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

AMY J BEAN
3867 SANDY HOOK RD – APT 2
HAZEL GREEN WI 53811

HILLCREST FAMILY SERVICES
2005 ASBURY RD
DUBUQUE IA 52001-3042

Appeal Number: 05A-UI-08719-RT
OC: 07-10-05 R: 12
Claimant: Respondent (1)

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 96.4-5 – Benefits Based on Service for an Educational Institution
Section 96.4-3 - Required Findings (Able and Available for Work)
Section 96.7-2-a-2 – Employer Contributions and Reimbursements
(Different Employment – Benefits Charged)
Section 96.3-7 - Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Hillcrest Family Services, filed a timely appeal from an unemployment insurance decision dated August 12, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Amy J. Bean. After due notice was issued, a telephone hearing was held on September 8, 2005, with the claimant participating. Julia Holdridge, Director of Human Resources, and Mary Jo Pancratz, Principal, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

At 3:58 p.m. on September 6, 2005, the claimant called the administrative law judge and asked that the hearing be rescheduled because she was working that day. She was working for the employer herein. The administrative law judge denied the claimant's request to reschedule a hearing because the administrative law judge felt that the employer could find some substitute to take over for the claimant briefly while the claimant participated in the hearing. The claimant did participate in the hearing.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: the claimant was and still is employed by the employer as a teacher associate, teaching students with behavioral disorders since February 21, 2005. The claimant has not been permanently separated from her employment, but has been off work or temporarily unemployed since July 22, 2005. The 2004-2005 school year ended on June 6, 2005, and the claimant would ordinarily have been off work at that time. However, the claimant worked for an additional four weeks for the employer when her employment ended on July 22, 2005. On June 6, 2005, the employer delivered to the claimant a contract for the 2005-2006 school year, providing for the same employment in that school year as the claimant had in the prior school year, 2004-2005. The claimant signed the contract on June 10, 2005 and returned it to the employer.

The employer is a non-profit organization and is not a government entity. The employer provides services in three separate divisions; Children and Family Services, Adult Mental Health, and Community Health. The claimant is employed in the first division; Children and Family Services. In that division the employer maintains the campus school as well as satellite classes. The claimant teaches at the campus school. In addition, in the division the employer provides adolescent residential services, foster care and family centered therapy. Other than the campus school and the satellite schools or classes, none of the employer's other services are educational related. The two other divisions do not provide any educational related activities or programs. Approximately 20 percent of the employer's budget is spent on the employer's campus school and its satellite classes. Approximately 69 out of 350 employees or 20 percent of its employees work for the campus school and the satellite classes. This is the same percentage for full time equivalency employees or FTE's. The employer is not licensed or approved or issued a permit to operate as a school by the Iowa State Department of Education or any other government agency authorized to approve, license, or issue permits for the operation of the school. The employer has a 28E agreement under Iowa Code section 28E, with the Dubuque Community School District for providing the campus school and the satellite schools. Students at the employer's schools must be enrolled in the Dubuque Community School District or other community school district. However, employees of the employer including, and especially, the employees in the campus school and satellite school are not employees of the Dubuque Community School District or any other community school district. Teacher associates such as the claimant, assist in the academic area and teaching of students and the claimant also acts as a substitute teacher on occasion the employer has no head start program.

Pursuant to her claim for unemployment insurance benefits filed effective July 10, 2005, the claimant has received unemployment insurance benefits in the amount of $762.00 as follows: $114.00 per week, for two weeks, benefit weeks ending July 16 and 23, 2005 (earnings $108.00): and $178.00 per week, for three weeks, from benefit week July 30, 2005 to benefit week ending August 13, 2005. The claimant has other earnings from non-school employers in

her base period as follows: $2,627.00 in her third quarter of 2004, from New Choices, Inc., and $4,095.00 in the forth quarter of 2004 also from New Choices, Inc.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant is temporarily unemployed but still job attached to an educational institution between two successive academic years or terms and has reasonable assurance of continued employment and, therefore, would be ineligible to receive unemployment insurance benefits between the two academic years or terms. The administrative law judge concludes that the claimant is not employed by an educational institution between two successive academic years or terms, although she has reasonable assurance of being employed in the new school year, 2005-2006 as she was employed in the prior school year, 2004-2005, and, therefore, she is not ineligible to receive unemployment insurance benefits between the two successive academic years or terms.

