IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

TIMOTHY W BEBEE
Claimant

CITY OF CHARITON
Employer

APPEAL NO. 12A-UI-08454-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/03/12
Claimant: Respondent (1)

Iowa Code Section 96.5(1) – Layoff

STATEMENT OF THE CASE:

The City of Chariton filed a timely appeal from the July 3, 2012, reference 01, decision that allowed benefits based on an agency conclusion that claimant Timothy Bebee was laid off effective May 31, 2012. After due notice was issued, a hearing was started on August 9, 2012 and concluded on September 18, 2012. The hearing in this matter was consolidated with the hearing in Appeal Number 12A-UI-08455-JTT concerned claimant Leroy Ruff and the same employer. The September 18 proceeding was also consolidated with reopened proceedings in Appeal Number 12A-UI-09727-JTT, concerning Mr. Bebee and employer PeopleService, Inc., and Appeal Number 12A-UI-09725-JTT, concerning Mr. Ruff and employer PeopleService, Inc. Mr. Bebee and Mr. Ruff each participated. Verle Norris, City Attorney for the City of Chariton, represented both employers. On August 9, the employer presented testimony through Cordy Goodenow and Tim Snyder. Mr. Ruff was the only witness to provide testimony on September 18. Exhibits One through Five were received into evidence on August 9, 2012.

ISSUE:

Whether Mr. Bebee separated from his employment with the City of Chariton for a reason that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Timothy Bebee was employed by the City of Chariton as a full-time Wastewater Operator 1 from 2001 until May 31, 2012. Mr. Bebee's work hours were 8:00 a.m. to 4:00 p.m., Monday through Friday. Mr. Bebee's final rate of pay was $14.85 per hour.

Leroy Ruff was employed by the City of Chariton as a full-time Wastewater Operator from 1998 until May 31, 2012. Mr. Ruff's work hours were 8:00 a.m. to 4:00 p.m., Monday through Friday. Mr. Ruff's final rate of pay was $17.31. At the end of the employment, Mr. Ruff held the position of Wastewater Operator 2.

The City of Chariton was required also to have a Wastewater Operator 3 on staff to supervise wastewater treatment operations. The most recent Wastewater Operator 3 resigned in March 2012. The Wastewater Operator 3/supervisor was responsible for all after-hours issues and was to be on-call for that purpose. Neither Mr. Bebee nor Mr. Ruff was required to be on-call.

Mr. Bebee and Mr. Ruff worked pursuant to a collective bargaining agreement between the union and the Chariton City Council. Mr. Bebee and Mr. Ruff were both union stewards. Mr. Bebee and Mr. Ruff had similar working conditions and employee benefits. The union had advocated for and won a set hourly wage for each hour worked, rather than a set monthly pay amount paid in two installments on the 1st and 15th of the month. The union had sought the pay-per-hour arrangement under the belief that under the old system the workers had been working for a reduced effective hourly wage at the end of longer months. However, under the old system, the employer had based the pay on 2,080 annual work hours, which when divided by 52 weeks amounts to 40 hours per week.

Mr. Bebee and Mr. Ruff participated in IPERS, a public employee defined benefit pension plan.

Mr. Bebee and Mr. Ruff both received health insurance through the employment, to which Mr. Ruff and Mr. Bebee contributed $246.00 per month. Mr. Bebee and Mr. Ruff knew that, pursuant to the collective bargaining agreement, the employee portion of the health insurance premium was set to increase by roughly 17 percent to $286.00 per month effective July 1, 2012. Mr. Bebee had recently incurred substantial expense for repeat hospitalizations, and appreciated the policy's limited his annual out-of-pocket expense to $1,500.00.

Mr. Bebee and Mr. Ruff both received dental insurance through the employment, for which they each contributed. As of May 2012, the employee contribution to the monthly dental premium was $6.86 every two weeks. Effective July 1, 2012, the employee portion of the monthly premium for dental insurance was to be $17.00 for a single person and $26.00 or $27.00 for a family.

The City did not require Mr. Bebee or Mr. Ruff to sign a non-compete agreement. The only restriction on their work efforts was that outside work or other activities should not interfere with their duties.

The City called upon Mr. Bebee and Mr. Ruff to perform work outside the wastewater treatment department as needed. The City had Mr. Ruff drive a dump truck, mow and trim weeds in the cemetery, help the water utility department look for water leaks, and work in the shop. The City might call up on Mr. Ruff to perform outside duties twice one month and not at all the next.

