

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

DECISION OF THE ADMINISTRATIVE LAW JUDGE

WILLIAM F RANKIN
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DONNELLSON IA 52625

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

DAN ANDERSON, IWD

Appeal Number: 06-IWDUI-185
OC: 07/02/06
Claimant: Appellant (1)

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 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)

September 29, 2006

(Decision Dated & Mailed)

Section 96.4-3 - Able and Available
Section 96.5-8 - Administrative Penalty
871 IAC 25.9(2) – Penalties
871 IAC 24.16(7) – Request to Reopen

STATEMENT OF THE CASE:

The claimant filed an appeal from an Iowa Workforce Development Department decision dated August 3, 2006, reference 01, which disqualified the claimant from receiving benefits for a period from July 30, 2006 to March 24, 2007, due to a prior overpayment based on misrepresentation.

The hearing was held pursuant to due notice on September 25, 2006, by telephone conference call. The claimant did not participate. Karen von Behren, Investigator, participated on behalf of Iowa Workforce Development, Investigation and Recovery. Department Exhibit One was received as evidence.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witness, and having considered all of the evidence in the record, finds: The claimant was the subject of an audit and investigation on his claim for benefits effective June 27, 2004. A representative of Iowa Workforce Development issued a decision that the claimant was over paid benefits \$3,892.00 due to misrepresentation on December 29, 2005, reference 01. The decision was not appealed, and it has now become final.

When the claimant filed his most recent claim effective July 2, 2006, a department representative notified Investigator Karen von Behren. The Investigator issued a warning letter to the claimant that she was considering a penalty due to the \$3,892 misrepresentation-overpayment, and she requested a telephone interview. After several attempts to reach the claimant, he called Investigator von Behren on August 2, 2006.

The claimant received the department documentation that determined the overpayment that included the audit information from his employer, Remedy Temporary. The claimant did not have any evidence to refute his employer's payroll history that reported his wages during the audit period. The claimant did not have any explanation for failing to report any wages for twelve weeks of the audit review period from June 27, 2005 to November 12, 2005.

The department has a policy guideline that would have permitted the Investigator to impose a penalty period of up to the remainder of the benefit year in this matter. The claimant did not make any repayment of the \$3,892 overpayment. Investigator von Behren disqualified the claimant two weeks for each of the seventeen weeks he incurred the overpayment for a total of thirty-four weeks. The Investigator noted that during the audit review period, the claimant reported wages of \$1,707 while the employer recorded paying him wages of more than \$6,000.

The claimant called-in before the start of the hearing to request that it be rescheduled for 10:30 am. and the department representative agreed. The claimant was not available for the start of the hearing. The claimant called after the close of the record, and he did not have a good cause for failing to participate in the hearing.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether the claimant's request to re-open the record should be approved.

871 IAC 26.14(7) provides:

- b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take evidence of the late party. For good cause shown, the presiding officer shall reopen the record....

The administrative law judge concludes that the claimant has failed to establish a good cause to reopen the record pursuant to 871 IAC 26.14(7) b. The claimant was given an opportunity to participate when the notice start time of 9:00 am. was moved to 10:30 am. at his request and consented to by the department representative. The claimant did not make himself available when called for the hearing.

The further 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.

The further issue is whether the administrative penalty imposed is correct.

Iowa Code Section 96.5-8 provides:

8. Administrative Penalty. If the department finds that, with respect to any week of an insured worker's unemployment for which such person claims credit or benefits, such person has, within the thirty-six calendar months immediately preceding such week, with intent to defraud by obtaining benefits not due under this chapter, willfully and knowingly failed to disclose a material fact; such person shall be disqualified for the week in which the department makes such determination, and forfeit all benefit rights under the unemployment compensation law for a period of not more than the remaining benefit period as determined by the department according to the circumstances of each case. Any penalties imposed by this subsection shall be in addition to those otherwise prescribed in this chapter.

871 IAC 25.9(2) provides:

- b. The general guide for disqualifications for deliberate falsification for the purpose of obtaining or increasing unemployment insurance benefits is listed below. It is intended to be used as a guide only and is not a substitute for the personal subjective judgment of the investigator because each case must be decided on its own merits. The administrative penalty recommended for falsification ranges from three weeks through the end of the benefit year.

The administrative law judge concludes that the administrative penalty imposed by the department is correct pursuant to Iowa Code Section 96.4-3 and Iowa Code Section 96.5-8. The claimant was the subject of an overpayment decision due to misrepresentation within the time period established by the law, which was not appealed, and it has now become final. The 34-week period of disqualification imposed by the department is within the administrative penalty discretion of the law.

The department representative imposed a lesser penalty than what the department guideline provided (remainder of the benefit year). The overpayment audit shows the claimant failed to report any wages earned for twelve weeks, and he has failed to make any repayment of the overpayment.

DECISION:

The decision of Iowa Workforce Development dated August 3, 2006, reference 01, is **AFFIRMED**. The claimant is disqualified from receiving benefits for the 34-week period ending March 24, 2007.

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