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

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Appeal Number: 05A-UI-07445-SWT
OC: 05/29/05 R: 04
Claimant: Appellant (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 are 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 – Between-Terms Denial
871 IAC 24.52(7)(a) – Head Start Programs and Between-Terms Denial

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated July 19, 2005, reference 01, that concluded she was not eligible to receive unemployment insurance benefits between academic years because her benefits were based on services performed with an educational institution. A telephone hearing was held on August 4, 2005. The claimant participated in the hearing. Pam Damhorst participated in the hearing on behalf of the employer. Exhibits A and One were admitted into evidence at the hearing.

FINDINGS OF FACT:

The employer is a private nonprofit corporation that is the designated community action agency for Scott, Muscatine, Cedar, and Clinton counties in Iowa. As a community action agency, the employer's purpose, as set forth in its Employee Handbook, is to provide services and

assistance to low-income, elderly and disabled and promote self-sufficiency to address the causes and effects of poverty.

The employer administers several community services programs including the Head Start program, the early Head Start program, the community childcare resource and referral program, the child and adult care food program, the family development and self-sufficiency program, the low-income energy assistance program, and weatherization program. About 70 percent of the personnel and 70 percent of the budget of the employer are devoted to the Head Start program.

Head Start is a program funded by the United States Department of Health and Human Services that provides comprehensive education, health, nutrition, and parent involvement services to low-income children and their families to prepare the children for elementary school. The employer's Head Start program is licensed by the Iowa Department of Human Resources as a licensed childcare center and preschool. Neither the employer nor the employer's Head Start program is accredited as a school or school district by the Iowa Department of Education. The National Academy of Early Childhood Programs, a nongovernmental association, has accredited the employer's Head Start program for its early childhood program.

The employer operates several Head Start centers in its four-county service area. The centers are located in facilities leased from various entities, including the Bettendorf School District, the City of Davenport, the Davenport Community School District, the Durant Community School District, North Scott Community School District, West Liberty Community School District, and the Clinton/Jackson Empowerment Area. Typically, the leasing arrangement provides classroom space at no cost or reduced cost to the Head Start program. The periods of operation of the employer's Head Start centers vary from center to center, or even within a Head Start center depending on the classroom. Some of the Head Start centers or particular classrooms operate year-round. Some are open for ten months, but the bulk of the centers are open for nine months and close over the summer months. Head Start employees do not have contracts but are informed when they are hired about the duration of their employment. They are informed by the supervisors at the end of the term if and when they are to report back to work.

The claimant has worked as a teaching assistant in the employer's Head Start program since August 1997. She works in the Clinton Head Start center, which is not located in a school and only has Head Start in the building. Her position is funded partly with Head Start funding and partly with funding provided by the Clinton/Jackson Empowerment Area. The additional funding by the Clinton/Jackson Empowerment Area allows the claimant to work an extended six-hour period per day instead the previous four-hour period per day. The claimant works from mid-August to late May each year. In her position, she is laid off each year over the summer months and then returns to work when her Head Start room opens. She had no contract but understands at the end of May that she will return to work when her room opens again in August. She worked under this arrangement from August 2004 through May 2005 and has been assured by the employer that she will be employed in the same capacity from August 2005 through May 2006. The claimant's job involves assisting the teacher in providing the education, health, nutrition, and parent involvement services involved with the Head Start program.

The claimant filed a new claim for unemployment insurance benefits with an effective date of May 29, 2005. Her benefits are all based on the services performed for the employer.

REASONING AND CONCLUSIONS OF LAW:

The Federal Unemployment Tax Act (FUTA), 26 U.S. C. § 3301 et seq., enacted originally as Title IX of the Social Security Act in 1935, creates a cooperative federal-state program of unemployment compensation (UC) to unemployed workers. FUTA allows states discretion in setting up their unemployment insurance system but also establishes certain minimum federal standards that a state must satisfy in order for employers in a state to receive credit against their Federal unemployment tax. See 26 U.S.C. §3304(a). The standard at issue in this case, §3304(a)(6)(A), FUTA, requires that UC not be paid based on certain educational services between and within school years or terms under certain conditions.