At a city council meeting in April 2012, the employer advised Mr. Ruff that the City had entered into a contract with, PeopleService, Inc., to have that company take over Chariton's wastewater treatment operations. The City had decided to enter into a contract with PeopleService due to the City's difficulty in keeping the Wastewater Operator 3 position staffed. The contract with PeopleService was to be effective June 1, 2012 and was to last for three years, at which time the City would decide whether to continue with the arrangement. The employer advised that a representative of PeopleService would be meeting with Mr. Ruff and Mr. Bebee during the first week in May. The City's desire was for Mr. Ruff and Mr. Bebee to become employees of PeopleService and that they continue to perform wastewater operator duties for the *City of Chariton as employees of PeopleService*.

On May 10, 2012, Tim Snyder, Regional Manager for PeopleService, provided Mr. Ruff and Mr. Bebee with a written offers of employment. While the offers contained a different wage

provisions for Mr. Ruff and Mr. Bebee based on their different positions, the offers contained many provisions in common. Each employee would be paid a starting salary based on 24-pay periods per year and to be paid on the 15th and last day of the month. Note, this was similar to the pay arrangement the union had previously challenged. Each employee would be eligible for time and a half (1.5) pay for overtime work. Each employee would be required to work evenings and weekends as part of his normal schedule. This was a substantial departure from the City employment. Each employee would have to work six months before he would become eligible for a week of vacation. Two weeks of vacation would be awarded on the employee's anniversary month. The vacation provision was a substantial departure from the City employment. Each employee would receive ten paid holidays (six legal holidays and four floating holidays to be designated by management. The company would provide life insurance and accidental death and dismemberment insurance equal to two times the annual salary.

Of special interest to Mr. Bebee, PeopleService's offer included "[a] medical plan with current monthly premiums at $116.00 for single; $260.00 for employee and spouse, $223.00 for employee and dependents; $350.00 for family. Note, the family plan was $104.00 more per month that the City's then current family plan and $64.00 more than the City's family plan that would be effect July 1, 2012. PeopleService's health plan included prescription drug card. While Mr. Bebee understood the PeopleService insurance plan would increase his maximum annual out of pocket expense to $4,500.00, the maximum out of pocket expense under PeopleService's health care plan was actually $2,250.00. Still, this was $750.00 more than under the City employment.

The offers from PeopleService included "[a] dental plan with current monthly premiums at $10.00 for single; $18.00 for employee and spouse; $25.00 for employee and dependents; $34.00 for family.

In contrast to the IPERS, defined benefit plans in which both Mr. Bebee and Mr. Ruff were vested, PeopleService offered a 401(k) defined contribution retirement plan, as follows:

> Eligible to participate in the 401(k) plan on a pre-tax basis up to 100% of your eligible earnings. The company match is $0.50 for every $1 up to 6%. You make your own investment decisions for your contributions as well as the company match. Vesting at 20% per year after completing 1,000 hours of service within a 12-month period.

The change in retirement plan was substantial.

In addition to the above provisions, the PeopleService offers of employment were conditioned upon Mr. Bebee and Mr. Ruff signing an Employee Loyalty Agreement. The agreement prohibited the men from engaging "in any conduct or enter[ing] into any business relationship that is in any way detrimental to PeopleService's best interests." The agreement prohibited the men from disclosing confidential PeopleService information. The agreement prohibited the men engaging in actual or apparent conflicts of interest. This included a prohibition against serving as an elected or appointed official of any PeopleService customer. The agreement designated the employment as at-will in nature. This was a substantial deviation from the City employment. The agreement contained the following non-compete provision:

> 4. Post-Employment Competition. For the one-year period immediately following the termination (voluntary or involuntary) of my employment, I will not (directly or indirectly, on my own behalf or on behalf of others) solicit the business of, sell to, or service any of PeopleService's customers with whom I actually did business and had personal contact while employed by PeopleService. I understand, however, that this agreement does *not*

> prevent me from engaging in any activity following my employment which: (i) cannot adversely affect PeopleService's relationship or volume of business with its customers; or (ii) is not related to, and not competitive with, the business, products and/or services that I offered or provided on behalf of PeopleService while employed by it. I also understand that this agreement does *not* prevent me from being employed by any customer of PeopleService who employed me immediately prior to my employment with PeopleService, so long as there is not contract in existence between PeopleService and the customer at the time my employment ends.

In other words, upon termination of the contract with the City of Chariton, PeopleService would not prevent Mr. Bebee or Mr. Ruff from returning to employment with the City of Chariton, but until such time as the contract terminated, both men were precluded from further employment with the City of Chariton. The non-compete agreement was a substantial departure from the City employment.