2. Whether the claimant is ineligible to receive unemployment insurance benefits because at relevant times she was not able, available, and earnest and actively seeking work. She is not ineligible to receive unemployment insurance benefits for these reasons.

3. Whether the claimant was receiving the same employment from the employer that she received during her base period and therefore the account of the employer herein should not be charged for any unemployment insurance benefits to which the claimant is entitled. The claimant is not receiving the same employment that she received during her base period and, therefore, any unemployment insurance benefits to which the claimant is entitled may be charged against the account of the employer herein.

4. Whether the claimant was overpaid unemployment insurance benefits. She is not.

Iowa Code Section 96.4-5-a provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:
>
> 5. Benefits based on service in employment in a nonprofit organization or government entity, defined in section 96.19, subsection 18, are payable in the same amount, on the same terms and subject to the same conditions as compensation payable on the same basis of other service subject to this chapter, except that:
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> a. Benefits based on service in an instructional, research, or principal administrative capacity in an educational institution including service in or provided to or on behalf of an educational institution while in the employ of an educational service agency, a government entity, or a nonprofit organization shall not be paid to an individual for any week of unemployment which begins during the period between two successive academic years or during a similar period between two regular terms, whether or not successive, or during a period of paid sabbatical leave provided for in the individual's contract, if the individual has a contract or reasonable assurance that the individual will perform services in any such capacity for any educational institution for both such academic years or both such terms.

871 IAC 24.51(6) provides:

> School definitions.
>
> (6) Reasonable assurance, as applicable to an employee of an educational institution, means a written, verbal, or implied agreement that the employee will perform services in the same or similar capacity, which is not substantially less in economic terms and conditions, during the ensuing academic year or term. It need not be a formal written contract. To constitute a reasonable assurance of reemployment for the ensuing academic year or term, an individual must be notified of such reemployment.

871 IAC 24.52(7) provides:

> (7) Head start programs are considered educational in nature; however, the employing unit as a whole must have as its primary function the education of students. When the employing unit is operated primarily for educational purposes then the between terms denial established by Iowa Code section 96.4(5) will apply between two successive academic years or terms and will apply for holiday and vacation periods to deny benefits to school personnel.
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> a. A nonprofit organization which has as its primary function civic, philanthropic or public assistance purposes does not meet the definition of an educational institution. Community action programs which have a head start school as one component are not an educational institution employer and the between terms denial does not apply.
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> b. A head start program which is an integral part of a public school system conducted by a board of education establishes an employing unit whose primary function is educational; therefore, the between terms denial would apply.

The administrative law judge concludes that there is not a preponderance of the evidence that the claimant is employed by an educational institution. The employer is a non-profit organization, which does provide, as one part of its services and functions, an organized course of study or training designed to transfer knowledge. It has a 28E agreement with, among other schools, the Dubuque Community School District and provides educational services to individuals with disabilities, including those individuals with behavioral problems. However, the employer is not a school district or any other governmental entity, but is a non-profit organization. The employer provides other programs or functions as well. It has three divisions. In the division in which the claimant was employed, Children and Family Services, the employer, in addition to its educational function as a campus school and satellite classes, has an adolescent residential treatment program, a foster care program and a family centered therapy program. These are not educational in nature. The employer also has two other divisions, adult mental health and community health, which also are not educational in nature. Other than the campus school and the satellite classes, the employer's other services and functions are for the purposes of civic, philanthropic, or public assistance purposes. Though the employer is a non-profit organization, it is not approved, licensed or issued a permit to operate as a school by the Department of Education or any other government agency and is therefore not an educational institution under 871 IAC 24.51(1) and Iowa Code section 96.19(14).

The issue then becomes whether the employer, or the employing unit, has as its primary function, the education of students so as to, in effect, make it an educational institution under

871 IAC 24.52(7). Although that rule seems to be addressed to head start programs, the applicable provisions of that rule refer to "employing unit." That rule provides that when an employing unit is operated primarily for educational purposes, then the between terms denial established by Iowa Code section 96.4(5) will apply between the two successive academic years or terms. The administrative law judge is constrained to conclude that the employer here does not have, as its primary function, the education of students. Approximately 20 percent of the employer's budget is devoted to the operation of the campus school and other satellite schools. 69 out of 350 employees or 20 percent of its employees are utilized in the campus school and its satellite schools. The same percentage of full time equivalency employees (FTE's) are so utilized for the employer's schools. The remaining budget, staff, and FTE's are devoted to the other functions of the employer, which are not educational. Accordingly, the administrative law judge is constrained to conclude that the employer here, or the employing unit, does not have, as its primary function, the education of students and therefore is not an educational institution and the between terms denial established by Iowa Code section 96.4-5, does not apply.

The administrative law judge is not unmindful of decisions by the Employment Appeal Board in 05B-UI-06194 and 05B-UI-06588, in which the Employment Appeal Board basically determined that head start programs are not educational institutions, no matter what the primary function might be. The decision addresses only head start programs but the administrative law judge sees no practical difference between an employer who has a head start program and an employer who conducts other educational services. The rule is clear that head start programs are considered educational in nature. At one point the rule does also speak to community action programs, but again, the administrative law judge sees no difference between a community action program and another non-profit organization such as the employer herein. Under the reasoning of the Employment Appeal Board, any such employing unit is not an educational institution for the purposes of the between terms denial.

The administrative law judge is also not unmindful of decisions by another administrative law judge in appeals 05A-UI-07651-SWT, 05A-UI-07652-SWT and 05A-UI-07517-SWT. In those decisions, the administrative law judge determined that the between terms denial applied to the employer herein only because the employer herein had a 28E agreement with the Dubuque Community School District. The administrative law judge concluded that the employer was acting as an educational agent providing educational services to the students in place of the local schools. The administrative law judge concluded therefore, that the claimant's were subject to the between terms denial provisions of Iowa Code section 96.4(5). The administrative law judge respectfully disagrees. It may well be that the employer here is an agent of the Dubuque Community School System. However, the administrative law judge is not aware of any provision in agency law that automatically confers, conveys, or bestows the character of the principal upon an agent. Through example, a real estate agent representing the seller does not, as a result of the agency relationship, become the seller or take on the characteristics of the seller. The administrative law judge who determined that the between terms denial applied, also referred to Iowa Code chapter 28E stating that Iowa Code chapter 28E allows the Dubuque Community School District to share its educational authority with the employer by entering into a 28E agreement. Again, the administrative law judge respectfully disagrees to the extent that, by virtue of a 28E agreement, the Dubuque Community School District bestows or confers upon the employer, the character of an educational institution. Nothing in Iowa Code chapter 28E provides that the character of the government entity or subdivision is conveyed through or conferred upon the other party in a 28E agreement. Even if the employer provides services "to or on behalf" of the Dubuque Community School District, that is not its primary function as discussed above. Finally, in

appeal 05A-UI-06877 the Employment Appeal Board ruled similarly determining that "the employer's cooperative agreements do not alter our analysis."

It is true that there is a preponderance of the evidence that the claimant has reasonable assurance that she will be returning to the employer and performing the same or similar services in the new or ensuing school year or term, 2005-2006, that she did in the prior academic year or term, 2004-2005. This is clearly shown by the contract offered to the claimant on June 6, 2005, and signed by the claimant on June 10, 2005. It is also true that the claimant provides services in an instructional capacity. However, the administrative law judge, as noted above, is constrained to conclude that the employer is not an educational institution, nor does it have, as its primary function, the education of students and is therefore, not an educational institution for the purposes of the between terms denial of unemployment insurance benefits established by Iowa Code section 96.4-5. Therefore, the administrative law judge concludes that the claimant is not ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided she is otherwise eligible.

The administrative law judge notes that even if the between terms or years denial under Iowa Code section 96.4(5) applied, that the claimant is otherwise monetarily eligible to receive unemployment insurance benefits based on non-school wages or wage credits from other employers in her base period and the claimant would still be eligible and entitled to receive unemployment insurance benefits based on those earnings.

Iowa Code Section 96.4-3 provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:
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> 3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The administrative law judge concludes that the claimant has the burden to prove that she is able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has met her burden of proof to demonstrate by a preponderance of the evidence that she is excused from the provisions requiring her to be available for work and earnestly and actively seeking work. The evidence establishes that the claimant was an employee of the employer for part of the 2004-2005 school year and that she performed services for the employer in that school year and will be performing the same services in the new or ensuring school year or term, 2005-2006. In fact, the employer has offered the claimant a contract for that employment and the claimant has signed it. The claimant was not working for the employer during the summer recess or between the two academic years or terms because of a lack of work from the claimant's regular job in which the claimant worked full-time prior to the summer recess and will again work full-time. Accordingly, the administrative law judge concludes that the claimant is

temporarily unemployed under Iowa Code section 96.19(38)(c) and is not subject to the requirements that she be available for work and earnestly and actively seeking work. There is no evidence that the claimant is not able to work. She worked for the employer in part of the 2004-2005 school year and is ready, willing and able to work in the 2005-2006 school year. Accordingly, the administrative law judge concludes that the claimant is able to work. Therefore, the administrative law judge concludes that the claimant is able to work and is excused from the provisions that require her to be available for work and earnestly and actively seeking work and, as a consequence, the claimant is not ineligible to receive unemployment insurance benefits if she is otherwise entitled to such benefits.

Iowa Code Section 96.7-2-a(2) provides:

> 2. Contribution rates based on benefit experience.
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> a. (2) The amount of regular benefits plus fifty percent of the amount of extended benefits paid to an eligible individual shall be charged against the account of the employers in the base period in the inverse chronological order in which the employment of the individual occurred.
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> However, if the individual to whom the benefits are paid is in the employ of a base period employer at the time the individual is receiving the benefits, and the individual is receiving the same employment from the employer that the individual received during the individual's base period, benefits paid to the individual shall not be charged against the account of the employer. This provision applies to both contributory and reimbursable employers, notwithstanding subparagraph (3) and section 96.8, subsection 5.
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> An employer's account shall not be charged with benefits paid to an individual who left the work of the employer voluntarily without good cause attributable to the employer or to an individual who was discharged for misconduct in connection with the individual's employment, or to an individual who failed without good cause, either to apply for available, suitable work or to accept suitable work with that employer, but shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.
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> The amount of benefits paid to an individual, which is solely due to wage credits considered to be in an individual's base period due to the exclusion and substitution of calendar quarters from the individual's base period under section 96.23, shall be charged against the account of the employer responsible for paying the workers' compensation benefits for temporary total disability or during a healing period under section 85.33, section 85.34, subsection 1, or section 85A.17, or responsible for paying indemnity insurance benefits.

The administrative law judge concludes that the claimant was not receiving the same employment from the employer during her base period as she was during the summer of 2005. In the claimant's base period, she was employed full time by the employer in the first quarter of 2005 and earnings were reported in the amount of $943.00. In the summer of 2005, the claimant was not employed by the employer, at least during the period in which she applied for benefits. Accordingly, the administrative law judge concludes that although the claimant is or was at relevant times not working for the employer, she was still in the employment of the employer, but not under the same terms and conditions and wages and hours as she was

employed during her base period. Accordingly, the administrative law judge concludes that any unemployment insurance benefits to which the claimant is entitled may be charged against the account of the employer herein and the account of the employer herein shall not be relieved of any charges for any unemployment insurance benefits to which the claimant is entitled.

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 $762.00 since filing for such benefits effective July 10, 2005. The administrative law judge concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of August 12, 2005, reference 01, is affirmed. The claimant, Amy J. Bean, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she is able to work and is not subject to the requirements that she be available and earnestly and actively seeking work because she is temporarily unemployed but remains job attached. Since the claimant is not receiving the same employment from the employer as she did during her base period, the employer may be charged for the unemployment insurance benefits to which the claimant is entitled and the employer's account shall not be relieved of any such charges. The employer is not an educational institution and therefore the "between terms or academic years denial" of unemployment insurance benefits under Iowa Code section 96.4(5) does not apply. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits as a result of her claim for unemployment insurance benefits filed effective July 10, 2005.

dj/kjf