This section is the product of the "Unemployment Compensation Amendments of 1976" (Public Law 94-566). Its major mandates are: (1) coverage of employees of state and local governments and their instrumentalities and nonprofit organizations; (2) equal treatment in the payment of UC to employees of such entities (equal treatment provision); and as an exception to the equal treatment provision, (3) denial of UC based on certain educational services performed for such entities between and within academic terms (between-terms denial provision). The between-terms denial provision in its current form sets forth required and optional denial provisions in (i) through (vi) of § 3304(a)(6)(A), FUTA (clauses (iv) and (v) were added in 1983). The six clauses are described below:

- Clause (i) requires, unless the specified conditions are met, the denial of UC between two successive academic years or terms based on instructional, research, and principal administrative services performed for an educational institution.
- Clause (ii) permits, under specified conditions, the denial of UC between years or terms based on all other (i.e., "nonprofessional") services performed for an educational institution, and retroactive payment based on those services, if no work is available in the second term.
- Clause (iii) requires the within terms denial of benefits during an established and customary vacation period or holiday recess based on all services performed for an educational institution.
- Clause (iv) requires the between and within terms denial of benefits based on all services performed in an educational institution while in the employ of an educational service agency (ESA).
- Clause (v) permits the State to implement the denial provisions of (i) through (iv) for services performed by governmental entities or nonprofit organizations if such services are provided to or on behalf of an educational institution.
- Clause (vi) permits the State to make the between and within terms denial provisions of clauses (iii) and (iv) optional based on the "nonprofessional" services described in clause (ii).

Unemployment Insurance Program Letter No. 41-97, Application of Between and Within Terms Denial to Head Start Program Personnel (U.S. Department Of Labor (DOL), September 30, 1997).

This background is essential to understanding the source of Iowa's between-terms denial. Iowa responded to the provisions of § 3304(a)(6)(A), FUTA by enacting Iowa Code §96.4-5, which explicitly adopts the equal treatment provision and in subsections a, b, c, and d enacts all of the required and optional clauses of § 3304(a)(6)(A), FUTA.

Iowa Code § 96.4-5-a and b, therefore, provide that benefits based on service "in an education 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 corporation" shall not be paid between academic years or terms if the employee worked in one academic year or term and has reasonable assurance of reemployment in the next year or term. This denial applies to services performed under subsection (a) in an instructional, research, or administrative capacity and under subsection (b) in any other capacity.

To assist the states in implementing the Unemployment Compensation Amendments of 1976, the DOL, Employment and Training Administration (ETA), issued Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976--P.L. 94-566 (August 26, 1977) (Draft Language and Commentary). In addition, the ETA interprets Federal law requirements pertaining to unemployment compensation (UC) as part of its role in the administration of the Federal-State UC program. These interpretations are issued in Unemployment Insurance Program Letters (UIPLs). The issue of the application of the between-terms denial to Head Start employees has been addressed in the Draft Language and Commentary and subsequent UIPLs. The most recent UIPL that addresses the issue, UIPL 41-97 (cited above) reviews the DOL position in the Draft Language and Commentary and subsequent UIPLs on the subject and concludes:

> Whether Head Start agencies are "educational institutions" was discussed in UIPL 40-79. That UIPL stated that Head Start programs operated by Community Action Groups do not meet the criteria of "educational institutions," and the between and within terms denial does not, therefore, apply to services performed for such groups. UIPL 40-79 stated, however, that when a local board of education operates a Head Start program as an integral part of the school system in facilities of an educational institution, with Head Start workers as employees of the board and the schools in every respect, subject to all employing policies, such as hiring, firing, working conditions, as other employees performing services for the educational institution, then such workers are considered to be employed by an educational institution. As such, these workers are subject to the denial provisions in the same manner as are all other educational institution employees. This remains the Department's position.

UIPL 41-97 next interprets clause (iv) set forth above and concludes that Head Start programs do not meet the definition of an ESA because they are not government entities operated exclusively to provide services to education institutions. Finally, in interpreting clause (v) set forth above, UIPL 41-97 concludes that whether services are "provided to or performed on behalf" of an educational institution depends on the facts of each individual case. If State law contains a provision implementing optional clause (v), a case-by-case determination must be made to determine if Head Start services are "provided to or on behalf of an educational institution."

