

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

THOMAS L FOGARTY
2070 KING AVE APT 9
DES MOINES IA 50320

SECURITAS SECURITY
SERVICES USA INC
C/o SHEAKLEY UNISERVICE INC
N/K/A TALK UC EXPRESS
PO BOX 429503
CINCINNATI OH 45242-9503

Appeal Number: 05O-UI-07782-RT
OC: 02-27-05 R: 02
Claimant: Respondent (2)

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.

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 Workforce Development. 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)

(Decision Dated & Mailed)

Section 96.5-3 - Failure to Accept Work
Section 96.4-3 - Required Findings (Able and Available for Work)
Section 96.3-7 - Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Securitas Security Services USA, Inc., filed a timely appeal from an unemployment insurance decision dated May 27, 2005, reference 02, allowing unemployment insurance benefits to the claimant, Thomas L. Fogarty. After due notice was issued, a telephone hearing was held on August 16, 2005, with the claimant participating. Erik Lysne, Branch Manager, and Andrea Karrer, Human Resources Manager, participated in the hearing for the employer. The employer was represented by David Schwab of Sheakley Uniservice, Inc., now known as TALX UC eXpress. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

An initial hearing was held in this matter on June 28, 2005, without the claimant's participation. By a decision dated July 12, 2005, the administrative law judge who conducted that hearing reversed the decision of Workforce Development and denied the claimant unemployment insurance benefits. The claimant appealed this decision to the Employment Appeal Board. By decision dated July 26, 2005, the Employment Appeal Board remanded this matter for another hearing.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer until he separated from his employment on February 19, 2005. That separation is not before the administrative law judge nor does the employer contest unemployment insurance benefits relating to that separation. On March 1, 2005, the employer offered the claimant a position as a security officer at United Parcel Service in Des Moines, Iowa, paying \$9.00 per hour for a full-time 40-hour week or a gross weekly wage of \$360.00. This involved less walking than the claimant's prior position with the employer. It was on the day shift, which was comparable hours from the prior employment with the employer. It had some outside work, as did the prior employment with the employer. The claimant refused this position because he believed that it would interfere with his social security benefits and he had had a prior incident at United Parcel Service. Sometime prior to 2003, the claimant had had an incident with an employee at United Parcel Service. The claimant believed that United Parcel Service was not going to offer him the position, but in fact United Parcel Service had approved the hiring of the claimant and approved the offer made by the employer, but the claimant refused it.

The claimant's average weekly wage for unemployment insurance benefits purposes is \$286.65 per week. Pursuant to his claim for unemployment insurance benefits filed effective February 27, 2005, the claimant has received unemployment insurance benefits in the amount of \$3,009.00 as follows: \$177.00 per week for 17 weeks from benefit week ending March 5, 2005, to benefit week ending June 25, 2005. This amount is now shown as overpaid. Thereafter, the claimant is shown as being disqualified to receive unemployment insurance benefits because he refused to accept suitable work. The claimant has placed no restrictions on his ability to work except for limited walking. The claimant has placed no restrictions on the hours or days when he can or cannot work concerning his availability for work, but has placed restrictions on his earnings because of his social security benefits.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant is disqualified to receive unemployment insurance benefits because he refused to accept suitable work. The claimant is disqualified to receive unemployment insurance benefits because he did refuse to accept suitable work.
2. Whether the claimant is ineligible to receive unemployment insurance benefits because at relevant times he is and was not able, available, and earnestly and actively seeking work. The claimant is ineligible to receive unemployment insurance benefits because he is not available for work.
3. Whether the claimant is overpaid unemployment insurance benefits. The claimant is overpaid unemployment insurance benefits in the amount of \$3,009.00

Iowa Code section 96.5-3-a provides:

An individual shall be disqualified for benefits:

3. Failure to accept work. If the department finds that an individual has failed, without good cause, either to apply for available, suitable work when directed by the department or to accept suitable work when offered that individual. The department shall, if possible, furnish the individual with the names of employers which are seeking employees. The individual shall apply to and obtain the signatures of the employers designated by the department on forms provided by the department. However, the employers may refuse to sign the forms. The individual's failure to obtain the signatures of designated employers, which have not refused to sign the forms, shall disqualify the individual for benefits until requalified. To requalify for benefits after disqualification under this subsection, the individual shall work in and be paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

a. In determining whether or not any work is suitable for an individual, the department shall consider the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness, prior training, length of unemployment, and prospects for securing local work in the individual's customary occupation, the distance of the available work from the individual's residence, and any other factor which the department finds bears a reasonable relation to the purposes of this paragraph. Work is suitable if the work meets all the other criteria of this paragraph and if the gross weekly wages for the work equal or exceed the following percentages of the individual's average weekly wage for insured work paid to the individual during that quarter of the individual's base period in which the individual's wages were highest:

(1) One hundred percent, if the work is offered during the first five weeks of unemployment.