The PeopleService offers required that Mr. Ruff and Mr. Bebee obtain and/or maintain a valid commercial driver's license. The offers also required that the men maintain an Iowa Grade I wastewater certification. The conditions were not different from those required under the City employment.

The offers of employment were "contingent upon passing a pre-employment physical (which includes a pulmonary test, range of motion, vision and color test), drug test and background check including a motor vehicle record check." This requirement was a substantial change from the City employment.

PeopleService's May 10, 2012 offer to Mr. Bebee included an offered wage of $14.85 per hour. PeopleService's May 10, 2012 offer to Mr. Ruff included an offered wage of $17.31. The wage was the same as Mr. Bebee's final wage with the City of Chariton.

Mr. Bebee's and Mr. Ruff's written responses to the May 10, 2012 offers of employment, along with their signatures on the Employee Loyalty Agreement, were due on May 18, 2012. Both men rejected the offers prior to that day. Both men also rejected subsequent offers made on May 21, 2012. The May 21, 2012 offer to Mr. Bebee included an increased proposed wage amount of $15.06, up from $14.85. The May 21, 2012 offer to Mr. Ruff included an increase wage amount of $18.00 per hour, up from $17.31. The increased wage amounts were intended to address Mr. Bebee's and Mr. Ruff's concerns that the twice-monthly pay structure the union had negotiated away from the City employment would somehow diminish the effective hourly wage for hours worked at the end of the month. Both men felt they had been given incomplete information from Mr. Snyder regarding about how they would be compensated for on-call work. The question was whether it would be treated as overtime work, paid at a rate 1.5 times the regular wage, or whether it would be treated as comp time resulting in no additional pay, but instead requiring that the men take a similar amount of time off elsewhere during the week. Both men were unclear, based on their discussions with Mr. Snyder, regarding whether Mr. Snyder had full appropriate authority to bind PeopleService in connection with the offers. Mr. Snyder did indeed have appropriate authority to bind PeopleService.

After Mr. Bebee and Mr. Ruff rejected the May 21, 2012 offers, PeopleService made no further offers of employment. Mr. Bebee's and Mr. Ruff's employment with the City of Chariton ended on May 31, 2012, when each was laid off.

Mr. Ruff established a claim for unemployment insurance benefits that was effective May 27, 2012. Mr. Bebee established a claim for unemployment insurance benefits that was effective June 3, 2012.

REASONING AND CONCLUSIONS OF LAW:

Workforce Development rule 871 IAC 24.1(113) provides as follows:

> Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
> a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory–taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.
> b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.
> c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.
> d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

The evidence in the record establishes that Mr. Ruff and Mr. Bebee was each laid off by the City of Chariton effective May 31, 2012, when *the City* no longer had work available to them because it had decided to enter into a contract with PeopleService effective June 1, 2012. Ordinarily, a layoff from employment would not disqualify a claimant for unemployment insurance benefits, because it involves neither a voluntary quit nor a disqualifying discharge. See Iowa Code section 96.5(1), below, and Iowa Code section 96.5(2)(a), regarding discharges from employment.

The employer relies upon Iowa Code section 96.5(1)(i) to argue that Mr. Ruff and Mr. Bebee should be disqualified for unemployment insurance benefits and that the City of Chariton should be relieved of liability for benefits.

Iowa Code section 96.5(1)(i) provides as follows:

> Causes for disqualification.
>
> An individual shall be disqualified for benefits:

> 1. *Voluntary quitting.* If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department. But the individual shall not be disqualified if the department finds that:
>
> i. The individual is unemployed as a result of the individual's employer selling or otherwise transferring a clearly segregable and identifiable part of the employer's business or enterprise to another employer which does not make an offer of suitable work to the individual as provided under subsection 3. However, if the individual does accept, and works in and is paid wages for, suitable work with the acquiring employer, the benefits paid which are based on the wages paid by the transferring employer shall be charged to the unemployment compensation fund provided that the acquiring employer has not received, or will not receive, a partial transfer of experience under the provisions of section 96.7, subsection 2, paragraph *"b"*. Relief of charges under this paragraph applies to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

There are a number of problems with the employer's argument. The first is that neither Mr. Ruff nor Mr. Bebee voluntarily quit the employment with the City of Chariton. They were instead laid off by the City. The second problem is the idea that the City of Chariton transferred a clearly segregable and identifiable part of its enterprise. The City obviously did not *sell* its wastewater treatment facility. More importantly, the City did not *transfer* it wastewater treatment operations within the meaning of the unemployment insurance law. Instead, the City merely entered into a short-term, three-year, contract to have PeopleService temporarily staff and operate its wastewater treatment operations.

