IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

SIERRA P RATTRAY Claimant **ANKENY LIL TOTS DAYCARE PRESCHOOL** **Employer**	**APPEAL NO. 21A-UI-07024-B2-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/15/20** **Claimant: Respondent (1)**

Iowa Code § 96.6-2 – Timeliness of Appeal
Iowa Code § 96.5-2-a – Discharge for Misconduct
Iowa Code § 96.3-7 – Recovery of Overpayment of Benefits
Federal Law PL 116-136 Sec. 2104 – Eligibility for Federal Pandemic Unemployment Compensation
871 IA Admin. Code 24(10) – Employer Participation in Fact Finding

STATEMENT OF THE CASE:

Employer filed an appeal from the February 22, 2021, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on May 18, 2021. The employer did participate through Erica Abbot. Claimant failed to respond to the hearing notice and did not participate.

ISSUES:

Whether the appeal is timely?

Whether claimant was discharged for misconduct?

Whether claimant was overpaid benefits?

If claimant was overpaid benefits, should claimant repay benefits or should employer be charged due to employer's participation or lack thereof in fact finding?

Is the claimant eligible for FPUC or LWAP benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: A decision was mailed to the employer's last known address of record on February 22, 2021. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by March 4, 2021. The appeal was not filed until March 9, 2021, which is after the date noticed on the disqualification decision. Employer stated that she was away on vacation and did not assign anyone else to handle her mail and respond to it while she was gone. Claimant filed the appeal

once she'd returned from her vacation. Employer stated that the business was still in operation throughout the time she was on vacation.

Claimant worked as a full time assistant teacher for employer. Claimant was terminated from her job for vaping on company property. Claimant was not warned about vaping prior to her being terminated. Employer does not have a policy against vaping on the property, but does have a policy against using tobacco products on company property.

Employer stated that claimant had previously been warned about falling asleep while watching children and about keeping a proper eye on children. Employer stated that they have a policy where termination may occur on a third warning of any type.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.6(2) provides, in pertinent part:

> 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. . . . 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.

The ten calendar days for appeal begin 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 Iowa Admin. Code r. 871-26.2(96)(1) and Iowa Admin. Code r. 871-24.35(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 have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was not due to any Agency error or misinformation or delay or other action of the United States Postal Service pursuant to Iowa

Admin. Code r. 871-24.35(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. See, *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. IDJS*, 277 N.W.2d 877 (Iowa 1979).

The matter of overpayment of state and federal benefits is moot.

The matter of employer participation in fact finding is moot.

DECISION:

The February 22, 2021, reference 03, decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect.

Blair A. Bennett
Administrative Law Judge

May 24, 2021
Decision Dated and Mailed

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