

IOWA DEPARTMENT OF INSPECTIONS & APPEALS
DIVISION OF ADMINISTRATIVE HEARINGS
Wallace State Office Building
Des Moines, Iowa 50319

Appeal Numbers: 08-IWDUI-048

OC: 03/25/07

Claimant: Appellant (4)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

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.**

DALE E. COLLINS
523 NE 50th AVENUE
DES MOINES, IA 50313-1817

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

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

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.

DAN ANDERSON, IWD

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)

January 22, 2008

(Decision Dated & Mailed)

Iowa Code section 96.19(41) – Definition of Wages
Iowa Code section 96.16(4) - Misrepresentation
Iowa Code section 96.3(7) - Recovery of Overpayments

STATEMENT OF THE CASE:

The claimant filed an appeal from an Iowa Workforce Development decision dated March 13, 2008.¹ The decision held that claimant had been overpaid in the net amount of \$163.00 for three weeks between July 15, 2007 and September 29, 2007 because he failed to report or incorrectly reported wages earned with Des Moines Area Community

¹ This appeal was consolidated for hearing with Appeal No. 08IWDUI-047 involving an overpayment decision for the weeks between October 8, 2007 and December 25, 2007. Because the facts involved in that case are relevant to this appeal, they will be set forth in this decision.

College (DMAAC).

After due notice was issued, a hearing was scheduled for a telephone conference call on May 21, 2008. The claimant participated. He submitted a package of materials which was marked

Exhibit A, pages 1-26 and was admitted into the record. Investigator Irma Lewis, participated for Iowa Workforce Development, Investigation and Recovery. She submitted materials which were marked Exhibit 1, pages 1-12 and Exhibit 2, pages 1-11 and which were admitted into the record.

At the close of the hearing, the record was left open for a period of thirty days to allow claimant to submit additional evidence and for Ms. Lewis to review the same. The claimant did submit additional evidence in the form of information supplied by Kim McMillan Robson, Payroll Specialist, Des Moines Area Community College. Those documents were marked Exhibit B and are hereby made a part of the evidence. The documents in Exhibit B all relate to claimant's appeal in the companion case and will not be discussed in this decision.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses, and having examined all of the evidence in the record, finds:

The claimant was employed by Des Moines Area Community College ("DMAACC") as an adjunct professor during the Summer and Fall terms of 2007. Claimant drew unemployment benefits during a portion of the quarter commencing July 1, 2007 and ending October 6, 2007. He was also reported as working during the quarter. Therefore, an audit notice was automatically generated and sent to DMAACC for response. DMAACC did respond by supplying payroll information showing wages paid and the pay periods during which wages were received.

Review of the information received from DMAACC showed that claimant had failed to report any earnings for the week of July 15, 2007 and had been overpaid benefits during that week. Additionally, claimant began as an adjunct professor for the fall semester the week of August 26, 2007. From that date until September 29, 2007, the information provided by DMAACC showed that claimant had underreported his wages on occasion and had been overpaid unemployment benefits.

Investigator Lewis testified that, when auditing adjunct professors, IWD begins with the total amount of wages paid and divides that number by the total number of weeks worked to arrive at average weekly wages. IWD takes this approach because the different institutions employing adjuncts use various methods of paying them over the tenure of their contracts. Ms. Lewis initially used this method to determine weekly wages. She then compared those wages against the amounts reported for the same weeks by claimant.

Claimant was notified of the audit and given until March 19, 2008 to provide additional information. Claimant did telephone Ms. Lewis and complain about the manner in which she averaged his wages. Therefore, Ms. Lewis recalculated the amount of the overpayment using the actual pay stub amounts provided by DMAAC and arriving at overpayments of \$131.00 for the week ending July 21, 2007; \$24.00 for the week ending September 1, 2007; and, \$116.00 for the week ending September 29, 2007, for a total of \$271.00. Ms. Lewis also determined claimant was underpaid in the amounts of \$5.00 for the week ending September 8, 2007 and \$103.00 for the week ending October 6, 2007. These sums were deducted from the overpayment leaving claimant with a net overpayment in the amount of \$163.00. This audit decision was issued to claimant on March 28, 2008.