The Iowa Workforce Development Department (IWD): (1) has authority in Iowa Code § 96.11-1 to adopt such rules as a deemed necessary to administer chapter 96, and (2) has an obligation in § 96.11-10 to cooperate with the United States Department of Labor and to take such action, through the adoption of appropriate rules to secure to the state and its citizens all the advantages provided by the federal act. Unquestionably, IWD promulgated 871 IAC 24.52(7) under the obligation stated in § 96.11-10 in order to adopt the DOL position regarding the application of the between-terms denial to Head Start employees employed by a community action agency. The rule 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 § 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.
>
> 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. (Emphasis added).

The representative who issued the determination in this case appears to have been influenced by the fact that 70 percent of the personnel and 70 percent of the budget of the employer are devoted to the Head Start program and by virtue of that concluded that the employer as a whole has the education of students as its primary function. This is a misinterpretation of the rule. The Iowa Supreme Court has ruled that principles of statutory construction apply to interpreting agency rules. Iowa Federation of Labor v. IDJS, 427 N.W.2d 443, 449 (Iowa 1988). In interpreting statutes, these principles teach that a more specific provision prevails over a more general provision. Christenson v. Iowa Dist. Court, 557 N.W.2d 259 (Iowa 1996). As a result, the more specific provision in 871 IAC 24.52(7)a should prevail over the general provision of 871 IAC 24.52(7). In fact, 871 IAC 24.52(7)a provides, as a matter of definition, that a community action agency that has Heart Start as a component is a nonprofit organization is not an educational institution because it has a public assistance purpose. This interpretation conforms to the position of DOL, which considering the source of Iowa's between-terms denial, is very persuasive authority on this issue. Furthermore, the fact that 70 percent of the budget and personnel are in Head Start program does not erase the fact that, as a whole, the employer's avowed purpose is to provide services and assistance to low-income, elderly and disabled and promote self-sufficiency to address the causes and effects of poverty. The question is not whether Head Start is educational but whether the employer is an educational institution. It is not, as shown by its mission and the various programs under its umbrella.

The unresolved question is whether the employer provides educational services "to or on behalf of an educational institution." Iowa Code § 96.4-5-a and b. Although evidence was presented that the employer has cooperative arrangements with some school districts to lease space for Head Start centers, the evidence does not prove the employer provides educational services to or on behalf of any educational institution. In particular, there is no evidence in the record that the Head Start center where the claimant worked in Clinton was even part of such a cooperative arrangement with a school district.

Finally, the employer cites Simpson v. Iowa Dep't of Job Service, 327 N.W.2d 775 (Iowa 1982), in support of its position that the between-terms denial applies to the claimant. Simpson, is distinguishable on a number of different grounds. First, there is no evidence that the Black Hawk-Buchanan County Head Start involved in Simpson was part of a community action agency. Second, there appears to be no recognition in Simpson of the fact that the source of the between-terms denial provision is one of the mandatory provisions of FUTA and certainly no consideration of DOL's position on this issue. Third, Simpson does not address 871 IAC 24.52(7)a, which is probably because the rule was adopted after Simpson was decided.

The equal treatment provision found in § 3304(a)(6)(A) FUTA and Iowa Code § 96.4-5 requires that employees of nonprofit organizations be treated equally with other employees under state

law, unless the exception in found in § 96.4-5 applies. State law grants benefits to individuals laid off due to lack of work, which is defined in 871 IAC 24.1(113)a as: "a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations."

There is a common misconception about the unemployment insurance program, which is that is the payment of unemployment insurance benefits is reserved for individuals who are unemployed unexpectedly. This is not the case. The employee who either knows or even agrees when she is hired that her employment is only for a particular duration is just as unemployed through no fault of her own as the worker who is laid off out of the blue. There is little difference between the claimant's situation and the situation of outdoor concrete workers in Iowa who knows that every year they will be laid off over the winter months. Iowa Code § 96.4-5 provides an exception to this scheme but one that must be applied strictly to avoid violating the equal treatment provisions of federal and state law. In this case, for the reasons presented above, the clamant is not subject to Iowa's between-term denial found in Iowa Code § 96.4-5.

DECISION:

The unemployment insurance decision dated July 19, 2005, reference 01 is reversed. The claimant is qualified to receive unemployment insurance benefits effective May 29, 2005, if she is otherwise eligible.

saw/tjc