THE SUPREME COURT OF IOWA

NO. 21-1948
Polk County CVCV061369

KYLE DORNATH,

PETITIONER /APPELLANT,

vs.

EMPLOYMENT APPEAL BOARD,

AGENCY RESPONDENT/APPELLEE

&

WINGER CONTRACTING,

EMPLOYER INTERVENOR/APPELLEE

APPEAL FROM THE DISTRICT COURT
OF POLK COUNTY

THE HONORABLE, JUDGE JEANIE VAUDT

APPELLEE BOARD'S AMENDED FINAL BRIEF & REQUEST FOR ORAL ARGUMENT

Rick Autry, Attorney
Employment Appeal Bd
Lucas State Office Building
Des Moines, IA 50319-0083
515-281-3070
Fax 515-281-7191
rick.autry@dia.iowa.gov
Attorney for Appellee Board

CERTIFICATE OF FILING AND SERVICE

I, Rick Autry, hereby certify that I or a person acting on my behalf filed the Appellee's Proof Brief with the Clerk of the Iowa Supreme Court via EDMS and served the Appellee's Final Brief (Corrected) upon the registered filers by EDMS on the 13th day of April, 2022.

Jason McClitis, Attorney
Blake & Uhlig PA
753 State Avenue Suite 475
Kansas City KS 66101

Gayla Harrison, Attorney
129 West 4th Street
PO Box 250
Ottumwa IA 52501

_____
Rick Autry
Attorney

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ROUTING STATEMENT: This appeal presents fundamental issues of broad public importance requiring ultimate determination by the supreme court. I. R. App. Pro. 6.1101(2)(d). A significant number of employees in Iowa are covered by collective bargaining agreements setting out the terms of an apprenticeship program that involves classroom instruction. Since Iowa Workforce Development changed its regulations in 2018 so that such instruction no longer qualifies for "department approved training," numerous cases have arisen

presenting the question of the availability requirement in this context. The EAB has consistently denied benefits in all of them. A decision in this matter will affect the payment, or nonpayment, of a substantial number of weeks of unemployment benefits every year. The case furthermore presents substantial questions of enunciating the legal principles of the availability requirement in the context of apprenticeship classroom training. I. R. App. Pro. 6.1101(2)(f). The EAB therefore agrees with the Claimant that the Supreme Court should retain jurisdiction.

STATEMENT OF THE CASE

NATURE OF CASE: Pursuant to Iowa Code section 17A.20, Kyle Dornath (Claimant) appeals from a decision of the district court affirming the Employment Appeal Board's (EAB) ruling that he was ineligible for unemployment benefits for the week he was attending classroom instruction all day long.

COURSE OF PROCEEDINGS: The case involves judicial review of a final agency decision in a contested case. The review is governed by Iowa Code Section 17A.19.

Kyle Dornath (Claimant) filed a claim for unemployment benefits with an effective date of October 6, 2019. (App. at p. 13). On July 27, 2020, the Iowa Workforce Development Center, Benefits Bureau, issued a decision, that found the Claimant not able and available for work for the single week ending May 16, 2020. (App. at p. 13). On August 4, 2020 the Claimant filed an appeal with the Iowa Workforce Development Center, Appeals Bureau. (App. at p. 15). An administrative law judge held a hearing on September 24, 2020, to determine whether the Claimant was able and available for work for that one week. (App. at p. 21). On September 28, 2020 the administrative law judge issued a decision, which affirmed the claims deputy's decision and disallowed benefits. (App. at p. 168-171). The Claimant appealed the administrative law judge's decision to the Employment Appeal Board on October 23, 2020. (App. at p. 62). The Employment Appeal Board found the appeal to be timely, and then reviewed the matter and issued a unanimous decision affirming the administrative law judge's on January 19, 2021. (App. at p. 367-378). No request for rehearing was filed. This appeal followed. On February 17, 2021 Claimant filed a Petition for Judicial Review in Polk County. On November 18, 2021 the Honorable Jeanie Vaudt entered an order

affirming the Board's finding of ineligibility. (App. at p. 452-466). The Claimant timely appealed to the Supreme Court, without making any post-decision motions.

STATEMENT OF THE FACTS: Kyle Dornath (Claimant) at the time of hearing was employed as a full-time apprentice electrician at Winger Electric (Employer). (App. at p. 23). He began working for this Employer on October 15, 2019 and remained employed there at all relevant times. (Rec. at 23). He typically is scheduled for four 10-hour days, Monday through Thursday each week. (App. at p. 23, p. 29; *see also* p. 37; p. 54; p. 59-60[CBA shows 10 hours with a ½ hour lunch break]).

Claimant is a member of the Local Union No. 347 International Brotherhood of Electrical Workers (IBEW). (App. at p. 24). As part of his apprenticeship program with the IBEW he is required to attend a certain amount of classroom training. (App. at p. 24). The trainings are only allowed to be missed if the Claimant is ill or had a death in the family. The Joint Apprenticeship and Training Committee (JATC) determines when the classroom trainings will be held. (App. at p. 25). Claimant and the Employer are notified of the scheduled classroom trainings and the Claimant is allowed to miss work in order to attend

the trainings. (App. at p. 25). Claimant is required to be in the apprenticeship program in order to remain in his current position as an apprentice electrician with this Employer. (App. at p. 25).

For the benefit week beginning May 10, 2020 and ending May 16, 2020, a classroom training was scheduled to be held. (App. at p. 23-24). Claimant and the Employer received notice of the training. The Claimant attended the training the entire week, Monday through Friday. (App. at p. 24-25). He did not earn any wages and did not perform services for the Employer that week. (App. at p. 25-26). He would have been scheduled for work if he were not attending the classroom training. The reason the Claimant did not work during the week in question was not due to a plant shutdown, vacation, inventory, lack of work or emergency from the individual's regular job or trade. (App. at p. 25-26).

