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

BRADLEY J HENDERSON	:	
	:	**HEARING NUMBER:** 19BUI-01667
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
WINGER CONTRACTING CO	:	
	:	
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: 96.4-3, 96.19-38B

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer 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. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Claimant, Bradley Henderson, worked for Winger Contracting Co. beginning March of 2018 as a full-time refrigeration service technician. The Employer and Union Local 91 contribute to a fund so that workers may attend training classes. When the Claimant was hired he had already been in the apprenticeship program.

As part of the apprenticeship program the Claimant participated in, he attended a training class in Cedar Rapids during the week ending February 16, 2019. This class was required for the Claimant to achieve journeyman status. Although the Employer benefits from having trained workers, the Claimant was *not* however required to attend the class in order to maintain his employment with the Employer. During that week the Employer did not pay the Claimant any wages. The Claimant was on a leave that week so that he could attend full-time classes. He had no intent of working that week for any employer.

For the week ending February 16, 2019, the Claimant received $467.00 in unemployment insurance benefits.

REASONING AND CONCLUSIONS OF LAW:

Voluntary Period of Unemployment: Iowa Administrative Code 871-24.23(10) states that a claimant is not eligible for benefits during any week that "[t]he claimant requested and was granted a leave of absence" because "such period is deemed to be a period of voluntary unemployment." This is comparable to rule 24.26(11) which provides that "the granting of a written release from employment by the employer at the employee's request …would constitute a period of voluntary unemployment by the employee and the employee would not meet the availability requirement…"

Here the Claimant is in an apprenticeship program, and understands that to be in the program he will need occasional time off work to attend training. Since the Employer would benefit as well, the Employer has agreed to the training leave of absence, but without pay. The evidence supports that the training was not mandatory in the sense that it was **not required** in order for the Claimant to keep working for the Employer. It was required to continue in the apprenticeship program, but the Claimant did not have to be in that program in order to do his job as refrigeration technician for the Employer. Nor does the evidence establish that attainment of journeyman status by some date certain was a mandatory condition of continued employment.

On this record it appears that the training was desirable to both parties, not a unilaterally imposed condition. As such the leave of absence for training – which was understood at the start of the apprenticeship - was one negotiated with the consent of both Employer and employee, and so "is deemed a period of voluntary unemployment for the employee-individual, and the individual is considered ineligible for benefits for the period." 871 IAC 24.22(2)(j). Thus benefits are denied for the week in question under a leave of absence theory.

General Unemployment Principles: We would reach the same conclusion even if we did not view this as a leave of absence. Clearly the Claimant was off work and so experienced a week of total unemployment. The stipend from the Union is not remuneration for services rendered to the Union and so does not constitute wages for partial unemployment benefits. In other words, the Claimant doesn't work for the Union. So we must focus on the job status with the Employer.

The Department of Labor has issued a guidance letter on apprenticeship training. Training and Employment Guidance Letter 12-09, which remains active, addresses the payment of unemployment compensation during subsidized work-based training initiatives for workers, such as registered apprenticeship programs. The TEGL first describes general unemployment principles, and then set out the implications of those principles. We quote at length:

> *Implications*. Because UC may only be paid to individuals with respect to their unemployment, it may not be paid to individuals who have not experienced unemployment during the week claimed. Similarly, UC may not be paid as a subsidy for employment (e.g. to make up the difference in hourly wages between the individual's former job and the individual's new, lower paying job) or as a stipend since it is not a payment "with respect to unemployment," but is instead a payment with respect to being employed. …

> *UC may be paid to individuals in training notwithstanding the requirement that they be able and available for work.* Federal UC law has always been interpreted as requiring states, as a condition of participation in the Federal-State UC program, to limit the payment of UC to individuals who are able and available (A&A) for work. (For additional information, see 20 CFR 604.5.) However, a state may consider an individual available for work "for all or a portion of the week claimed, provided that any limitation placed by the individual on his or her availability does not constitute a withdrawal from the labor market." Thus it would be **possible** for a state to consider individuals in work based training (for example, 20 hours a week) A&A **as long as they were available for work during some portion of the week**.
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> *UC may be paid to individuals in training approved by the state UC agency.* Federal law prohibits denial of UC to individuals participating in training with the approval of the state agency based on state law provisions relating to availability for work, active search for work, or refusal of work. However, individuals who are participating in employer sponsored "on-the-job training" are not "unemployed" and thus may not be paid UC unless they are not working full time during the week the on-the-job training takes place. **In TEGLs Nos. 21-08 and 21-08, Change 1, the Department encouraged states to broaden their definition of approved training and to implement procedures that would facilitate individuals' participation in training.** In TEGL No. 2-09, the Department provided information about recommended policies for approved training.
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> *Individuals working part-time may be eligible for UC*. Each state's UC law includes provisions for UC payments to individuals who are partially unemployed. Depending on state law requirements concerning monetary and non-monetary eligibility, individuals who are earning part-time wages may be eligible for UC **as long as they are unemployed for some part of the week being claimed**.

