

**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**

**STEVEN T HOSCH
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**HILLCREST FAMILY SERVICES
2005 ASBURY ROAD
DUBUQUE IA 52001-3042**

**Appeal Number: 05A-UI-07652-SWT
OC: 06/12/05 R: 04
Claimant: Respondent (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
Section 96.3-7 - Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated July 8, 2005, reference 01, that concluded the claimant was on a short-term layoff and eligible to receive unemployment insurance benefits. A telephone hearing was held on August 8, 2005. The claimant participated in the hearing. Julia Holdridge participated in the hearing on behalf of the employer with a witness, Mary Jo Pancratz. Exhibit One was admitted into evidence at the hearing.

FINDINGS OF FACT:

The employer is a private non-profit social service agency in Dubuque, Iowa. The employer has several different programs providing services to adults and children, including counseling, foster care, adoption, and residential facilities for adults and children with mental and emotional problems. One component of the employer's services is a kindergarten through 12th grade

(K-12) school located on the grounds of its organization's campus in Dubuque, Iowa (called the on-campus school), and satellite classrooms in other communities in northeastern Iowa. The school and classrooms are for students with behavioral problems that prevent them from being successful in a traditional classroom. About 20 percent of the personnel and 20 percent of the budget of the employer are devoted to the educational program operated by the employer.

Students who participate in the on-campus school are either students who have been placed in the employer's residential facilities or students who have been transferred from their home school to the on-campus school because of behavioral problems. Students in the satellite classrooms are students who have been transferred from their home school to the satellite classroom because of behavioral problems. The Dubuque School District and the employer have entered into what is termed a 28E Agreement, with the employer providing educational services and the Dubuque School District providing funding, administrative services, and educational accountability for the program. The employer's on-campus school is not accredited as a school by the Department of Education or any other government agency. The employer develops the curriculum in consultation with the Dubuque School District. Teachers are required to have college degrees and teaching certificates to teach for the employer. Teacher associates are not required to have any certification and the education required is a high school diploma.

Under the 28E Agreement, the employer is reimbursed by the Dubuque School District for the educational services it provides to students from the Dubuque School District. The students remain registered with the Dubuque School District and the credits earned are with the Dubuque School District. For students in the on-campus school or satellite classrooms who are not residents of the Dubuque School District, the financial arrangement is that the Dubuque School District reimburses the employer for education services provided to these students and then bills the home school district. Nonresident students remain registered with their home school district and earn credits in their home school district. For example, a student who successfully completes the 12th grade in the employer's on-campus school who is from Cedar Rapids will receive his diploma from his home school in Cedar Rapids.

The claimant began working for the employer as a youth care worker on November 22, 1991, and was employed year round. In August 1995, he began working as a teacher associate in the on-campus classroom. He works from late August to early June each year. He is laid off each year over the summer months and then returns to work when school starts again. He worked under this arrangement from August 23, 2004, through June 6, 2005. He was offered a contract on June 6, 2005, and was assured that he would be employed as a teacher associate from August 22, 2005 through June 2, 2006. The claimant's job involves assisting the teacher in providing instruction and behavioral adjustment to create an environment conducive to learning. The claimant has a college degree and teaching certificate that allows him substitute for teachers, but the credentials are not required for his teacher associate job.

The claimant filed a new claim for unemployment insurance benefits with an effective date of June 12, 2005. His benefits are all based on the services performed for the employer in the employer's school. The claimant filed for and received a total of \$1,322.00 in benefits for the weeks between June 12 and August 13, 2005.

REASONING AND CONCLUSIONS OF LAW:

The Federal Unemployment Tax Act (FUTA), 26 U.S. C. § 3301 et seq., creates a cooperative federal-state program of unemployment compensation (UC) for 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 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) through (vi) 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).

Iowa responded to the provisions of § 3304(a)(6)(A), FUTA by passing 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.

Iowa Code § 96.19-14 defines an "educational institution" as an entity: (1) in which students are offered an organized course of study or training designed to transfer to them knowledge or skills through an instructor or teacher; (2) which is approved, licensed or issued a permit to operate as a school by the department of education or other authorized government agency; and (3) which offers a course of study or training that may be academic, technical, trade or preparation for gainful employment.

As mentioned in the findings, the employer provides educational services under a 28E agreement. This refers to Iowa Code chapter 28E, which allows a public agency, including a local school district, to enter into an agreement with a private agency for joint or co-operative actions. Iowa Code § 28E.4. In this case, chapter 28E allows the Dubuque School District to share its educational authority with the employer by entering into a 28E agreement.

The employer is not an educational institution for two reasons. First, although the employer satisfies conditions (1) and (3) of Iowa Code § 96.19-14 set forth above, it does not satisfy (2) because it is not accredited as a school by the department of education or any other authorized government agency. This is true even though it operates under the Dubuque School District's educational authority. Second, the unemployment insurance rules provide that a nonprofit organization that has as its primary function civic, philanthropic or public assistance purposes does not meet the definition of an educational institution. 871 IAC 24.52(7)a. The employer in this case, as a whole, is a social services agency whose primary function is not the education of students. The employer also is not an "educational service agency," because it is not a government agency or government entity established and operated exclusively for the purpose of providing educational services to educational institutions. Iowa Code § 96.4-5-d.

The final question is whether the claimant's benefits are based on services "provided to or behalf of an educational institution" while in the employ of a nonprofit organization as set forth in Iowa Code § 96.4-5-a and b. The DOL Employment and Training Administration (ETA), interprets Federal law requirements pertaining to unemployment compensation as part of its role in the administration of the Federal-State UC program. These interpretations are issued in Unemployment Insurance Program Letters (UIPLs). UIPL No. 41-83, contains the instructions to the states on implementing the Social Security Amendments of 1983, which added the "provided to or on behalf of" language to the between-terms denial provisions of § 3304(a)(6)(A), FUTA. As a result, UIPL No. 41-83 provides persuasive authority on this question. UIPL No. 41-83 (Attachment I) states the words "provided to" require only that the services provided to the educational institution give some benefit or support to the institution, while the words "on behalf of" apply to services performed by employees of a governmental entity or nonprofit organization as an agent or representative of an educational institution.

The facts are clear that under the 28E agreement, the claimant was in the employ of a nonprofit organization providing services "to or on behalf of" the Dubuque School District or the local school districts where the students maintained their school residence. The employer is acting as an educational agent providing educational services to the students in place of their local schools. As a result, the claimant is subject to the "between-term" denial provisions of Iowa Code § 96.4-5-a and is denied benefits between school years effective June 12, 2005.

The next issue in this case is whether the claimant was overpaid unemployment insurance benefits.

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.

As a result of this decision, the claimant is disqualified from receiving unemployment insurance benefits and was overpaid \$1,322.00 in benefits for the weeks between June 12 and August 13, 2005.

DECISION:

The unemployment insurance decision dated July 8, 2005, reference 01, is reversed. The claimant is denied benefits between school years effective June 12, 2005. The claimant was overpaid \$1,322.00 in unemployment insurance benefits, which must be repaid.

saw/kjw