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

Appeal Number: 05A-UI-03878-RT
OC: 03-13-05 R: 01
Claimant: Respondent (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.

CHRIS E NIES
722 COURT ST APT A
SIOUX CITY IA 51105

SECURITAS SECURITY SERVICES USA INC
C/O SHEAKLEY UNISERVICE INC
NOW TALX EMPLOYER SERVICES
PO BOX 429503
CINCINNATI OH 45242-9503

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quitting
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Securitas Security Services USA, Inc., filed a timely appeal from an unemployment insurance decision dated April 1, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Chris E. Nies. After due notice was issued, a telephone hearing was held on May 2, 2005, with the claimant not participating. Although the claimant did call in a telephone number where he purportedly could be reached for the hearing, when the administrative law judge called that number at 10:03 a.m., the person who answered informed the administrative law judge that the claimant was not there and that he was at a meeting and could not be reached. The person who answered indicated that the claimant had forgotten

about the hearing. The administrative law judge told the person who answered that he was going to proceed with the hearing and if the claimant wanted to participate in the hearing he would need to call before the hearing was over and the record was closed. The administrative law judge provided an 800 number for the claimant to call. The hearing began when the record was opened at 10:05 a.m. and ended when the record was closed at 10:18 a.m. and the claimant had not called during that period of time. Ralph Olson, Branch Manager, participated in the hearing for the employer. The employer was represented by David Schwab of Sheakley Uniservice, Inc. now TALX Employer Services. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

The claimant called the Appeals Section at 12:15 p.m. on Monday, May 2, 2005 and left a message for the administrative law judge to call him. The administrative law judge called the claimant at 12:26 p.m. The administrative law judge called the same number which is in the message to call him that the administrative law judge had called before the hearing. The claimant informed the administrative law judge that he had simply forgotten about the hearing at 10:00 a.m. The claimant stated that he had a previous "engagement" that he could not get out of but that he did not call for a continuance because he had simply forgotten about the hearing. The administrative law judge informed the claimant that he would treat his telephone call as a request to reopen the record and reschedule the hearing made after the record had been closed and the hearing held. Although not directly applicable, the administrative law judge concludes that the following rule applies here although that rule speaks to a situation where the party does not respond to the notice of appeal and telephone hearing until after the record has been closed.

871 IAC 26.14(7) provides:

> (7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.
>
> a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.
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> 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 the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.
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> c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

The administrative law judge concludes is constrained to conclude that the claimant has not demonstrated good cause to reopen the record and reschedule the hearing. The claimant was aware of the date and time of the hearing and he had provided a telephone number. It was the claimant's obligation to be at the telephone number he had provided for the hearing or to contact the administrative law judge in advance. The claimant did not do so. The claimant did

not do so because he had forgotten about the hearing. Forgetting about the hearing is not good cause to reopen the record and reschedule the hearing. Accordingly, the administrative law judge concludes that the claimant's request to reopen the record and reschedule the hearing is hereby denied.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time security officer from April 23, 2003 until he voluntarily quit effective November 11, 2004. The claimant was first employed at the employer's Sioux City, Iowa, location and then transferred to the Lincoln, Nebraska location on August 11, 2004. The claimant had been assigned to a client in Lincoln, Nebraska since his transfer on August 11, 2004. He was working the hours from midnight to 8:00 a.m. The claimant was offered a transfer to a new client in Lincoln, Nebraska at the same hours but with higher pay. The claimant agreed to the transfer and the hours and accepted the transfer. However, the claimant never showed up for his shift which began on November 12, 2004 nor did he show up thereafter. The claimant never called the employer as to why he did not show up. The claimant never did show up for his shift with the new client. The employer tried to call the claimant several times and finally reached the claimant about a week later. The claimant informed the employer that he could not work those hours because of babysitting problems. The claimant has not returned and offered to go back to work for the employer. The claimant's hours did not change when he was transferred to the new client. The days off may have changed. The claimant's specific duties changed slightly. The new job was in a guard house which would require less walking than the claimant had been doing before. The claimant never expressed any concerns to the employer's witness, Ralph Olson, Branch Manager, about his working conditions including his hours or the transfer nor did he do so to anyone else that Mr. Olson heard about. The claimant also never indicated or announced an intention to quit to Mr. Olson if any of his concerns about his employment were not addressed by the employer nor did he do so to anyone else that Mr. Olson heard about. If the claimant had attended his shifts appropriately, work remained available. The employer might have even worked with the claimant if the claimant had had problems with his hours but the claimant never gave the employer an opportunity. Pursuant to his claim for unemployment insurance benefits filed effective March 13, 2005, the claimant has received unemployment insurance benefits in the amount of $1,188.00 as follows: $198.00 per week for six weeks from benefit week ending March 19, 2005 to benefit week ending April 23, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.