REGULATORY FRAMEWORK OF UNEMPLOYMENT CLAIMS

Eligibility In General & Burden Of Proof: As a general matter a claimant for unemployment benefits must meet the eligibility requirements of Iowa Code §96.4. One of these is that "[a]n unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that...The individual is able to

work, is **available** for work, and is earnestly and actively seeking work." Iowa Code §96.4(3)(a) (emphasis added). Two notable things about these eligibility provisions are that the determination is made on a weekly basis, and that the burden of proof on eligibility is on the claimant. Iowa Code §96.4 (first unnumbered paragraph refers to "any week"). The Claimant argues he did not have a burden, but reading the actual words of the statute leaves no doubt:

> The **claimant has the burden of proving** that the claimant meets the basic eligibility conditions of section 96.**4**. The **employer has the burden of proving** that the claimant is disqualified for benefits pursuant to section 96.**5**, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsections 10 and 11, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h"

Iowa Code §96.6(2)(emphasis added). By statute the Employer is only given the burden of proving disqualification under Iowa Code §96.5, and so has the burden of proving that a Claimant quit, refused suitable work, was fired for misconduct, etc. *See generally* Iowa Code §96.5. None of these things happened in this case. The sole issue in this case is whether the Claimant is available to work as required by Iowa Code

§96.4(3)(a). The claimant has this burden by statute. A claimant is given the burden of proving that he "meets the basic eligibility conditions of section 96.4..." Iowa code §96.6(2) (emphasis added). Subsection 96.4(3) sets out the availability requirements *and* it sets out the exceptions to availability. It follows that a claimant must prove he is available for work, and if he cannot so prove then he must prove he falls within one of the specified exceptions. Any argument to the contrary contradicts the directive that "[w]hen the statute's language is plain and its meaning is clear, we look no further." *Estate of Ryan v. Heritage Trail Assoc.*, 745 N.W.2d 724, 730 (Iowa 2008); *accord Bacon, The Elements of the Common Law of England: Maxims of Law, Reg. III,* p. 47 (1597)("Divinatio non interpretatio est, quae omnino recedit a litera" i.e. "It is a guesswork not an interpretation which altogether departs from the literal.").

Again, availability is the issue in this case. At every stage of the proceedings the agency identified availability under Iowa Code §96.4 as the issue. (App. at p. 13 [initial decision cites 96.4(3); p. 18 [Notice of Hearing]; p. 21 [ALJ describes issue at hearing]; p. 156 [ALJ decision]; p. 171 [ALJ decision]; p. 367 [EAB decision]; p. 378 [EAB decision]). No one at any time argued that the Claimant was

disqualified under any provision of Iowa Code §96.5. All the Claimant has to argue about the burden is to cite to *Irving v. EAB*, 883 NW2d 179, 192 (Iowa 2016) where the Court states that "the employer generally has the burden to show disqualification." This does not mean the Employer had a burden in *this* case. First, the sentence in *Irving* before that one states "the claimant has the burden to initially show qualification for benefits" which is the issue here. Second, the sentence relied upon by the Claimant is immediately followed by citation to "Iowa Code §96.6(2)." *Irving v. EAB*, 883 NW2d 179, 192 (Iowa 2016). The cited Code section gives the employer a burden in §96.5 cases, not in §96.4 cases like this one. *Irving* does not even mention §96.4. Clearly the case at bar is not a case of a quit, discharge, refusal of work, etc. under Iowa Code §96.5, but rather is a case of availability under §96.4. The burden was thus on the Claimant to prove he was available to work during the week in question, and if not, then he had to prove he fell within one of the exceptions.

The Role of the Availability Requirement: The unemployment system is a joint federal-state system, in the sense that federal law, through the Social Security Act, and the Federal Unemployment Tax Act, sets out minimum requirement state laws must satisfy to qualify

for receipt of certain federal monies, and to receive tax breaks for that state's employers. The state agencies do not administer a federal unemployment law, as there is no such on-going federal unemployment law. Instead, the federal government provides financial incentives for states to have such laws, and for such laws to comply with certain federal minimal requirements. Naturally, the federal government has no power to alter state laws, nor is there a federal unemployment law that occupies the field and preempts state laws. The remedy for noncompliance is for the federal government to remove the affected funding and/or tax breaks.

The first law to set out such a requirement for receipt of funds was the Social Security Act, which was signed into law by President Franklin D. Roosevelt on August 14, 1935. Among other things this law gave states until January 1, 1937 to enact legislation in order to access over $250 million in funding available to the states for unemployment compensation. In January 1936 the federal Social Security Board issued a "draft bill" setting out guidance to states in order for them to draft legislation that would satisfy the federal requirements. The draft bill included a requirement that a claimant is able to work, and is available for work. *Draft Bills for State Unemployment Compensation*

of Pooled Fund and Employer Reserve Account Types, The Social Security Board §4(c) (Washington 1936)[1]. In the summer of 1936 Iowa's 46th General Assembly, in an extraordinary session, passed the Employment Security Law allowing for unemployment benefits in Iowa. That law also required that "[a]n unemployed individual shall be eligible to receive benefits with respect to any week only if the commission finds that ..He is able to work, and is available for work." 47 GA ch. 102, §4(c). This requirement now is found in Iowa Code §96.4(3)(a). It has been in Iowa's statute for the 85 years that we have had an Employment Security Law.

As the draft bill makes clear the federal Department of Labor had always interpreted the law as having an availability requirement, and passed a regulation in 2007 saying so. 20 CFR § 604.3. Effective in February of 2012, Congress codified the requirement. 42 U.S.C. 503(a)(12)("A requirement that, as a condition of eligibility for regular compensation for any week, a claimant must be able to work, available to work, and actively seeking work.") (Codified in P.L. 112-96, §2101(a)). The requirement is universal. United States. *Green Book*, p.