During the conversation between Ms. Lewis and claimant, claimant expressed concern that Ms. Lewis would forget the employer's amount of \$370 during the week ending October 6, 2007. Therefore, in order to assure claimant the amount was not forgotten, Ms. Lewis conducted a second audit for the remainder of the fall semester at DMACC, from October 7, 2007 through December 2007. This audit resulted in an overpayment of \$256.00, consisting of an overpayment in the amount of \$127.00 for the week ending October 13, 2007; \$2.00 for the week ending November 10, 2007; and, \$127.00 for the week ending December 15, 2007. Again, claimant telephoned Ms. Lewis and discussed the overpayment calculations. During that conversation, the parties agreed that Ms. Lewis' calculations were incorrect by \$10.00. Ms. Lewis documented this conversation in a letter to claimant dated March 25, 2008 where she explained the final overpayment calculation arrived at was \$246.00. This audit decision was issued to claimant on March 28, 2008.

Claimant appealed from both decisions. This decision involves only his appeal from the March 13, 2008 decision.

Initially, claimant admits that he was overpaid for the week ending July 21, 2007. He testified, however, that the department's call in service was not operating properly at the time and, while he attempted to report wages for the week in question, the call-in service did not record the same.

As to the remaining weeks, claimant argues that his records do not agree with the information provided to IWD by DMAAC.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case involves whether the claimant has received overpayment of benefits in the net amount of \$163.00 for the period July 15, 2007 and September 29, 2007 because he failed to report or incorrectly reported his wages.

The term "wages" as used in the context of this case is statutorily defined as "all remuneration for personal services, including commissions and bonuses and the cash

value of all remuneration in any medium other than cash.”² IWD has adopted rules to implement the statute. As applies to professional employees employed in an academic setting, the department has determined that [d]eductions from unemployment insurance payments are on a ‘when earned’ basis rather than on a ‘when paid’ basis.”³ Thus, the question becomes: when did claimant earn the wages in question.

The record does not reflect that a contract existed between claimant and DMAAC that sets out how claimant was to earn his wages. In cases such as this, where adjunct professors, where there is no contract specifying how wages are earned, as opposed to how they are paid, IWD generally looks at the term during which each adjunct professor is employed. “Term” is defined by IWD’s rules as one of the periods an educational institution uses to divide its annual period of instruction, i.e., a semester.⁴ IWD totals the amount of wages paid during the term and divides that figure by the number of weeks in the term. That assumes that the professor earns his or her wages on a weekly basis throughout the term. This method assures that all adjunct professors are treated similarly even though the various institutions which employ them may each pay them on a different schedule. Investigator Lewis would have like to have used this method in this audit. She did originally calculate the overpayment for the period July 15, 2007 through September 29, 2007 using this method, but claimant objected and Investigator Lewis recalculated the overpayment at his request.

Claimant argues that there is a discrepancy between what his check stub totals for the period commencing July 15, 2008 and ending December 29, 2008. This argument must be discounted. First claimant failed to demonstrate any discrepancies between the amount of wages he actually earned and those reported by DMAAC for the term in question. Second, Investigator Lewis relied on the payroll information supplied to her by DMAAC. She is entitled to do so. There is no evidence in the record that the information DMAAC supplied was inaccurate.

The undersigned concludes that because claimant requested recalculation of the overpayment by Investigator Lewis and because his arguments against the final results are not supported by the evidence, Investigator Lewis’ decision that claimant was overpaid benefits in the net amount of \$163 during three weeks between October 8, 2007 and December 15, 2007 should be affirmed.

Iowa law provides that the division of job service may, in its discretion, recover any overpayment of benefits regardless of whether the recipient acted in good faith. Recovery may be made by either having a sum equal to the overpayment deducted from future benefits or by having the recipient pay the amount of the overpayment to the division.⁵ If any benefits were received due to misrepresentation, the department is entitled to file a lien in the amount of the overpayment in favor of the state against any

² Iowa Code section 96.19(41).

³ 871 IAC 24.52(8).

⁴ 871 IAC 24.52(7(b)).

⁵ Iowa Code section 96.3(7).

property owned by the benefits recipient.⁶

Here, the evidence establishes that an overpayment of benefits occurred. However, the evidence does not show misrepresentation on the part of claimant. Claimant appeared to be honestly confused about how and when to report his wages. It does appear it attempted to report his wages in good faith regardless of the fact he reported the same inaccurately.

DECISION:

The decision of the representative dated March 13, 2008, reference 05, is MODIFIED in favor of the claimant. The claimant is overpaid benefits in the net amount of \$163, but it is NOT due to misrepresentation.

⁶ Iowa Code section 96.16(4).