

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

SAMUEL J NUZUM II
3417 WRIGHT ST
DES MOINES IA 50316

COMMUNICATIONS DATA SERVICE INC
ATTENTION: HUMAN RESOURCES
PO BOX 671
DES MOINES IA 50303

Appeal Number: 04A-UI-00182-S2T
OC: 09/28/03 R: 02
Claimant: Appellant (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 96.6-2 - Timeliness of Appeal
Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Samuel Nuzum (claimant) appealed a representative's October 24, 2003 decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with Communications Data Service (employer) for excessive unexcused absenteeism. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 29, 2004. The claimant participated personally. The claimant offered Penny Hutzler-Nuzum, the claimant's prior spouse, and Steven James, Process Assurance Analyst, as witnesses. The employer participated by Linda Carter, Employee Relations Manager; Joan Psotka, Supervisor of

Production Support Group; Janese Fitzgerald, Production Support Manager; and Kristin Hansen, Senior Employee Relations Specialist. Exhibit D-1 was admitted into evidence.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on February 25, 1996, as a full-time production support group associate. The claimant received a copy of the employer's handbook and signed for its receipt. The claimant received a written warning for attendance on December 20, 1999.

On August 28, 2003, the claimant discovered that he had violated his probation from an incident in the year 2000. The claimant immediately contacted his supervisor and informed the employer he would be incarcerated. The employer provided the claimant with a number which would accept collect calls from the jail. The claimant attempted to call the employer on August 29, 2003, but the telephone number the employer gave the claimant would not accept collect calls. The claimant contacted his ex-wife and she contacted the employer on August 30, 2003. The employer did not provide the ex-wife with any other number for the claimant to call. The employer maintained that the number would accept collect calls.

September 1, 2003, was a holiday and the claimant was not required to work. The claimant's ex-wife again notified the employer of the claimant's circumstances on September 2, 2003. On September 3, 2003, the claimant's co-worker notified the employer that the claimant had called him and the claimant would not be at work due to his incarceration.

The claimant was released from jail on September 5, 2003, and immediately went to the workplace in the clothes he was wearing when he was incarcerated. He informed the employer that he could not work because law enforcement was installing an in-home confinement system that day. The claimant requested his paycheck which was issued during the prior week so he could pay his bills.

On September 8, 2003, the employer terminated the claimant for failing to properly report his absences to the employer.

A disqualification decision was mailed to the claimant's last known address of record on October 24, 2003. The claimant did not receive the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by November 3, 2003. The appeal was not filed until December 30, 2003, which is after the date noticed on the disqualification decision. The claimant filed his appeal as soon as he discovered the decision.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.6-2 provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall

commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The ten calendar days for appeal begins running on the mailing date. The "decision date" found in the upper right-hand portion of the representative's decision, unless otherwise corrected immediately below that entry, is presumptive evidence of the date of mailing. Gaskins v. Unempl. Comp. Bd. of Rev., 429 A.2d 138 (Pa. Comm. 1981); Johnson v. Board of Adjustment, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

Pursuant to rules 871 IAC 26.2(96)(1) and 871 IAC 24.35(96)(1), appeals are considered filed when postmarked, if mailed. Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983).

The record in this case shows that more than ten calendar days elapsed between the mailing date and the date this appeal was filed. The Iowa Supreme Court has declared that there is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and that the administrative law judge has no authority to change the decision of a representative if a timely appeal is not filed. Franklin v. IDJS, 277 N.W.2d 877, 881 (Iowa 1979). Compliance with appeal notice provisions is jurisdictional unless the facts of a case show that the notice was invalid. Beardslee v. IDJS, 276 N.W.2d 373, 377 (Iowa 1979); see also In re Appeal of Elliott 319 N.W.2d 244, 247 (Iowa 1982). The question in this case thus becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. Hendren v. IESC, 217 N.W.2d 255 (Iowa 1974); Smith v. IESC, 212 N.W.2d 471, 472 (Iowa 1973). The record shows that the appellant did not have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes the employer failed to effect a timely protest within the time period prescribed by the Iowa Employment Security Law, and the delay was due to other action of the United States Postal Service pursuant to 871 IAC 24.35(2). The administrative law judge further concludes that the appeal was timely filed pursuant to Iowa Code Section 96.6-2, and the administrative law judge has jurisdiction to make a determination with respect to the nature of the appeal. See Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979) and Franklin v. IDJS, 277 N.W.2d 877 (Iowa 1979).

The issue becomes whether the claimant was discharged for misconduct. For the following reasons the administrative law judge concludes he was not.

Iowa Code Section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer discharged the claimant and has the burden of proof to show misconduct. The employer did not provide sufficient evidence of misconduct at the hearing. The claimant notified the employer of the incarceration at the onset. He attempted to telephone the employer at the only number the employer provided. When the claimant sent word that he could not reach the employer through that number, the employer did not offer the claimant any other manner to report his absences. The claimant notified the employer as best he could. Consequently the employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The decision of the representative dated October 24, 2003 (reference 01) is reversed. The appeal in this case was timely. The claimant was discharged. Misconduct has not been established. Benefits are allowed provided the claimant is otherwise eligible.

bas/kjf