[1] https://www.google.com/books/edition/Draft_Bills_for_State_Unemployment_Compe/1aTJAAAAMAAJ?hl=en&gbpv=1

4-11. Washington: Committee on Ways and Means, U.S. House of Representatives, (2016)[2] ("All State laws provide that a claimant must be both able to work and available for work.")

As explained by the Board, the availability requirement is an indispensable and defining part of the unemployment system. Without this requirement the unemployment benefit system becomes a form of disability insurance or training fund. The Employment Security system is not designed for this, and the tax-supported fund could not be maintained on that basis. The Iowa Courts have repeatedly explained this. In *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (1991) a secretary broke her arm, went on a leave of absence, and offered to return when she was just 70% of capacity. The Court affirmed the finding that she was not able to work and went on to explain "unemployment compensation under this chapter is not disability insurance and simply does not cover physically disabled persons during the periods when they are unemployable." *Geiken* at 226. The next year the Court was faced with a truck driver who sought to obtain benefits even though he left work because of his heart

[2] https://greenbook-waysandmeans.house.gov/2016-green-book/chapter-4-unemployment-insurance

condition on the advice of a physician. In rejecting the claim that such leaving should not disqualify the Court reiterated that "the Employment Security Law is not designed to provide health and disability insurance..." *White v. Employment Appeal Board*, 487 N.W.2d 342, 345 (Iowa 1992); *see also Butts v. Iowa Dep't of Job Serv.*, 328 N.W.2d 515, 517 (Iowa 1983)("the legislature has merely determined not to provide maternity leaves").

Finally, the Iowa Court of Appeals has made clear that "[w]e do not think the legislature intended to make unemployment benefits available for claimants who were not even 'available for work' with their own employers." *Amana Refrigeration v. Iowa Dept. of Job Service*, 334 NW 2d 316, 318 (Iowa App. 1983).

ARGUMENT

I. The Claimant Cannot Show As A Matter Of Law That He Was Available For Work

A. PRESERVATION OF ERROR: The EAB agrees that the Claimant preserved error on the issue of his availability as a matter of fact

B. STANDARD OF REVIEW: The role of the court when reviewing agency action under the Administrative Procedure Act is appellate in nature. Iowa Code §17A.19(7) (2022); *Mike Brooks, Inc. v. House*, 843 N.W.2d 885, 889 (Iowa 2014); *Cerro Gordo County Care Facility v. Iowa Civil Rights Commission*, 401 N.W.2d 192, 195 (Iowa. 1987). Accordingly the Court's review of an agency finding is at law and not *de novo. Harlan v. Iowa Department of Job Service*, 350 N.W.2d 192, 193 (Iowa 1984); *Mike Brooks, Inc.*, 843 N.W.2d at 889.

On factual issues it is clear that the EAB is due the usual deference. Too numerous for citation are the dozens of cases subjecting an EAB decision to the substantial evidence standard. The first such case to review a decision of the "unemployment security commission" (as the Board was called then) explained:

> It has been **repeatedly held,** under Code Sections 1452 and 1453, that **where the facts are in dispute, or**

> **where reasonable minds may differ on the inferences to be drawn from the proven facts and circumstances, the findings of the Industrial Commissioner are conclusive**. If the evidence presents a question which should have been submitted to a jury, if the trial were before a jury, then the court is bound by such findings. *Reddick v. Grand Union Tea Co.*, 230 Iowa 108, 296 N.W. 800; *Reynolds v. George & Hoyt*, 230 Iowa 1267, 300 N.W. 530. **Such holdings are likewise applicable to findings of Iowa Employment Security Commission**.

Wolfe v. Iowa Unemployment Comp. Comm'n, 232 Iowa 1254, 7 N.W.2d 799, 800-801 (Iowa 1943). This principle, "repeatedly held" by 1943, remains just as strong today and there is no need to cite the dozens of intervening cases applying substantial evidence review to an EAB ruling. *See e.g. Sladek v. Employment Appeal Bd.*, 939 NW 2d 632, 634 (Iowa 2020). As a result the EAB's decision must be supported by "substantial evidence in the record before the court when that record is viewed as a whole." Iowa Code §17A.19(10)(f). "Substantial evidence" under this standard is what a reasonable mind would accept as adequate to reach a given conclusion, even if the reviewing court would have drawn a contrary inference from the evidence. *Mike Brooks, Inc. v. House*, 843 N.W.2d 885, 889 (Iowa 2014); *Titan Tire Corp. v. Employment Appeal Bd.*, 641 N.W.2d 752 (Iowa 2002). The possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by

substantial evidence. *Mike Brooks, Inc. v. House*, 843 N.W.2d 885, 889 (Iowa 2014); *Westling v. Hormel Foods Corp*., 810 N.W.2d 247, 251 (Iowa 2012). "The reviewing court only determines whether substantial evidence supports a finding **according to those witnesses whom the [agency] believed.**" *Arndt v. City of Le Claire*, 728 N.W.2d 389, 395 (Iowa 2007)(emphasis in original); *accord GITS Manu. v. St. Paul Travelers Inc.*, 855 N.W.2d 195, 197-98 (Iowa 2014) (quoting *Arndt* and reversing Court of Appeals decision for failure to grant deference on credibility determination of agency). While the Courts must "consider all the evidence together, including the body of evidence opposed to the agency's view, this rule merely means that support for the agency finding can be gathered from any part of the evidence." *Hy Vee v. Employment Appeal Board*, 710 N.W.2d 1, 3 (Iowa 2005).

