IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

CLINT L DEVORE Claimant **CHILDSERVE HOMES INC** Employer	**APPEAL 20A-UI-07353-JC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/15/20** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview
PL116-136, Sec. 2104 – Federal Pandemic Unemployment Compensation (FPUC)

STATEMENT OF THE CASE:

The employer/appellant, Childserve Homes Inc., filed an appeal from the April 15, 2020 (reference 01) Iowa Workforce Development ("IWD") unemployment insurance decision that allowed benefits. A first hearing was scheduled for August 4, 2020 but continued to allow the parties to receive the opposing party's proposed exhibits. The parties were properly notified about the second hearing. A telephone hearing was held on August 18, 2020. The claimant, Clint L. Devore, participated. The employer participated through Drew Wilson, staff relations specialist.

The administrative law judge took official notice of the administrative records. Department Exhibit D-1 was admitted. Employer Exhibit A, and Claimant Exhibits B, C, and D were also admitted. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Is the appeal timely?
Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?
Is the claimant eligible for Federal Pandemic Unemployment Compensation?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a resident assistant and was separated from employment on

March 9, 2020. He last performed work on December 13, 2019. The evidence is disputed as to whether the claimant quit or was discharged.

Prior to the claimant's final day of work in December 2019, he had reported to management issues he was having with co-workers, and specifically, his manager. The issues were unresolved when he went on a prescheduled vacation December 14, 2019 through January 5, 2020. He then began a leave of absence effective January 6, 2020 for personal medical issues.

The claimant had worked overnights, during the weeknights, at the "Johnston Duplex" location. At the end of his leave of absence, the employer had replaced the claimant at the Johnston Duplex. The employer had no work available to the claimant as a resident assistant, working weeknights on an overnight shift, as he had before his leave of absence. When the claimant refused to accept work on other shifts, the employer initiated separation, effective March 9, 2020.

The administrative record reflects that claimant has received unemployment benefits in the amount of $10,101.00, since filing a claim with an effective date of March 15, 2020.

The claimant also received federal unemployment insurance benefits through Federal Pandemic Unemployment Compensation (FPUC). Claimant received $600 payments for seventeen weeks for a total of $10,200.

The administrative record also establishes that the employer did not participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. Mr. Wilson usually attends the fact-finding interviews and relies upon internal staff who handle mail and distribute IWD mail to him. Due to internal staff issue, the mail was given to a human resources representative rather than Mr. Wilson, who was unaware of the scheduled call until after it occurred.

An initial unemployment insurance decision (Reference 01) resulting in an allowance of benefits was mailed to the employer's last known address of record on April 15, 2020. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by April 25, 2020. Because April 25, 2020 was a Saturday, the final day to appeal was extended to April 27, 2020. The employer received the decision within the appeal period.

The employer stated it had filed an appeal via fax on April 20, 2020. The employer did not have proof of submission, a cover letter or any other proof of submission. The employer checked with IWD in June when it had not received any information about the appeal and learned the appeal had not been received. The appeal was not filed until July 1, 2020 (Department Exhibit D-1), which is after the date noticed on the disqualification decision. When the appeal was filed on July 1, 2020, it contained a letter dated April 17, 2020, the initial decision and then attached documents with a banner reflecting they were printed on July 1, 2020 (and not April 20. 2020). *See Department Exhibit D-1 and Employer Exhibit A.*

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the appeal is untimely.

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

> Filing – determination – appeal.

> 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.

Iowa Admin. Code r. 871-24.35(2) provides:

> Date of submission and extension of time for payments and notices.
> (2) The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the division that the delay in submission was due to division error or misinformation or to delay or other action of the United States postal service.
> a. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
> b. The division shall designate personnel who are to decide whether an extension of time shall be granted.
> c. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the department after considering the circumstances in the case.
> d. If submission is not considered timely, although the interested party contends that the delay was due to division error or misinformation or delay or other action of the United States postal service, the division shall issue an appealable decision to the interested party.

The ten calendar days for appeal begins 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).

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. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 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. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 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 employer stated it filed its appeal on April 20, 2020 by fax machine. This date does not match the date of letter drafted by the employer, or the print off date of documents attached with the July 1, 2020 appeal.