(2) Seventy-five percent, if the work is offered during the sixth through the twelfth week of unemployment.

(3) Seventy percent, if the work is offered during the thirteenth through the eighteenth week of unemployment.

(4) Sixty-five percent, if the work is offered after the eighteenth week of unemployment.

However, the provisions of this paragraph shall not require an individual to accept employment below the federal minimum wage.

The administrative law judge concludes that the employer has the burden to prove that the claimant has refused to accept suitable work. Norland v. Iowa Department of Job Service, 412 N.W.2d 904, 910 (Iowa 1987). The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant refused to accept suitable work. The employer's witness, Erik Lysne, Branch Manager, credibly testified that the employer offered the claimant a position on March 1, 2005, as a security officer at United Parcel Service. This position paid \$9.00 per hour for a 40-hour week, or a gross weekly wage of \$360.00. This offer was made in the claimant's second or third week of unemployment and needed to pay 100 percent of the claimant's average weekly wage of \$286.65. The gross weekly wage of the offered position paid significantly more than the

claimant's average weekly wage. The offered position had the same shift as a prior shift worked by the claimant and provided the claimant with less walking, which the claimant wished. The offered position was in Des Moines, as was the prior position the claimant held with the employer. Both positions involved some outside work. The claimant refused the offer of work because it would interfere with his social security benefits and the claimant believed that United Parcel Service would not approve of him because of some incident that the claimant had had in the past with an employee of United Parcel Service. However, the evidence clearly establishes that the claimant had an opportunity to work at United Parcel Service. The position paid sufficient monies to make it suitable. The administrative law judge also concludes that in all other aspects, the position offered by the employer was suitable. The reasons given by the claimant for his refusal of the position, that it interferes with his social security benefits and he did not believe that United Parcel Service would hire him are not valid reasons for the claimant's refusal. Accordingly, the administrative law judge is constrained to conclude that the employer offered the claimant suitable work and the claimant unreasonably and unjustifiably refused the offer and therefore, the claimant is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

It is true that ordinarily before a disqualification for a Failure to Accept Work may be imposed, an individual must first satisfy the benefit eligibility conditions of being able and available for work. See 871 IAC 24.24(4). As noted below the administrative law judge concludes that the claimant is not available for work. However, the reason that the claimant is unavailable for work or not available for work is because the claimant does not want to earn enough wages during the year to adversely affect his federal old age benefits or social security benefits. The administrative law judge believes that this particular reason for not being available for work does not invalidate a disqualification for refusal to accept 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".

The administrative law judge concludes that the claimant has the burden to prove that he is able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has failed to meet his burden of proof to demonstrate by a preponderance of the evidence that he is either partially unemployed or temporarily unemployed as defined by Iowa Code section 96.19(38)(b)(c), which would excuse the claimant from the requirement that he be available for work. The administrative law judge further concludes that the claimant has not met his burden of proof to demonstrate by a preponderance of the evidence that he is available for work. The claimant testified that he has placed restrictions on his availability for work concerning earning enough

wages to adversely affect his federal old age benefits. This is a reason for the claimant to be disqualified for being unavailable for work. See 871 IAC 24.23(22). There was evidence that the claimant wanted to restrict his walking, but the administrative law judge does not believe that this affects his ability to work or unreasonably restricts his opportunity to obtain employment. However, the administrative law judge is constrained to conclude that the claimant is not available for work because of the restrictions on his earnings. Accordingly, the administrative law judge concludes that the claimant is not available for work and, as a consequence, he is ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits and demonstrates that he is able, available, earnestly and actively seeking work.

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 department 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 department a sum equal to the overpayment.

If the department 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 has received unemployment insurance benefits in the amount of \$3,009.00 since filing for such benefits effective February 27, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of May 27, 2005, reference 02, is reversed. The claimant, Thomas L. Fogarty, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits and demonstrates that he is available for work, because he has refused to accept suitable work and is not available for work. The claimant has been overpaid unemployment insurance benefits in the amount of \$3,009.00.

dj/kjw