Meanwhile deference applies to an agency's application of law to fact if "application of law to fact ... has clearly been vested by a provision of law in the discretion of the agency." Iowa Code §17A.19(10)(m). If "the claim of error lies with the ultimate conclusion reached, then the challenge is to the agency's application of law to the facts..." *Meyer v IBP Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). "When

the question is whether the agency erred in applying its rules, then the challenge is to the agency's application of the law to the facts, and the question on review is whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence." *Des Moines v. IDOT*, 911 NW 2d 431, 441 (Iowa 2018). "When an agency has been clearly vested with the authority to make factual determinations, it also has been vested with the authority to apply the law to those facts, and a reviewing court may only disturb the agency's application of the law to the facts of the particular case if that application is irrational, illogical, or wholly unjustifiable." *Polk County Assessor v. Iowa Public Information Bd,* No. 20-0902, slip op. at 12 (Iowa 12/17/21). The Employment Appeal Board is empowered "to hear and decide contested cases under chapter ...96." Iowa Code §10A.601(1); *accord* Iowa Code §96.6(3). Thus the Board is clearly vested with the authority to apply the law to the facts concerning eligibility for unemployment compensation in individual cases. The conclusion about whether the Claimant was eligible for benefits during the week in question is an application of law to fact since it is the ultimate issue in the case.

Under the Administrative Procedures Act the Courts grant deference to agency interpretations of law where the "interpretation has clearly been vested by a provision of law in the discretion of the agency." Iowa Code §17A.19(10)(l). Where the interpretation of law is clearly vested in the agency the agency interpretation can be reversed only if it is "irrational, illogical, or wholly unjustifiable". Iowa Code §17A.19(10)(l). In the absence of an express statement by the legislature granting interpretive authority to an agency, the Courts review the precise language of the statute, its context, the purpose of the statute, and the practical considerations involved. *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 10-14 (Iowa 2010); *The Sherwin-Williams Co. v. Iowa Dep't Of Revenue*, 789 N.W.2d 417 (Iowa 2010). Where the case involves complex or specialized subject matter deference is appropriate. *Id.* Although the Employment Security Law is broadly construed to carry out its beneficial purpose, this does not alter the literal terms of the statute. Guidance to construction simply does not come into play when reading plain English. *See e.g. Young v. Iowa City Community School Dist.*, 934 NW 2d 595, 604 (Iowa 2019)("If a statute is unambiguous, we look no further than the express language of the statute."); *In re Detention of Fowler*, 784 N.W.2d 184,

187 (Iowa 2010) ("We do not search for meaning beyond the express terms of a statute when the statute is plain and its meaning clear."); *Swiss Colony, Inc. v. Deutmeyer*, 789 N.W.2d 129, 135 (Iowa 2010)("[T]he principle of liberal construction does not vest th[e] court with an editor's pen with the power to add or detract from the legislature's handiwork."); *Kaiser Aluminum & Chem. Sales, Inc. v. Hurst*, 176 N.W.2d 166, 168 (Iowa 1970) (stating even where statute directs the court to construe a chapter liberally to promote its underlying purpose, the court "cannot ignore the plain language" of the statute); *Moulton v. Iowa 't Sec. Comm'n*, 239 Iowa 1161, 34 N.W.2d 211, 216 (Iowa 1948)(In unemployment cases "[w]hile the statute under consideration is to be liberally construed in order to effect its beneficent purpose, yet construction should not be carried beyond the limits of its plain legislative intent.")

When the Supreme Court reviews a district court decision on the validity of agency action it only asks whether the district court has correctly applied the law. *Banilla Games v. Iowa Dept. of Inspec. & Appeals*, 919 N.W.2d 6, 12 (2018). The Supreme Court merely applies the standards of §17A.19(10) to the agency action to determine whether the Supreme Court's conclusions are the same as those of the district

court. *Sladek v. Employment Appeal Bd.*, 939 NW 2d 632, 637 (Iowa 2020). If the Supreme Court has the same conclusions it affirms the district court and if the conclusions differ the Supreme Court must reverse.

C. LEGAL FRAMEWORK: As set out above the Claimant must be unemployed and must be able and available for work in order to collect benefits. With a few particularized exceptions, the Code does not allow paying benefits to people who aren't being paid, if they aren't also trying to get a job or if they have no realistic job prospects. The rules of the Department explain the requirement:

> 24.22 Benefit eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, **available for work**, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

871 IAC 24.22 (emphasis added).

As demonstrated above "[t]he claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4." Iowa Code §96.6(2)(emphasis added); *accord* 871 IAC 24.22. The Claimant therefore must show that he was eligible for benefits as a matter of law. *Langley v. Employment Appeal Board*, 490 N.W.2d 300, 304 (Iowa App. 1992).

D. SUBSTANTIAL EVIDENCE SUPPORTS THAT THE CLAIMANT WAS NOT AVAILABLE FOR WORK: In order to be draw benefits a claimant who is drawing on wages earned in full-time work, must be available for full-time work. The regulations state that "if an individual is available to the same degree and to the same extent as when the wage credits were accrued, the individual meets the eligibility requirements of the law." 871 IAC 24.23(5). So in order to be available to work during the week in question the Claimant would have to be available for full-time work. Yet his testimony showed that he was attending classes full-time already. His hours of instruction substantially overlapped his hours of work. (App. at p. 23; p. 25; p. 35-36). The Claimant argued to the Board that he could have worked another shift outside his training hours. The problem, however, is his own testimony:

> Q: And it wasn't possible for you to go to the training and still work full-time that week? Is that right, because of the hours involved?
>
> A: Yes
>
> ....
>
> [Employer Attorney]: You were, you were not able to attend both the class and to perform your job, isn't that correct?
>
> A: Yes.

(App. at p. 26; p. 36). It is true that this does not conclusively establish that the Claimant could not have worked the night shift after a full day of instruction. But it was the Claimant who had the burden, and he nowhere testified that he could have or would have been willing to work the night shift. This plus the testimony above completely undermines the claim of night shift availability.

