BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

NATASSJA RUSH	:	
	:	**HEARING NUMBER:** 15B-UI-03624
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
L A LEASING INC	:	
Employer		

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A, 96.3-7

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Employer appealed the issue of the chargeability of the overpayment in this case to the Employment Appeal Board. The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision on the **chargeability** of the overpayment. The Employment Appeal Board **REVERSES** on the overpayment chargeability issue as set forth below.

As a result, the Claimant is still not eligible for benefits but now will also be responsible for paying back the overpayment.

FINDINGS OF FACT:

The Administrative Law Judge findings of fact are adopted by the Board as its own. In addition the Board makes the following findings of fact.

> The Claimant filed for unemployment insurance benefits with an effective date of March 1, 2015. She claimed for benefits after the separation from employment. On March 11, 2015, the Employer faxed 14 pages to the fact finder including a letter saying that it would "be participating in fact finding's [sic] via written statement". That same communication gave the phone numbers of two

persons to call "for rebuttal." These persons had knowledge of the reasons for the Claimant's separation. The fact finder had the supplied names and phone numbers available, but made no call to the Employer.

The Employer provided documents for the March 12, 2015 fact-finding interview. Those documents included a separation form which set out that the Claimant quit, specifically saying that the Claimant "voluntary quit by no call no show 1/29/15" and directing "see all attached." The attached information included the termination letter which set out that the Claimant was fired for being no call/no show on January 29, 2015. The information included the Employer's absenteeism policy which set out the requirement of a call in 30 minutes before shift. In addition, the information included disciplinary actions forms and among those were forms showing no call no show on August 14, August 15, August 19, September 20, September 27, October 17, October 31, and November 4 all in 2014. The information included a final last chance warning dated November 17, 2014.

REASONING AND CONCLUSIONS OF LAW:

The Administrative Law Judge conclusions of law are adopted by the Board as its own with the exception of the conclusions in the last two sentences of the conclusions of law. In lieu of these two sentences the Board makes the following conclusions of law

As an initial matter, we make clear that the Claimant was disqualified based on the separation from employment, and that **the disqualification decision still stands**. Indeed, the disqualification decision was not appealed by the Claimant. Our decision today has no effect on the disqualification issue since we have no jurisdiction over it.

What was appealed to the Board was the Administrative Law Judge's determination to charge the Employer for the overpayment based on the Administrative Law Judge's decision that the Employer failed to participate in fact finding. The regulations, cited by the Administrative Law Judge, set out the standard for determining participation:

> 24.10(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. ….If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. **In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7)**.

871 IAC 24.10(1). If the Employer met this standard of participation then the Claimant has to pay back the overpayment. Otherwise the Employer's account is chargeable for this amount and the Claimant is relieved of having to pay it back.

The written information the Employer submitted was sufficient to meet the standard of the regulation for the information that must be supplied if participation is to be in writing. The information required need only be such that "if unrebutted [it] would be sufficient to result in a decision favorable to the employer." 871 IAC 24.10(1). "In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7)." 871 IAC 24.10(1). The details of the Claimant's attendance record, as far as those can be known by the Employer, were supplied at the fact finding with much of the same supporting documentation that was supplied at hearing. We note that normally *details* about why an employee missed worked are known to the employee, not the employer, especially where the employer is a staffing firm as here. *See Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187, 191 (Iowa 1984) (Finding unexcused under the law absences for "oversleeping, delays caused by tardy babysitters, car trouble, and no excuse.") The Employer nevertheless at fact finding supplied information on the nature of the absences (no call/no show) such as was reasonably available to the Employer. In particular, the Claimant was repeatedly no call/no show and was no call/no show for the final absence. Just as these details were sufficient to disqualify after the hearing, so the information that was made available at the fact finding clearly meets the standard that the reasons for the discharge, if unrebutted, would lead to a finding for the Employer. The Employer thus satisfied the documentation requirement.

The contact information supplied by the Employer was sufficient to meet the requirement of the regulation to give the names of persons to contact for rebuttal, even assuming this requirement applies to written participation cases. The cover letter specifically listed two persons to call for rebuttal. Since the Employer gave the name and number of employees to contact with questions, this was sufficient to meet the requirement of giving the contact information for an employee "who may be contacted, if necessary, for rebuttal." 871 IAC 24.10(1). The people listed coordinate for the Employer and could make the necessary people available had they been called – and they were not. This is contact information sufficient to satisfy the purpose of the rule. Specifically, in the circumstances of this case, we find that the temporary staffing firm can supply the contact information of the coordinator who can route the fact finder to the other personnel if that is deemed necessary.

The Employer has satisfied the requirement of participation set out by regulation. The Employer is relieved of charges for the overpayment. The Claimant will be charged the overpayment.

<u>*Note to Claimant:*</u> The procedural aspects of this case are a little odd. The Claimant did not attend the hearing. We do not know if the Claimant had a legally sufficient excuse for not attending since she has filed no argument with the Board. We recognize, of course, that until today the Claimant had not been required to pay back benefits and thus did not choose to explain her absence at hearing. We point this out now so that the Claimant is explicitly aware of the ability to apply for rehearing of today's decision within 20 days of issuance of today's decision, *including* in the count weekends and holidays. The Claimant may make whatever argument for reopening that she thinks appropriate, and this would include argument explaining why the Claimant failed to attend the hearing. We are not saying the argument would necessarily prevail, only that we would consider it. We do caution that the 20-day deadline for applying for rehearing is not flexible.

DECISION:

The administrative law judge's decision dated April 21, 2015 is **REVERSED ON THE ISSUE OF OVERPAYMENT CHARGING**. The overpayment entered in the amount of $996 is chargeable to the Claimant and not to the Employer's account. The Claimant **remains disqualified** on the terms set out by the Administrative Law Judge as that decision was not appealed to the Board.

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Kim D. Schmett

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Ashley R. Koopmans

_____
James M. Strohman

RRA/fnv
DATED AND MAILED_____

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