

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

KIMBERLY K HUTCHINSON

Claimant,

and

IOWA WORKFORCE

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HEARING NUMBER: 11B-EUCU-00240

**EMPLOYMENT APPEAL BOARD
DECISION**

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: 96.3-7

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds the administrative law judge's decision is correct. The administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED**.

The Employment Appeal Board would comment that although we affirm the Administrative Law Judge we now also explain why we are forced to reject the Claimant's argument about waiver.

Extended benefits in this case are paid pursuant to Public Law 110-252, which provides in part:

REPAYMENT.—In the case of individuals who have received amounts of **emergency** unemployment compensation under this title to which they were not entitled, the State shall require such individuals to repay the amounts of such emergency unemployment compensation to the State agency, except that the State agency may waive such repayment if it determines that—

(1) the payment of such emergency unemployment compensation was without fault on the part of any such individual; and

(2) such repayment would be contrary to equity and good conscience.

PL 110-252, §4005(b), 122 STAT. 2323, 2356 (emphasis added). A similar provision is found at 871 IAC 24.50(7). That rule states:

24.50(7) Waiver of overpayments.

a. Individuals who have received amounts of temporary **extended** unemployment compensation to which they were not entitled shall be required to repay the amounts of such temporary extended unemployment compensation except that the state repayment may be waived if the workforce development department determines that:

- (1) The payment of such temporary extended unemployment compensation was without fault on the part of the individual; and
- (2) Such repayment would be contrary to equity and good conscience.

b. In determining whether fault exists, the following factors shall be considered:

- (1) Whether a material statement or representation was made by the individual in connection with the application for temporary extended unemployment compensation that resulted in the overpayment and whether the individual knew or should have known that the statement or representation was inaccurate.
- (2) Whether the individual failed or caused another to fail to disclose a material fact in connection with an application for temporary extended unemployment compensation that resulted in the overpayment and whether the individual knew or should have known that the fact was material.
- (3) Whether the individual knew or could have been expected to know that the individual was not entitled to the temporary extended unemployment compensation payment.
- (4) Whether, for any other reason, the overpayment resulted directly or indirectly, and partially or totally, from any act or omission of the individual or of which the individual had knowledge and which was erroneous or inaccurate or otherwise wrong.

c. In determining whether equity and good conscience exist, the following factors shall be considered:

- (1) Whether the overpayment was the result of a decision on appeal;
- (2) Whether the state agency had given notice to the individual that the individual may be required to repay the overpayment in the event of a reversal of the eligibility determination on appeal; and

- (3) Whether recovery of the overpayment will cause financial hardship to the individual.

Since pointing out these waiver provision in previous decisions it has come to our attention, through decisions issued by Iowa Workforce Administrative Law Judges, that the Department of Labor has issued Unemployment Insurance Program Letter 23-08. In Appendix A of this letter the Department of Labor addresses waiver:

Overpayments. Under Section 4005(b) of the Act, each state must require repayment from individuals who have received any overpayment of EUC08 (whether fraudulent or non-fraudulent), unless the state, under the optional language of Section 4005(b), elects to waive recovery. The option to waive recovery applies only to non-fraudulent overpayments.

- (1) Application of State Waiver Provision. **If** the state has a state law waiver provision for **regular** compensation, the state provision may be applied to nonfraudulent EUC08 overpayments if the provision requires the state to determine that:

- (A) the payment of such EUC08 was without fault on the part of the individual, and
- (B) such repayment would be contrary to equity and good conscience.

In making these determinations, the state must apply the same standards as are applied in making such determinations with respect to the waiver of overpayments of regular compensation.

- (2) Optional EUC08 Waiver. Under Section 4005(c) of the Act, **any state** that does not have a state waiver provision or does not have a state waiver provision that meets both the “fault” and “equity and good conscience” requirements stated in paragraph (1) above **may adopt this optional EUC08 waiver**. If the state elects to implement the optional EUC08 waiver, **it may not do so until it has issued agency operating instructions for staff to follow**.

- (A) The state may waive recovery of a non-fraudulent EUC08 overpayment if it determines that:

- i. the payment of such EUC08 was without fault on the part of the individual, and
- ii. such repayment would be contrary to equity and good conscience.

- (B) In determining whether fault exists, the following factors must be considered:

- i. Was a material statement or representation made by the individual in connection with the application for EUC08 resulting in the overpayment, and did the individual know, or should the individual have known, that the statement or representation was inaccurate?

ii. Did the individual fail, or cause another to fail, to disclose a material fact in connection with an application for EUC08 resulting in the overpayment, and did the individual know or should the individual have known that the fact was material?

iii. Did the individual know, or would s/he have been expected to know, that s/he was not entitled to the EUC08 payment?

iv. Did the overpayment result directly or indirectly, and partially or totally, from any act or omission of the individual and which was erroneous, inaccurate or otherwise wrong and the individual knew or could have been expected to know that the act or omission was erroneous or inaccurate or otherwise wrong?

(C) In determining whether equity and good conscience exists, the following factors must be considered:

i. Was the overpayment the result of a decision on appeal?

ii. Had the state agency given notice to the individual that the individual may be required to repay the benefit payment in the event of a reversal of the eligibility determination on appeal?

Attachment A to UIPL 23-08, p. A11-A12. So there are two ways of waiving EUCU overpayments. First, if the state has a waiver provision for *regular* benefits that can be applied to EUCU. Iowa has a waiver provision for *extended* benefits, not regular benefits. No waiver can be made under this first prong. Second, the state through Iowa Workforce can just elect to apply the EUCU waiver provision. All that is required for this is to apply the dictated waiver provisions as the cases come up. No regulation is mentioned or required. The only limit on choosing to implement the optional EUCU waiver is that Workforce “may not do so until it has issued agency operating instructions for staff to follow.” Naturally, if regulations were required to make the election then there would be no point in *also* requiring “operating instructions.” The only requirement is operating instructions. The problem for the Claimant is, as we have now learned, that Iowa Workforce has not issued operating instructions. *E.g. Morris v. Iowa Workforce Dept.*, 10A-UI-16069 (2011). We do not receive grants from or have contracts directly with the Department of Labor. It is Iowa Workforce that has the ongoing legal relationship with that Department, and that must issue operating instructions. We review decisions, we do not direct Iowa Workforce staff. For reasons that escape us, Iowa Workforce has declined to issue operating instructions. This inaction by Workforce prevents application of the waiver provision under UIPL 23-08 (attachment A). Workforce has tied our hands in this matter.

Lastly, 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.

John A. Peno

Monique F. Kuester

AMG/fnv