2. Whether the claimant is overpaid unemployment insurance benefits. He is.

Iowa Code section 96.5-1 provides:

> 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.

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.

871 IAC 24.25(4)(17) provides:

> Voluntary quit without good cause. 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 from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.
>
> (17) The claimant left because of lack of child care.

The employer's witness, Ralph Olson, Branch Manager, credibly testified, and the administrative law judge concludes, that the claimant effectively left his employment voluntarily on November 11, 2004. That was the last day the claimant worked and thereafter the claimant did not show up for work nor did he inform the employer as to why he was not showing up for work. The claimant has never returned to the employer and offered to go back to work. The employer tried to call the claimant numerous times and finally reached the claimant about a week later. The claimant told the employer that he could not work his hours because of babysitting problems. Accordingly, the administrative law judge concludes that the claimant left his employment voluntarily effective November 11, 2004. The issue then becomes whether the claimant left his employment without good cause attributable to the employer.

The administrative law judge concludes that the claimant has the burden to prove that he has left his employment with the employer herein with good cause attributable to the employer. See Iowa Code section 96.6-2. The administrative law judge concludes that the claimant has failed to meet his burden of proof to demonstrate by a preponderance of the evidence that he left his employment with the employer herein with good cause attributable to the employer. The claimant did not participate in the hearing and provide reasons attributable to the employer for his quit. Mr. Olson credibly testified that when he finally reached the claimant, the claimant stated that he could not work his hours because of babysitting problems. However, leaving work voluntarily because of babysitting problems or daycare problems is not good cause attributable to the employer. It is also not good cause attributable to the employer to be absent

for three days without giving notice to the employer in violation of the employer's rule. Mr. Olson credibly testified that the claimant was given a transfer to a new client in Lincoln, Nebraska on November 11, 2004 and he was to start on November 12, 2004 and the claimant never showed up for work with the new client. However, Mr. Olson credibly testified that the claimant's hours were not going to change and that the claimant had been working midnight to 8:00 a.m. since being transferred to Lincoln, Nebraska on August 11, 2004 and those hours were going to continue with the new client. The claimant had been offered the transfer to the new client for the same hours and with higher pay and the claimant had agreed to the transfer. However, the claimant never showed up for work at the new location of the client and never informed the employer of why. The claimant's days off may have changed but the claimant was fully aware of all of the conditions related to the new client and accepted them. In fact, the claimant's new duties would be more guardhouse work and less walking. Under these circumstances, the administrative law judge concludes that the employer did not willfully and substantially breach its contract of hire with the claimant. There does not appear to be any substantial changes in the claimant's hours or type of work or any other changes which would result in a substantial change in his contract of hire. Finally, the claimant never expressed any concerns to the employer about any of these matters nor did he ever indicate or announce an intention to quit if any of his concerns were not addressed. The claimant gave the employer no reasonable opportunity to address any of his concerns although the employer would have tried to accommodate the claimant if the claimant had so expressed such concerns. Accordingly, and for all of the reasons set out above, the administrative law judge concludes that the claimant left his employment voluntarily without good cause attributable to the employer and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

Iowa Code section 96.3-7 provides:

> 7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.
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> If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $1,188.00 since separating from the employer herein on or about November 11, 2004 and filing for such benefits effective March 13, 2005. The administrative law judge concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of April 1, 2005, reference 01, is reversed. The claimant, Chris E. Nies, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he left his employment voluntarily without good cause attributable to the employer. He has been overpaid unemployment insurance benefits in the amount of $1,188.00.

pjs/pjs