

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**ALICE SMITH**  
Claimant

**APPEAL NO: 13A-UI-01138-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CITY OF DES MOINES PAYROLL**  
Employer

**OC: 12-23-12**  
**Claimant: Respondent (2R)**

Section 96.4-3 – Able and Available for Work  
Section 96.4-3 – Same Hours and Wages  
Section 96.3-7 – Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the January 25, 2013, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on February 26, 2013. The claimant participated in the hearing. Phyllis Morris, Human Resources Analyst, participated in the hearing on behalf of the employer. Employer's Exhibit One was admitted into evidence.

**ISSUE:**

The issues are whether the claimant is able and available for work and whether the claimant is still employed with the employer for the same hours and wages as contemplated in the original contract of hire.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was hired as a part-time, less than half-time associate with the Park and Recreation Department for the City of Des Moines April 5, 2011. She continues to be employed in that capacity with no change in her hours or wages.

On May 15, 2012, the claimant signed a Terms of Employment agreement which stated, "I, Alice M. Smith, understand that the Park & Recreation Associate position that I have accepted is Regular Less than Half-Time with the City of Des Moines Park and Recreation Department. I further understand that I may work up to 40 hours weekly during the months of May through August and prior to and after this period my work hours will be reduced working up to 19 hours weekly provided availability of work" (Employer's Exhibit One). The claimant was never guaranteed a certain number of hours per week, either at the time of hire or upon signing the Terms of Employment agreement May 15, 2012.

The claimant has claimed and received unemployment insurance benefits since filing her claim for benefits effective December 23, 2012.

## REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant is still employed at the same hours and wages as contemplated in the original contract of hire and is not able and available for work.

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:

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".

871 IAC 24.23(26) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(26) Where a claimant is still employed in a part-time job at the same hours and wages as contemplated in the original contract for hire and is not working on a reduced workweek basis different from the contract for hire, such claimant cannot be considered partially unemployed.

The claimant was hired as a less than half-time part-time associate of the Des Moines Park and Recreation Department. She was never guaranteed a certain number of hours. There has been no separation from her part-time employment and the claimant is currently working for this employer at the same hours and wages as contemplated in the original contract of hire and agreed to in the Terms of Employment agreement she signed May 15, 2012. The claimant was aware her hours would fluctuate depending on the time of year and the availability of work. Because the claimant is still employed by the City of Des Moines and can be called for work at any time, she is not considered able and available for work. Under these circumstances, the administrative law judge must conclude the claimant is not eligible for unemployment insurance benefits and therefore benefits are denied.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did

not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

**DECISION:**

The January 25, 2013, reference 01, decision is reversed. The claimant is still employed at the same hours and wages as in her original contract of hire and consequently is not able and available for work. Benefits are denied. The claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

---

Julie Elder  
Administrative Law Judge

---

Decision Dated and Mailed

je/pjs