

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

BOBBIJO PAGE

Claimant,

and

USA STAFFING INC LABOR WORLD IA

Employer.

:
:
:
:
:
:
:
:
:

HEARING NUMBER: 10B-UI-06155

**EMPLOYMENT APPEAL BOARD
DECISION**

SECTION: 10A.601 Employment Appeal Board Review

D E C I S I O N

FINDINGS OF FACT:

A hearing in the above matter was held on June 15, 2010. The administrative law judge's decision was issued June 17, 2010. The administrative law judge's decision has been appealed to the Employment Appeal Board.

A disqualification decision was mailed to Bobbijo Page (Claimant) on April 1, 2010. The appeal to the Administrative Law Judge was due on April 12, 2010. An appeal was faxed to the appeals section on April 23, 2010. The Claimant testified that she mailed and faxed the appeal to the local office at some earlier dates. The record does not reveal when these times were, nor whether or not the Claimant has any fax reports or other proof that in fact the appeal was sent earlier.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 10A.601(4) (2009) provides:

5. Appeal board review. The appeal board may on its own motion affirm, modify, or set aside any decision of an administrative law judge on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it. The appeal board shall permit such further appeal by any of the parties interested in a decision of an administrative law judge and by the representative whose decision has been overruled or modified by the administrative law judge. The appeal board shall review the case pursuant to rules adopted by the appeal board. The appeal board shall promptly notify the interested parties of its findings and decision.

Iowa Code 96.6 provides:

2. *Initial determination.* ... 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.

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 - but not conclusive - evidence of the date of mailing.

There is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and the Administrative Law Judge and this Board have no authority to change the decision of representative if a timely appeal is not filed. *Franklin v. Iowa Dept. Job Service*, 277 N.W.2d 877, 881 (Iowa 1979). The ten day period for appealing an initial determination concerning a claim for benefits has been described as jurisdictional. *Messina v. Iowa Dept. of Job Service*, 341 N.W.2d 52, 55 (Iowa 1983); *Beardslee v. Iowa Dept. Job Service*, 276 N.W.2d 373 (Iowa 1979). The only basis for changing the ten-day period would be where notice to the appealing party was constitutionally invalid. *E.g. Beardslee v. Iowa Dept. Job Service*, 276 N.W.2d 373, 377 (Iowa 1979). The question in such cases becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. *Hendren v. Iowa Employment Sec. Commission*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Employment Sec. Commission*, 212 N.W.2d 471 (Iowa 1973). The question of whether the Employer has been denied a reasonable opportunity to assert an appeal is also informed by rule 871-24.35(2) which states that "the submission of any ...appeal...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."

The Administrative Law Judge focused on the date the appeal was received in the Appeals Office. We are aware that the rules of Workforce describe an appeal as being filed by its delivery to the Appeals section. We leave for another day whether this rule is mandatory or whether it is merely directory - such as the requirement of a statement of grounds found in the same rule. We defer this question because, regardless, if the appeal was delivered to a local office earlier then any delay in perfecting the appeal with the Appeals section would become the fault of the agency. This is the sort of error of Workforce that excuses the late faxing under rule 871-24.35(2). We do not have evidence on these asserted earlier attempts to appeal so we remand.

In conducting the new hearing the Administrative Law Judge should take evidence on the circumstances surrounding the appeal of the April 1, 2010 claims representative decision, including whether the Claimant had, prior to April 23, sent appeals to the local office. The hearing may also, in the Administrative Law Judge's discretion, address whether the June 17, 2010 was correct in its conclusion that the protest was untimely and, if necessary, the merits of whether the Claimant should be eligible for benefits.

DECISION:

The decision of the administrative law judge dated June 17, 2010, is not vacated at this time. This matter is remanded to an administrative law judge in the Workforce Development Center, Appeals Section. The administrative law judge shall conduct a new hearing following due notice addressing the issues in a manner consistent with our decision. After the hearing, the administrative law judge shall issue a decision that provides the parties appeal rights.

John A. Peno

Elizabeth L. Seiser

RRA/fnv