is still employed at the part-time employment and request removal of any charges to the part-time employer account, whether contributory or reimbursable, pursuant to Iowa Code section 96.7(3)"a"(2).

871 IAC 24.52(13); *see also* 871 IAC 23.43(4). This provision brings up the issue of whether the Claimant's wage credits from Spencer Schools could be used for benefit qualification purposes. Even assuming the Claimant is receiving the "same employment" we do not think a relief of charges here amounts to a removal of wage credits. The Code provision refers specifically the charging of the employer's account as does the regulation. In contrast other rules refer specifically to wages that cannot "be used as wage credits for claim or benefit purposes." 871 IAC 24.53(1). This strongly suggests that the wage credits here are not excluded for benefit purposes even if so done for charging purposes. We do not rule on the issue, however, as the question of monetary eligibility has already been remanded. As for the relief of charges, we do not generally hear tax issues and do not express an opinion on that matter either. But we note that in the event that the Employer is charged for benefits to this Claimant the Employer could protest the charging of its account under these provisions. *See generally* 871 IAC 23.53(1)(e).

Conclusion

We cannot discern in the law a rule of automatic exclusion of on-call workers as developed by the learned Administrative Law Judges in this case. But in addition policy has nothing to recommend such a sweeping approach. In general, one who takes full-time, but temporary, odd jobs while in a benefit year can receive benefits once the odd jobs end, assuming no disqualifying separation. *See* 871 IAC 24.1(86); Iowa Code §96.19(38)(b)(2). Also, those who take odd jobs providing part-time hours while looking for full-time work can receive partial benefits, and can even quit the part-time work without being disqualified. For such workers benefits are allowed for sound policy reasons including the reduction of unemployment liability, and maintaining the worker with some attachment to the labor market. It makes no sense to us to allow such benefits but disallow them if the worker takes an on-call job rather than a simple one-time "odd job" or a more regular part-time job. So long as the on-call worker is still looking for and available to other full-time work, and has base period wage credits other than for on-call work, he is on no different footing than any other odd-job worker and should not be denied benefits merely because his odd job is also on-call.

DECISION:

The administrative law judge's decision dated December 18, 2013 is **REVERSED**. The Employment Appeal Board concludes that the claimant did not have reasonable assurance between terms, and that the Claimant is not rendered ineligible by his working on-call jobs. Accordingly, the Claimant is allowed benefits **provided** the Claimant is otherwise eligible. The overpayment entered against claimant in the amount of $1,632 is vacated and set aside, but may be reinstated if the Claimant is found, or has been found, to be monetarily or otherwise ineligible.

A portion of the Claimant's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence were reviewed, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

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Monique F. Kuester

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Cloyd (Robby) Robinson

RRA/fnv