The third problem with the City's argument is that neither Mr. Bebee nor Mr. Ruff would be disqualified for benefits under Iowa Code section 96.5(3) because the offers and rejections preceded their claims for unemployment insurance benefits. That was the conclusion reached in Appeal Numbers 12A-UI-09725-JTT and 12A-UI-09727-JTT, concerning the claimants and prospective employer PeopleService. There is also a question regarding whether there was a bonafide offer of employment, in light of the offers being conditions on a pre-employment physical.

The fourth problem with the employer's argument is the idea that the proposed positions with PeopleService represented suitable work.

If a claimant fails, without good cause, to accept suitable work when offered to the claimant, the claimant is disqualified for unemployment insurance benefits until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. See Iowa Code section 96.5(3).

Iowa Administrative Code section 871 IAC 24.24(15) provides as follows:

> *Suitable work*. In determining what constitutes suitable work, the department shall consider, among other relevant factors, the following:
> *a.* Any risk to the health, safety and morals of the individual.
> *b.* The individual's physical fitness.
> *c.* Prior training.
> *d.* Length of unemployment.
> *e.* Prospects for securing local work by the individual.
> *f.* The individual's customary occupation.
> *g.* Distance from the available work.

h. Whether the work offered is for wages equal to or above the federal or state minimum wage, whichever is higher.
i. Whether the work offered meets the percentage criteria established for suitable work which is determined by the number of weeks which have elapsed following the effective date of the most recent new or additional claim for benefits filed by the individual.
j. Whether the position offered is due directly to a strike, lockout, or other labor dispute.
k. Whether the wages, hours or other conditions of employment are less favorable for similar work in the locality.
l. Whether the individual would be required to join or resign from a labor organization.

The suitable work question splits both ways, but ultimately comes down to the work not being suitable due to the requirement that both men surrender their membership to the union that protected their rights in the context of the City employment and the associated impact on their morals. The City's proposed change in employer brought with it a substantial disenfranchisement of the rights, working conditions, and benefits that both Mr. Bebee and Mr. Ruff had enjoyed under the City employment.

The impact on Mr. Ruff and Mr. Bebee of the City's decision to enter into the contract with PeopleService was both substantial and detrimental. While the administrative law judge does not see an issue with the wages offered, the other conditions of the offers were a different story. The proposed employment would require a change in work hours, from 8:00 a.m. to 4:00 p.m., Monday through Friday, to a schedule that would regularly include evenings and weekends. The proposed change in employment would require on-call work, whereas the City employment had not. Both men had a legitimate concern regarding how they would be compensated for the on-call work, whether it would be time and a half or comp time. The proposed change in employment would result in substantial increases in insurance expense, especially to Mr. Bebee. The change would also bring a less substantial change in dental plan cost. The proposed change in employment would result in loss of the IPERS defined benefit pension plan and substitution of a substantially inferior 401k defined contribution plan. The proposed change in employment would subject both men to a non-compete agreement.

The proposed substantial changes in the employment would have provided Mr. Ruff and Mr. Bebee with good cause to *quit* the City employment.

871 IAC 24.26(1) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (1) A change in the contract of hire. An employer's willful breach of contract of hire shall not be a disqualifiable issue. This would include any change that would jeopardize the worker's safety, health or morals. The change of contract of hire must be substantial in nature and could involve changes in working hours, shifts, remuneration, location of employment, drastic modification in type of work, etc. Minor changes in a worker's routine on the job would not constitute a change of contract of hire.

"Change in the contract of hire" means a substantial change in the terms or conditions of employment. See Wiese v. Iowa Dept. of Job Service, 389 N.W.2d 676, 679 (Iowa 1986). Generally, a substantial reduction in hours or pay will give an employee good cause for quitting. See Dehmel v. Employment Appeal Board, 433 N.W.2d 700 (Iowa 1988). In analyzing such cases, the Iowa Courts look at the impact on the claimant, rather than the employer's

motivation. Id. An employee acquiesces in a change in the conditions of employment if he or she does not resign in a timely manner. See Olson v. Employment Appeal Board, 460 N.W.2d 865 (Iowa Ct. App. 1990).

In other words, regardless of whether the proposed new employment was suitable work, both men had good cause for rejecting it.

Iowa Code section 96.5(1)(i) does not disqualify the claimant for unemployment insurance benefits and does not relieve the employer of liability for benefits. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

DECISION:

The Agency representative's July 3, 2012, reference 01, is affirmed. The claimant was laid off effective May 31, 2012. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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