Regular proceeding by the agency would have meant that the appeal would be retained, and the appeal would be docketed, and a hearing with the Appeals Bureau would be conducted. None of this occurred before the employer's appeal was received by the Appeals Bureau on July 1, 2020. Had it been received prior to July 1, 2020, the regular process should have been triggered, but it was not. "The proceedings of all officers and courts of limited and inferior jurisdiction within the state shall be presumed regular". Iowa Code §622.56; accord *City Of Janesville v. McCartney*, 426 N.W.2d 785 (Iowa 1982). Thus, there is a presumption, from Workforce Development having no record of an appeal prior to July 1, 2020, that no appeal was received by Workforce. This is not an absolute presumption, but is instead a presumption that may be overcome with sufficient probative evidence.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). Administrative agencies are not bound by the technical rules of evidence. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*.

The administrative law judge concludes that the employer simply did not supply evidence sufficient to overcome the presumption. The employer witness testified that the appeal was sent by fax on April 20, 2020. The employer provided no transmission report, no phone records, no fax cover sheet pertaining to the purported fax. The Employer has none of this. Weighing the evidence carefully, the administrative law judge concludes that the appeal was not timely filed because it was not in fact received by Workforce Development.

The administrative law judge concludes that failure to follow the written instructions 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 § 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. Iowa Dep't of Job Serv.*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. Iowa Dep't of Job Serv.*, 277 N.W.2d 877 (Iowa 1979).

In the alternative, even if the appeal was deemed timely filed, the administrative law judge concludes the claimant would be eligible for benefits, because the claimant did not quit, but was discharged for no disqualifying reason.

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). A voluntary leaving of

employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). In this case, the claimant did not have the option of remaining employed nor did he express intent to terminate the employment relationship. Where there is no expressed intention or act to sever the relationship, the case must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

Iowa Admin. Code r.871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Separation occurred here after the claimant went on FMLA and learned the employer no longer had a full-time residential advisor shift, working overnights for the weekdays available when he returned from FMLA. The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa Ct. App. 1985). Here, the claimant's history was working weekdays, overnight shifts, which he reasonably expected to return to (whether at the facility he had been at or another) after his leave of absence. The claimant's refusal to move to weekends overnights or day shifts was reasonable under the circumstances. Based on the evidence presented, the administrative law judge concludes the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

Because the claimant is eligible for benefits, the issues of overpayment of regular unemployment insurance benefits and relief of charges are moot.

The final issue to address is whether the claimant is eligible for Federal Pandemic Unemployment Compensation (FPUC).

PL116-136, Sec. 2104 provides, in pertinent part:

> (b) Provisions of Agreement
>
> (1) Federal pandemic unemployment compensation.--Any agreement under this section shall provide that the State agency of the State will make payments of regular compensation to individuals in amounts and to the extent that they would be determined if the State law of the State were applied, with respect to any week for which the individual is (disregarding this section) otherwise entitled under the State law to receive regular compensation, as if such State law had

> been modified in a manner such that the amount of regular compensation (including dependents' allowances) payable for any week shall be equal to
>
> (A) the amount determined under the State law (before the application of this paragraph), plus
>
> (B) an additional amount of $600 (in this section referred to as "Federal Pandemic Unemployment Compensation").
>
> ….
>
> (f) Fraud and Overpayments
>
> (2) Repayment.--In the case of individuals who have received amounts of Federal Pandemic Unemployment Compensation to which they were not entitled, the State shall require such individuals to repay the amounts of such Federal Pandemic Unemployment Compensation to the State agency…

Because the claimant is allowed regular unemployment insurance benefits, he is also eligible for FPUC, provided he is otherwise eligible. The employer is not charged for these federal benefits.

The parties are reminded that under Iowa Code § 96.6-4, a finding of fact or law, judgment, conclusion, or final order made in an unemployment insurance proceeding is binding only on the parties in this proceeding and is not binding in any other agency or judicial proceeding. This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise.

DECISION:

The April 15, 2020, (reference 01) unemployment insurance decision is affirmed. The appeal was not timely filed. The appeal in this case was not timely, and the decision of the representative remains in effect.

Jennifer L. Beckman
Administrative Law Judge
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August 25, 2020
Decision Dated and Mailed

jlb/sam