The Claimant dismisses his own testimony as being "gotcha." This apparently means that it somehow was not reliable – his own testimony. This somewhat remarkable argument boils down to an invitation to the Court to reweigh the evidence. This the Court may not do. At this point in the case the question is not whether there was substantial evidence to warrant a decision that the agency did not make, but rather whether there is substantial evidence to warrant the decision it did make. *City of Des Moines v. Employment Appeal Board*, 722 N.W.2d 183, 195 (Iowa 2006). Pointing to evidence that supports the position taken by a Claimant, rather than the lack of any evidence supporting the Board's conclusion is not an approach allowed by the standard of review. Of course, the possibility of drawing two inconsistent conclusions from the evidence does not prevent the

agency's findings from being supported by substantial evidence. *Myers v. F.C.A. Services, Inc.* 592 N.W.2d 354, 355 (Iowa 1999). Weight-of-evidence issues, including credibility determinations, are exclusively within the agency's domain. *Hy Vee v. Employment Appeal Board*, 710 N.W.2d 1, 3 (Iowa 2005). "The reviewing court only determines whether substantial evidence supports a finding **according to those witnesses whom the [agency] believed**." *Arndt v. City of Le Claire*, 728 N.W.2d 389, 395 (Iowa 2007)(emphasis in original). The Claimant's arguments on weight of evidence come too late. It was entirely within the Board's discretion to believe the Claimant when he testified he was occupied with his classroom instruction and not available to work. *Terwilliger v. Snap-On Tools Corp*, 529 N.W.2d 267, 273 (Iowa 1995).

Speculation over the idea that *maybe* the Claimant *could* have been available for other jobs fails to prove error. It is the claimant for benefits who has the burden of proving availability. Iowa Code §96.6(2). While the Claimant argues, in effect, that the evidence fails to establish that there is no conceivable work the Claimant can do this is not the standard. The Claimant has the burden of proof, and this appeal is not about whether the evidence affirmatively refutes the

Claimant's claim. The Claimant had the burden at the hearing and in this appeal the Claimant has the burden of proving error in that hearing. Iowa Code §17A.19(8)(a). The Claimant is thus tasked with proving his eligibility **as a matter of law**. It is simply not sufficient to show only that the finding of ineligibility is not the only one possible. As always, the question is not whether there was substantial evidence to warrant a decision that the agency did not make, but rather whether there is substantial evidence to warrant the decision it did make. *City of Des Moines v. Employment Appeal Board*, 722 N.W.2d 183, 195 (Iowa 2006). The claim that unavailability was not proven as a matter of law is not sufficient to show that availability *was*. Given that there was no testimony that the Claimant was in fact available to work the week in question, it was not an error of law to find that the Claimant did not carry his burden of showing he was available to work that week.

II. The Claimant Cannot Show As A Matter Of Law That He Falls Within An Exception to the Availability Requirement

A. PRESERVATION OF ERROR: The EAB agrees that the Claimant preserved error on the issue of his availability as a matter of application of law to fact.

B. LEGAL FRAMEWORK: Not everyone has to be available to work in order to collect benefits. There are a few enumerated exceptions in the statute. These exceptions are for are any week when a claimant is in department approved training, any week when the claimant is partially unemployed while still job attached, and any week when the claimant is temporarily unemployed. The sweep of each of these exceptions is constrained by the express terms of the statute.

The Department approved training (DAT) exception states that "[a]n otherwise eligible individual shall not be denied benefits for any week because the individual is in training with the approval of the director..." Iowa Code §96.4(6)(a). Such persons are eligible for benefits, and any benefits paid while on DAT may not be charged to employers, but instead are charged to the tax-supported fund. *Id.* If a claimant meets the necessary criteria then the claimant may receive his usual unemployment benefits while going to vocational training. A claimant applies for approval of the training and if it is approved then the requirement of looking for work, being available for work, and being able to work are all waived while the training is on-going. Iowa Code §96.4(3)(a); *see also* 20 CFR §604.5(c); 871 IAC 24.39(1)(application). Naturally, the Iowa Workforce Department

passed regulations describing what will constitute Department Approved Training. Effective February 7, 2018[3] those rules provide that DAT "be completed 104 weeks or less from the start date," that it be at "a college, university or technical training institution," and that the claimant be "enrolled and attending the training program in person as a full-time student." 871 IAC 24.39(2).

Partial unemployment is defined by statute. For present purposes[4], someone is partially unemployed if "[w]hile employed at the individual's then regular job, the individual works less than the regular full-time week and in which the individual earns less than the individual's weekly benefit amount plus fifteen dollars." Iowa Code §96.1A(37)(b)(1); 871 IAC 24.1(139)(a)("A week in which an individual worked less than the regular full-time hours for such individual's regular employer, because of lack of work and earned less than the weekly benefit amount [plus $15]..."). There are three plain

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3 https://www.legis.iowa.gov/docs/aco/arc/3562C.pdf

4 "Odd job" partial unemployment discussed in §96.1A(37)(b)(**2**) is not at issue in this case, and in any event waiver of availability does not apply to odd job partial unemployment. (Odd job unemployment is more generally known among UI professionals as "part total" unemployment although the Iowa statute uses "partial" for both categories. *E.g.* *UIPL, 08-98*, (DOL ETA 1/12/98)).

requirements: (1) claimant must be still employed at his then regular job (2) claimant must work less than the regular full-time work for that kind of job and (3) the individual must earn less than his weekly benefit amount plus fifteen dollars.

Temporary unemployment is also defined by statute. Someone is temporarily unemployed "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 §96.1A(37)(c).

Meanwhile a person is "totally unemployed" during "any week with respect to which no wages are payable to the individual and during which the individual performs no services." Iowa Code §96.1A(37)(a); *see also* 871 IAC 24.1(139)(c).

C. CLAIMANT WAS NOT ON DEPARTMENT APPROVED TRAINING: There is no serious question in this case that the Claimant was not on approved training. Of course, denial of a request to have training approved would be appealable to the Board. This case does

not involve such an appeal. Basically, no one argues that the Claimant was on approved training. Its importance is mostly as background, and as contrast with the training in this case, which was *not* Department approved.

Prior to the 2018 change in the approved training regulation, that regulation did not require that the training had to be completed within two years of the start date, did not require the training be at an educational institution, and did not require the claimant to be enrolled as a full-time student. 871 IAC 24.39(1) (12-20-17)[5]. This meant that apprentices whose training spans are more than 52 weeks, who are not enrolled at a college or other educational institution, and who are not full-time students could nevertheless have received approval under DAT. Such apprentices could then receive unemployment benefits without being available to work, and the benefits were charged to the taxpayer supported fund rather than to the employer in question. This allowed the unions and the employers to create a situation where the employers didn't have to pay the workers full salary, and instead the workers received taxpayer money while in training. Both parties were content. This also meant that EAB was not seeing any apprenticeship

[5] https://www.legis.iowa.gov/docs/iac/agency/12-20-2017.871.pdf

cases – apprentices were getting benefits while in training, the employers in question weren't being directly charged for it, and there was no aggrieved party who would appeal to EAB. But this changed when Iowa Workforce changed its regulations in 2018. Now the employers had to be charged if benefits were allowed while an apprentice was in related instruction. Those employers protested, and now the agencies faced the availability issue. This explains, of course, why the issue is a new one. After years of charging the fund, the law had changed and new issues had to be faced. Thus, while everyone agrees that Claimant was not on DAT, the change in the DAT regulation is the whole reason this case has come about.

D. CLAIMANT WAS NOT PARTIALLY UNEMPLOYED: The next exception to availability which the Claimant cannot show as a matter of law is that he was partially unemployed during his training week. Again, there are three requirements: (1) claimant must be still employed at his then regular job (2) claimant must work less than regular full-time for that kind of job and (3) the individual must earn less than his weekly benefit amount plus fifteen dollars. Iowa Code §96.1A(37)(b)(1); 871 IAC 24.1(139)(a).

Here it is clear that the Claimant is still employed in his regular job, and that he was *paid* less than his weekly benefit amount plus $15 (although perhaps he might someday dispute whether he *earned* this amount but was not paid). As identified by the Board, the problem is the requirement that he work part-time. Compounding this problem is Iowa Supreme Court precedent that when one is totally unemployed, one cannot be treated as being partially unemployed for the purposes of the availability exception.

As the Board explained, under the law of the excluded middle either attending related instruction full-time all week long falls within the category of performing work for the Employer, or it does not. If attending training is performing work for the Employer then the Claimant was performing services for the Employer on a full-time basis during that week. He thus did **not** work "less than the regular full-time week."[6] It follows that he cannot be partially unemployed if attending training falls within the category of performing work for the Employer.

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[6] While Claimant asserts he worked 42 hours, the CBA submitted by Claimant shows for schedules of four 10-hour days there is a ½ hour unpaid lunch break. So, 10 hours a day not 10 and a half, i.e. 40 hours a week. (App. at p. 54; p. 59-60; *see also* p. 37). Also if this was work he did not *earn* less than his WBA plus $15 – but he was *paid* less.

The only other possibility is that attending training is **not** performing work for the Employer. It *seems* like the Claimant would then satisfy the conditions for partial unemployment since in that situation he *would* work less than full-time since he was in classroom instruction full-time. Here the problem is not logic, but law. This is because someone who performs no services and who is paid no wages has met the very definition of being "totally unemployed." Iowa Code §96.1A(37)(a); *see also* 871 IAC 24.1(139)(c). Totally unemployed people have to available in order to collect benefits, but job-attached partially unemployed people don't have to be. If the Claimant is correct, and total unemployment is just a form of partial unemployment where the wages are zero, then the entire availability requirement has evaporated. As the Board explained:

> 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 seek work, while on layoff no matter for how long. A twelve-week seasonal layoff would be compensable even if the laid off worker was not looking for work while waiting for recall. This is inconsistent with the regulations of the Department. 871 IAC 24.23(20) (A claimant is not available for work "Where availability for work is unduly limited because the claimant is waiting to be recalled to work by a former employer...")

(App. at p. 374). On June 8, 2021, five months after this ruling, an amendment to the Code made the point even stronger. New Code

paragraph §96.4(3)(b) was added by *2021 Acts, ch 171, §26*. That paragraph allows IWD to waive the job search requirement if the person is job attached but is on "a layoff period of sixteen weeks or less [sic] due to seasonal weather conditions that impact the ability to perform work related to highway construction, repair, or maintenance with a specific return-to-work date verified by the employer." Iowa Code §96.4(3)(b). This specific and narrow job-search flexibility would be unnecessary if *everyone* who was job attached, but laid off, by that reason alone qualified as being "partially unemployed."

If the law viewed all job-attached suspensions of paid status to be partial unemployment then a worker would never have to be available for work, or seek work, while on layoff no matter for how long. This would simply write off the books the four-week limitation in Iowa Code §96.1A(37)(c), wipe out the limitations specified in 2021 Acts, ch. 171, §26 and repeal regulations like 871 IAC 24.23(20) which states that a claimant is not available for work "[w]here availability for work is unduly limited because the claimant is waiting to be recalled to work by a former employer..." This, of course, would be contrary to the basic rule that the words in statutes and rules are presumed to have a purpose. *E.g.* Iowa Code §4.4(2) ("entire statute is intended to be

effective"); *Leversee v. Reynolds*, 13 Iowa 310, 311 (1862); *Esterville v. Iowa Civil Rights Commission*, 522 N.W.2d 82, 86 (Iowa 1994); *State v. Iowa Dist. Ct. for Scott County*, 889 N.W.2d 467, 474 (Iowa 2017); *Bacon, The Elements of the Common Law of England: Maxims of Law, Reg. III* (1597)("Verba aliquid operari debent...").

But we don't have to rely on the Board's legal analysis on this point. The Iowa Supreme Court has answered the question. Partial unemployment "applies where, during a particular week, services are performed for one's regular employer for less than the regular work week, or where no services are performed for the regular employer during a particular week and 'odd job' employment for that week yields less than an established amount." *Hart v. Iowa Dept. of Job Service*, 394 NW 2d 385, 387 (Iowa 1986) In *Hart* a pregnant worker who was allowed to return on a part-time basis filed for weeks during which she performed no services and earned no money. The Supreme Court of Iowa reversed the finding that she was partially unemployed:

> **Claimant's claims are for those weeks in which no services are performed. As a result, she does not meet the statutory definition of a partially unemployed individual**. Because the district court determined her benefit eligibility solely on that basis, its decision must be reversed.

Hart at 387 (emphasis added). Under *Hart* if no services are performed then the worker is not partially unemployed. Thus, if attending related instruction **is** performing services then the Claimant performed full-time services and is not partially unemployed, while if attending related instruction is **not** performing services then the Claimant is totally unemployed, not partially unemployed. Since attending the training must either be performing services or not be performing services, and either way the Claimant is not *partially* unemployed, it was no error of law to find that the Claimant was not partially unemployed during his training week. This analysis, moreover, confirms the common-sense point that someone who is in classroom training all week long is not eligible for a benefit that is meant to pay workers when they lose wages as a result of their hours getting cut.

The Claimant's attempt to distinguish *Hart* misses the point altogether. The Claimant argues he was performing work and therefore was partially unemployed. But if he was performing work all day long, all week long, he wasn't unemployed at all. Again partial unemployment requires one to work part-time hours. While the Claimant argues working 37.5 versus 40 hours is a reduction of

sufficient magnitude to no longer be full-time it was no error of law for the EAB to consider someone working all day long with a half hour break to still be working full-time. Indeed, under the regulations full-time is "[t]he number of hours or days per week currently established by schedule, custom, or otherwise, as constituting a week of full-time work for the kind of service an individual performs for an employing unit." *See* 871 IAC 24.1(135). Here, assuming the training is providing "services" as asserted by Claimant, then 37.5 hours is exactly the number of hours per week designated by the "schedule" for that "kind of service." Indeed, the hours of "work" for apprentices are set by the applicable CBA. (App. at p. 105). Given this, if we accept the Claimant's argument that he was actually working all day then, of course, he was not unemployed. The point to *Hart* is that if we do **not** treat the instruction time as work, then the Claimant would be in exactly the same position as Ms. Hart: a week not performing services. And the Supreme Court has instructed that a week of not performing services is total unemployment, and one must therefore be available to work. So, again, if the instruction was **not** work then under the reasoning of *Hart* the Claimant was totally *not* partially unemployed, and if the instruction **was** work then the Claimant was not working

less than full-time and so did not meet the statutory definition of partial unemployment.

An example, illustrates the difference between being **unpaid**, and being unemployed. Consider Joe's Garage, where the owner Joe has just worked his mechanics each 40 hours in one week. Joe realizes he is short on cash. On Friday he says "Thank you for all the work. I'm out of cash. I won't pay you this week." Were those mechanics unemployed that week? No, they worked 40 hours. Were they partially unemployed? No, they worked 40 hours. Can they get unemployment? No, they were not unemployed[7]. What they have is an unpaid wages claim under chapter 91A, *not* an unemployment claim under chapter 96. The unemployment system is not an additional remedy provided for unpaid wage claims. In fact, in the case of Joe's Garage the two claims are mutually exclusive. If the workers could get unemployment then it would follow they performed no services. Having performed no services they would be due no wages, and being due no wages they would not have an unpaid wage claim.

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[7] Under Claimant's partial unemployment argument if one of those workers actually worked 39 instead of 40 hours he'd get benefits for being partially unemployed! This is *not* consistent with the purpose of the Employment Security Law.

Unemployment benefits are paid for being unemployed, not for being unpaid.

E. CLAIMANT WAS NOT TEMPORARILY UNEMPLOYED: The next exception to availability which the Claimant cannot show as a matter of law is that he was temporarily unemployed during his training week. Again, the Code defines "temporarily unemployed' to mean "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..." Iowa Code §96.1A(37)(c). "When the legislature has defined words in a statute — that is, when the legislature has opted to 'act as its own lexicographer' — those definitions bind us." *State v. Coleman*, 907 NW 2d 124, 135 (Iowa 2018) (*quoting State v. Fischer*, 785 N.W.2d 697, 702 (Iowa 2010)). In this binding definition the legislature listed five specific categories of reasons for being unemployed that could, if the unemployment is short enough in duration, make one temporarily unemployed. Notably had the legislature meant these to be mere examples, rather than explicitly limited categories, it would have indicated this through words similar to "such as" or "including, but not limited to" or "similar to." *C.f. Sullivan v. Chicago & Northwestern*

Transportation Co., 326 N.W.2d 320, 323 (Iowa 1982). The legislature included no such expansive qualifiers, and so the question is whether the one-week training for a limited group of apprentices at a time, would fall under any of specified categories.

Although the Employment Security Law is broadly construed to carry out its beneficial purpose, this does not alter the literal terms of the statute. Guidance to construction simply does not come into play when reading plain English. *See e.g. Swiss Colony, Inc. v. Deutmeyer*, 789 N.W.2d 129, 135 (Iowa 2010)("[T]he principle of liberal construction does not vest th[e] court with an editor's pen with the power to add or detract from the legislature's handiwork."); *Moulton v. Iowa 't Sec. Comm'n,* 239 Iowa 1161, 34 N.W.2d 211, 216 (Iowa 1948).