TEGL, 12-09 p. 6-7 (emphasis added). The upshot is that there are specific conditions which will allow payment of unemployment. Partial unemployment, approved training, and temporary unemployment are all exceptions to the able, available, and work-seeking requirements. None apply here.

Partial Unemployment: If the worker is working part of the week, and is partially unemployed, then the worker would not have to be available under Iowa Code §96.4(3) and *TEGL 12-09* makes clear this would be consistent with Federal law. But this Claimant was not partially unemployed. A Union training stipend does not meet the definition of wages, and being paid an educational stipend while you attend class is not employment. *See* 871 IAC 23.3(3)(c)("Members of a union, *subject to the direction and control of the union and acting on behalf of the union*, are considered employees of the union with respect to the services performed."); 871 IAC 24.13(2)(d)(strike pay is considered wages and deductible from benefits but only "when it is a payment received for services rendered and the individual is otherwise eligible for benefits"). So unless the Claimant was drawing some other wages for the work in question we must view him as totally, not partially unemployed.

It is inconceivable to us that total unemployment can be viewed as a special case of partial unemployment where the wage equals zero. If this were the case then all layoffs would be

subsumed under the definition of partial unemployment. Under the Code when an “individual’s employment although temporarily suspended,

has not been terminated" and the period of suspension is for enumerated reasons, and for no more than four weeks then the worker need to be available for, or seeking work. See 871 IAC 21.1(113)(a)("A layoff is a suspension from pay status initiated by the employer…"). If we viewed all such suspensions of paid status to be partial unemployment then a worker would never have to be available for work, or seeking work, while on layoff no matter for how long. The concepts are different and one is not a subcategory of the other. This being the case, the Claimant is totally unemployed for the week in question. Thus we cannot rely on partial unemployment to excuse the Claimant from complying with the able, available, and actively seeking work requirements.

Approved Training: As mentioned by TEGL 12-09 a broad concept of approved training might allow collection of benefits during a week of classroom training without meeting the requirements of Iowa Code §96.4(3). But Workforce has not implemented such a broad concept and there has been no approval of the training in this case. Thus the Claimant is not excused from the requirements by being on approved training.

Temporary Unemployment. Under Code §96.4(3) a worker who is temporarily unemployed need not meet the availability and job seeking requirements. But the definition of temporary unemployment is statutory:

> c. An individual shall be deemed temporarily unemployed if for a period, verified by the department, not to exceed four consecutive weeks, the individual is unemployed due to a **plant shutdown, vacation, inventory, lack of work, or emergency from the individual's regular job** or trade in which the individual worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated.

Iowa Code §96.19(38)(c). Being off for training does not fit this paragraph. It is not any of the listed categories of temporary unemployment and does not meet the statutory definition. We thus cannot find the Claimant is excused from the availability and job seeking requirements by being temporarily unemployed.

Upshot: The Claimant was not partially unemployed, temporarily unemployed, or on approved training. He met none of the exceptions to being able and available and actively seeking work. He thus is disallowed benefits even if we do not treat this as an agreed leave of absence.

No Overpayment: Finally, since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule:

> 871 IAC 23.43(3) Rule of two affirmances.
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> a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.
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> b. However, if the decision is subsequently reversed by higher authority:

(1) The protesting employer involved shall have all charges removed for all payments made on such claim.
(2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.

(3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

Thus the Employer's account may not be charged for any benefits paid so far to the Claimant for the weeks in question, but **the Claimant will not be required to repay benefits already received.**

DECISION:

The administrative law judge's decision dated March 27, 2019 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was not able and available for week for the week ending February 16, 2019. Accordingly, he is denied benefits for that week.

No remand for determination of overpayment need be made under the double affirmance rule, 871 IAC 23.43(3), but still the Employer's account may not be charged.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv