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

SARA J TIMMERMAN
317 W WEBSTER ST
CUBA CITY WI 53807-4433

HILLCREST FAMILY SERVICES
2005 ASBURY RD
DUBUQUE IA 52001-3042

Appeal Number: 06A-UI-01205-RT
OC: 12-25-05 R: 12
Claimant: Respondent (1)

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 is 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 – Benefits Based on Service for an Educational Institution
Section 96.4-3 – Required Findings (Able and Available for Work)
Section 96.7-2-a-2 – Employer Contributions and Reimbursements (Different Employment – Benefits Charged)
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Hillcrest Family Services, filed a timely appeal from an unemployment insurance decision dated January 24, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Sara J. Timmerman. After due notice was issued, a telephone hearing was held on February 16, 2006, with the claimant not participating. Julia Holdridge, Director of Human Resources, and Mary Jo Pancratz, Principal, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department

unemployment insurance records for the claimant. Employer's Exhibit One was admitted into evidence.

At 4:17 p.m. on February 9, 2006, the claimant called and spoke with the administrative law judge. The claimant asked if she had to participate in the hearing. The administrative law judge informed her that she did not have to participate, but if she did not, the chances were better that the claimant might lose. The claimant informed the administrative law judge that she did not now want unemployment insurance benefits and would not be participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where she or any of her witnesses could be reached for the hearing as instructed in the notice of appeal. The claimant did not participate in the hearing.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibit One, the administrative law judge finds: the claimant was and still is employed by the employer as a teacher associate, teaching students with behavioral disorders, since September 19, 2005. The claimant has not been permanently separated from her employment, but has been off work or temporarily unemployed from December 23, 2005 to January 3, 2006, during the time that the employer's school was closed for the holidays. The claimant fully expected to be employed following the holiday and has been back at work since.

The employer is a non-profit organization and is not a government entity. The employer provides services in three separate divisions: Children and Family Services, Adult Mental Health Services, and Community Health Services. The claimant is employed in the first division, Children and Family Services. In that division, the employer maintains the Hillcrest school as well as satellite classes. The claimant teaches at the Hillcrest school. Other than the Hillcrest school and the satellite schools or classes, none of the employer's other services are educational related. The two other divisions do not provide any educational related activities or programs. Approximately 20 percent of the employer's budget is spent on the employer's campus school and its satellite classes. Approximately 70 out of 350 employees, or 20 percent, of its employees work for the Hillcrest school and the satellite classes. This is the same percentage for full time equivalency employees or FTE's. The employer is not licensed or approved or issued a permit to operate as a school by the Iowa State Department of Education or any other government agency authorized to approve, license, or issue permits for the operation of the school. The employer has a 28E Agreement under Iowa Code Chapter 28E, with the Dubuque Community School District for providing the Hillcrest school and the satellite schools. Students at the employer's schools must be enrolled in the Dubuque Community School District or other community school district. However, employees of the employer including, and especially, the employees in the Hillcrest school and satellite schools are not employees of the Dubuque Community School District or any other community school district. Teacher associates such as the claimant, assist in the academic area and instruction of individual students. The claimant's contract appears at Employer's Exhibit One.

Pursuant to her claim for unemployment insurance benefits filed effective December 25, 2005, the claimant has received no unemployment insurance. The claimant has other earnings from non-school employers in her base period sufficient to maker her otherwise monetarily eligible to receive unemployment insurance benefits.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant is temporarily unemployed but still job attached to an educational institution between two successive academic years or terms and has reasonable assurance of continued employment and, therefore, would be ineligible to receive unemployment insurance benefits between the two academic years or terms or during holiday recesses. The administrative law judge concludes that the claimant is not employed by an educational institution between two successive academic years or terms or during holiday recesses, although she has reasonable assurance of being employed in the second school term, 2006, as she was employed in the prior school term, 2005, and, therefore, she is not ineligible to receive unemployment insurance benefits between the two successive academic terms.

2. Whether the claimant is ineligible to receive unemployment insurance benefits because at relevant times she was not able, available, and earnest and actively seeking work. She is not ineligible to receive unemployment insurance benefits for these reasons.

3. Whether the claimant was receiving the same employment from the employer that she received during her base period and therefore the account of the employer herein should not be charged for any unemployment insurance benefits to which the claimant is entitled. The claimant is not receiving the same employment that she received during her base period and, therefore, any unemployment insurance benefits to which the claimant is entitled may be charged against the account of the employer herein.

4. Whether the claimant was overpaid unemployment insurance benefits. She is not.

Iowa Code Section 96.4-5-a, c provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:
>
> 5. Benefits based on service in employment in a nonprofit organization or government entity, defined in section 96.19, subsection 18, are payable in the same amount, on the same terms and subject to the same conditions as compensation payable on the same basis of other service subject to this chapter, except that:
>
> a. Benefits based on service in an instructional, research, or principal administrative capacity in an educational 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 organization shall not be paid to an individual for any week of unemployment which begins during the period between two successive academic years or during a similar period between two regular terms, whether or not successive, or during a period of paid sabbatical leave provided for in the individual's contract, if the individual has a contract or reasonable assurance that the individual will perform services in any such capacity for any educational institution for both such academic years or both such terms.
>
> c. With respect to services for an educational institution in any capacity under paragraph "a" or "b", benefits shall not be paid to an individual for any week of unemployment which begins during an established and customary vacation period or

> holiday recess if the individual performs the services in the period immediately before such vacation period or holiday recess, and the individual has reasonable assurance that the individual will perform the services in the period immediately following such vacation period or holiday recess.

871 IAC 24.51(6) provides:

> School definitions.
>
> (6) Reasonable assurance, as applicable to an employee of an educational institution, means a written, verbal, or implied agreement that the employee will perform services in the same or similar capacity, which is not substantially less in economic terms and conditions, during the ensuing academic year or term. It need not be a formal written contract. To constitute a reasonable assurance of reemployment for the ensuing academic year or term, an individual must be notified of such reemployment.

871 IAC 24.52(7) 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 section 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.
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> b. A head start program which is an integral part of a public school system conducted by a board of education establishes an employing unit whose primary function is educational; therefore, the between terms denial would apply.

The administrative law judge concludes that there is not a preponderance of the evidence that the claimant is employed by an educational institution. The employer is a non-profit organization, which does provide, as one part of its services and functions, an organized course of study or training designed to transfer knowledge. It has a 28E Agreement with, among other schools, the Dubuque Community School District and provides educational services to individuals with disabilities, including those individuals with behavioral problems. However, the employer is not a school district or any other governmental entity, but is a non-profit organization. The employer provides other programs or functions as well. It has three divisions. Other than the Hillcrest school and the satellite classes, the employer's other services and functions are for the purposes of civic, philanthropic, or public assistance purposes. Though the employer is a non-profit organization, it is not approved, licensed or issued a permit to operate as a school by the Department of Education or any other government agency and is therefore not an educational institution under 871 IAC 24.51(1) and Iowa Code section 96.19(14).

The issue then becomes whether the employer, or the employing unit, has as its primary function, the education of students so as to, in effect, make it an educational institution under

871 IAC 24.52(7). Although that rule seems to be addressed to head start programs, the applicable provisions of that rule refer to "employing unit." That rule provides that when an employing unit is operated primarily for educational purposes, then the between terms denial established by Iowa Code section 96.4(5) will apply between the two successive academic years or terms or holiday recesses. The administrative law judge is constrained to conclude that the employer here does not have, as its primary function, the education of students. Approximately 20 percent of the employer's budget is devoted to the operation of the Hillcrest school and other satellite schools. Seventy out of 350 employees, or 20 percent of its employees, are utilized in the campus school and its satellite schools. The same percentage of full time equivalency employees (FTE's) are so utilized for the employer's schools. The remaining budget, staff, and FTE's are devoted to the other functions of the employer, which are not educational. Accordingly, the administrative law judge is constrained to conclude that the employer here, or the employing unit, does not have, as its primary function, the education of students and therefore is not an educational institution and the between terms denial established by Iowa Code section 96.4-5, does not apply.

The administrative law judge is not unmindful of decisions by the Employment Appeal Board in 05B-UI-06194 and 05B-UI-06588, in which the Employment Appeal Board basically determined that head start programs are not educational institutions, no matter what the primary function might be. The decision addresses only head start programs but the administrative law judge sees no practical difference between an employer who has a head start program and an employer who conducts other educational services. The rule is clear that head start programs are considered educational in nature. At one point the rule does also speak to community action programs, but again, the administrative law judge sees no difference between a community action program and another non-profit organization such as the employer herein. Under the reasoning of the Employment Appeal Board, any such employing unit is not an educational institution for the purposes of the between terms denial.

The administrative law judge is also not unmindful of decisions by another administrative law judge in appeals 05A-UI-07651-SWT, 05A-UI-07652-SWT and 05A-UI-07517-SWT. In those decisions, the administrative law judge determined that the between terms denial applied to the employer herein only because the employer herein had a 28E Agreement with the Dubuque Community School District. The administrative law judge concluded that the employer was acting as an educational agent providing educational services to the students in place of the local schools. The administrative law judge concluded, therefore, that the claimants were subject to the between terms denial provisions of Iowa Code section 96.4(5). The administrative law judge respectfully disagrees. It may well be that the employer here is an agent of the Dubuque Community School System. However, the administrative law judge is not aware of any provision in agency law that automatically confers, conveys, or bestows the character of the principal upon an agent. Through example, a real estate agent representing the seller does not, as a result of the agency relationship, become the seller or take on the characteristics of the seller. The administrative law judge who determined that the between terms denial applied also referred to Iowa Code Chapter 28E, stating that Iowa Code Chapter 28E allows the Dubuque Community School District to share its educational authority with the employer by entering into a 28E Agreement. Again, the administrative law judge respectfully disagrees to the extent that, by virtue of a 28E Agreement, the Dubuque Community School District bestows or confers upon the employer, the character of an educational institution. Nothing in Iowa Code Chapter 28E provides that the character of the government entity or subdivision is conveyed through or conferred upon the other party in a 28E Agreement. Even if the employer provides services "to or on behalf" of the Dubuque Community School District, that is not its primary function as discussed above. Finally, in

appeal 05B-UI-06877 the Employment Appeal Board ruled similarly determining that "the employer's cooperative agreements do not alter our analysis."

It is true that there is a preponderance of the evidence that the claimant has reasonable assurance that she will be returning to the employer and performing the same or similar services in the new or ensuing school term, 2006, that she did in the prior academic term, 2005. It is also true that the claimant provides services in an instructional capacity. However, the administrative law judge, as noted above, is constrained to conclude that the employer is not an educational institution, nor does it have, as its primary function, the education of students and is therefore, not an educational institution for the purposes of the between terms denial of unemployment insurance benefits established by Iowa Code section 96.4-5. Therefore, the administrative law judge concludes that the claimant is not ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided she is otherwise eligible.

The administrative law judge notes that even if the between terms or years denial under Iowa Code section 96.4(5) applied, the claimant is otherwise monetarily eligible to receive unemployment insurance benefits based on non-school wages or wage credits from other employers in her base period and the claimant would still be eligible and entitled to receive unemployment insurance benefits based on those earnings.

Iowa Code Section 96.4-3 provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:
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> 3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The administrative law judge concludes that the claimant has the burden to prove that she is able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that although the claimant did not participate in the hearing, there is nonetheless a preponderance of the evidence that she is excused from the provisions requiring her to be available for work and earnestly and actively seeking work. The evidence establishes that the claimant was an employee of the employer for the 2005 school term and that she performed services for the employer in that school term and will be performing the same services in the new or ensuring school term, 2006. In fact, the claimant's contract so provides at Employer's Exhibit One. The claimant was not working for the employer during the holiday recess or between the two academic years or terms because of a lack of work from the claimant's regular job in which the claimant worked full time prior to the summer recess and will again work full time. Accordingly, the administrative law judge concludes that the claimant is temporarily unemployed under Iowa Code section 96.19(38)(c) and is not subject to the requirements that she be available for work and earnestly and actively seeking work. There is no evidence that the claimant is not able to work. She worked for the

employer in the 2005 school term and is ready, willing, and able to work in the 2006 school term. Accordingly, the administrative law judge concludes that the claimant is able to work. Therefore, the administrative law judge concludes that the claimant is able to work and is excused from the provisions that require her to be available for work and earnestly and actively seeking work and, as a consequence, the claimant is not ineligible to receive unemployment insurance benefits if she is otherwise entitled to such benefits.

Iowa Code Section 96.7-2-a(2) provides:

> 2. Contribution rates based on benefit experience.
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> a. (2) The amount of regular benefits plus fifty percent of the amount of extended benefits paid to an eligible individual shall be charged against the account of the employers in the base period in the inverse chronological order in which the employment of the individual occurred.
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> However, if the individual to whom the benefits are paid is in the employ of a base period employer at the time the individual is receiving the benefits, and the individual is receiving the same employment from the employer that the individual received during the individual's base period, benefits paid to the individual shall not be charged against the account of the employer. This provision applies to both contributory and reimbursable employers, notwithstanding subparagraph (3) and section 96.8, subsection 5.
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> An employer's account shall not be charged with benefits paid to an individual who left the work of the employer voluntarily without good cause attributable to the employer or to an individual who was discharged for misconduct in connection with the individual's employment, or to an individual who failed without good cause, either to apply for available, suitable work or to accept suitable work with that employer, but shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.
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> The amount of benefits paid to an individual, which is solely due to wage credits considered to be in an individual's base period due to the exclusion and substitution of calendar quarters from the individual's base period under section 96.23, shall be charged against the account of the employer responsible for paying the workers' compensation benefits for temporary total disability or during a healing period under section 85.33, section 85.34, subsection 1, or section 85A.17, or responsible for paying indemnity insurance benefits.

The administrative law judge concludes that the claimant was not receiving the same employment from the employer during her base period as she was during the holiday recess from December 23, 2005 to January 3, 2006, between academic terms. In the2005 term, she was employed full time by the employer. During the holiday recess of 2005, the claimant was not employed by the employer, at least during the period in which she applied for benefits. Accordingly, the administrative law judge concludes that although the claimant is or was at relevant times not working for the employer, she was still in the employment of the employer, but not under the same terms and conditions and wages and hours as she was employed during her base period. Accordingly, the administrative law judge concludes that any unemployment insurance benefits to which the claimant is entitled may be charged against the

account of the employer herein and the account of the employer herein shall not be relieved of any charges for any unemployment insurance benefits to which the claimant is entitled.

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.
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> If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received no unemployment insurance benefits, but even if she had, she would not be overpaid such benefits.

DECISION:

The representative's decision of January 24, 2006, reference 01, is affirmed. The claimant, Sara J. Timmerman, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she is able to work and is not subject to the requirements that she be available and earnestly and actively seeking work because she is temporarily unemployed but remains job attached. Since the claimant is not receiving the same employment from the employer as she did during her base period, the employer may be charged for the unemployment insurance benefits to which the claimant is entitled and the employer's account shall not be relieved of any such charges. The employer is not an educational institution and therefore the "between terms or academic years denial" of unemployment insurance benefits under Iowa Code section 96.4(5) does not apply. The claimant has received no unemployment insurance benefits, but even if she had, she would not be overpaid such benefits.

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