

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

VANEISE L MCWHERTER
Claimant

APPEAL NO. 13A-UI-07853-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

LOCAL GOVERNMENT SERVICES INC
Employer

OC: 10/07/12
Claimant: Appellant (1)

Section 96.3-5 – Layoff Due to Business Closing
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Claimant filed an appeal from a fact-finder's decision dated October 24, 2012, reference 01, that denied the claimant's request to have her claim re-determined as a business closure effective October 7, 2012. The claimant filed her appeal from the October 24, 2012 decision on July 2, 2013, in person. After due notice was provided, a telephone hearing was scheduled for 8:30 a.m., on August 12, 2013. The employer did not participate. The claimant was not available at the telephone number provided, although repeated calls were made. Ms. McWherter contacted the Appeals Section that afternoon. The administrative law judge contacted the claimant in response to her late call and conducted the telephone hearing.

ISSUE:

At issue in this matter is whether the appeal filed herein was timely.

FINDINGS OF FACT:

The administrative law judge having considered all of the evidence in the record, finds: That a disqualification decision was mailed to the claimant's address of record on October 24, 2012 and received by the claimant in the due course of the mail. The decision contained a warning that the appeal must be postmarked or received by Appeals Section by November 3, 2012. The appeal was not filed until July 2, 2013, which is after the date noticed on the disqualification decision.

The claimant late appeal was on the decision finding that the employer's business did not permanently closed effective October 7, 2012. In her testimony about the late filing of the appeal, Ms. McWherter testified that after her layoff from Local Government Services she later accepted employment with the Data Business Systems Company, the firm that had purchased a portion of the Local Government Services, Inc. business located at 6000 Grand Avenue, Des Moines, Iowa at the location where she had been employed. The claimant further testified

that after accepting employment with Data Business Systems Company, she was employed at the same facility located at 6000 Grand Avenue, Des Moines, Iowa.

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.

Iowa Code section 96.3-5 provides:

5. Duration of benefits. The maximum total amount of benefits payable to an eligible individual during a benefit year shall not exceed the total of the wage credits accrued to the individual's account during the individual's base period, or twenty-six times the individual's weekly benefit amount, whichever is the lesser. The director shall maintain a separate account for each individual who earns wages in insured work. The director shall compute wage credits for each individual by crediting the individual's account with one-third of the wages for insured work paid to the individual during the individual's base period. However, the director shall recompute wage credits for an individual who is laid off due to the individual's employer going out of business at the factory, establishment, or other premises at which the individual was last employed, by crediting the individual's account with one-half, instead of one-third, of the wages for insured work paid to the individual during the individual's base period. Benefits paid to an eligible individual shall be charged against the base period wage credits in the individual's account which have not been previously charged, in the inverse chronological order as the wages on which the wage credits are based were paid. However if the state "off indicator" is in effect and if the individual is laid off due to the individual's employer going out of business at the

factory, establishment, or other premises at which the individual was last employed, the maximum benefits payable shall be extended to thirty-nine times the individual's weekly benefit amount, but not to exceed the total of the wage credits accrued to the individual's account.

871 IAC 24.29(2) provides:

(2) Going out of business means any factory, establishment, or other premises of an employer which closes its door and ceases to function as a business; however, an employer is not considered to have gone out of business at the factory, establishment, or other premises in any case in which the employer sells or otherwise transfers the business to another employer, and the successor employer continues to operate the business.

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 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).

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 of Iowa has declared there is a mandatory duty to file appeals from representative's 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. Iowa Department of Job Service, 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. Iowa Department of Job Service, 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 administrative law judge concludes that the failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was not due to Agency error or action of the United States Postal Service pursuant to 871 IAC 24.35(2). The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code section 96.6-2 and the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the appeal.

The decision of the adjudicator remains in effect. An employer is not considered to have gone out of business at the factory, establishment, or other premises in any case where the employer sells or otherwise transfers the business or a separate portion of the business to another employer and the successor employer continues to operate the business. The claimant went to work for the new employer who had bought a portion of her former employer's business, and that she continued to perform services at the same business location. The claimant therefore was properly determined to have not been laid off due to a business closure. Any re-calculation of benefits would be properly denied until such time as the business did actually close. At that point the claimant could provide a letter of notification of the closing and request re-calculation.

DECISION:

The representative's decision dated October 24, 2012, reference 01, is affirmed. The appeal in this case was not timely and the decision of the representative remains in effect.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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