Looking to the actual words of the statute, first up is the idea of a "shut down." Obviously, there was no evidence that the plant in question was "shut down" and so the Claimant did not carry the burden of showing a "plant shutdown." Similarly, there was no showing of a plant inventory, or a general vacation. Although the statute uses "vacation" this is clearly meant to refer to a plant-wide, or department-wide, vacation for the workers. First, the Code had specific provisions already dealing with individual vacations. *E.g.* Iowa Code §96.5.

Second, under the doctrine of *noscitur a sociis* the meanings of statutory terms are ascertained in light of the meaning of words with which they are associated. *E.g. Peak v. Adams*, 799 NW 2d 535, 547-48 (Iowa 2011). Here that means we understand vacation in terms of plant-wide shutdowns, and inventories. Third, it would be ridiculous to use the Employment Security Law as a way of creating paid vacations during which the worker need not look for work. Fourth, of course, there is no evidence in this case that anyone considered this time off work to be a vacation.

The next category is that of being off work due to an emergency. As the Board discussed at length, a long-anticipated training session does not fall within the category "emergency" under any sensible reading of that word. It is noteworthy that this term "emergency" means a general and widespread emergency not one personal to the claimant. This is obvious because workers who leave work for emergencies such as personal injury, injuries to family members, and for compelling personal reasons not exceeding 10 days, are **not** allowed benefits while off work. Iowa Code §96.5(1). Hence if "emergency" in §96.1A(38)(c) provided for benefits during personal emergencies this would contradict specific provisions mandating a

denial of benefits while off on a *personal* emergency. This leaves "lack of work."

The only way the Claimant could claim he was off for a "lack of work," would be if that term was used to mean "lack of work for the particular individual." The problems with this reading are profound. First, as a factual matter, the Employer did not lack work. It had work for the Claimant, but was required not to schedule him because the JATC had ordered him into related instruction. Second, the phrase "lack of work" in this context clearly cannot mean at the individual level. Again, the doctrine of *noscitur a sociis* requires reading "lack of work" in the context of the clearly more general layoffs described by the rest of the definition. Third, if "lack of work" meant "lack of work based on reasons personal to the claimant" then every person who is incapable of doing his job would qualify as temporarily unemployed while off work for less than four weeks. Being off work because you are injured and unable to work, under the such reading, would be due to a "lack of work" for the worker since the employer would have no job tasks to assign to that particular injured worker. The worker, although too injured to work, and though not available for employment generally, would still get four weeks of unemployment benefits. Such

a reading of temporary unemployment would make the listing of reasons that qualify for temporary unemployment pointless – almost any suspension of paid status would fall under the "lack of work" moniker. This, again, contradicts the maxim that all the words of a statute should be given effect. Iowa Code §4.4(2). Clearly "lack of work" means that the Employer has laid off the worker because there's not enough work to go around. There is no evidence in this case that that is what happened here. The Claimant thus falls within none of the categories for being temporarily unemployed, and so does not meet this exception to availability either.

F. EAB DID NOT "IGNORE" PRECEDENT: The Claimant claims that the Board "ignored" precedent but only by misusing the term "ignore." The EAB decision set out a separate section in its decision titled "Precedent Is Either Not On Point or Is Unpersuasive." The EAB then devoted around 500 words to discussing all precedent cited below. Right or wrong, this is not "ignoring" precedent[8].

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[8] In fact, if the Claimant raised an argument and the EAB failed to address it – whether through oversight or by "ignoring" it – then the Claimant was required to seek rehearing in order to preserve error. *E.g. KFC Corp. v. Iowa Dep't of Revenue*, 792 N.W.2d 308, 329 (Iowa 2010). Since no rehearing was filed if <u>any</u> "ignoring" actually took place the Claimant failed to preserve error.

Turning to the precedent much of it does not deserve such a designation. For example, unappealed Administrative Law Judge decisions are never binding on the EAB, and this is particularly so for those from before the change in the approved training regulation was passed. The Claimant makes a lot of argument about these decisions from inferior tribunals, and that in strident and emotive language. But emotion is not legal reasoning. What the Claimant fails to explain is why *unappealed* decisions of Administrative Law Judges should be considered binding on the Board which has the statutory authority to set aside the decisions of those Administrative Law Judges. The decisions of the Administrative Law Judge are appealable to the EAB, not the other way around. The EAB has the greater adjudicative authority. Thus, "decisions of higher tribunals are considered as binding upon lower tribunals, while those of coordinate tribunals [*i.e.* other ALJ's] may be considered as persuasive, but not binding." *DOLETA Handbook 382 3rd Ed.*, p. 6 (2011).[9]

This is a case brought under the Iowa Administrative Procedures Act. The Claimant fails to explain how the Board's failure to be bound

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9 https://wdr.doleta.gov/directives/attach/ETAH/ET_Handbook_No_382_3rd_Edition.pdf

by nonbinding decisions from inferior tribunals constitutes as error under Iowa Chapter 17A. That act provides that a ground for finding error is when the agency action is "inconsistent with **the agency's** prior practice or precedents..." Iowa Code §17A.19(10)(h)(emphasis added). In this paragraph the definite article "the" is used before "agency." This means "the agency" is the one previously mentioned in the section. The previously mentioned agency is the one whose action is under review. It is "the agency" that must be served with a copy of the Petition, it is "the agency" that must be named in the Petition, it is "the agency" whose action aggrieved the petitioner. In short – and it really should go without saying – an agency cannot be reversed for failing to follow some other inferior tribunal's non-binding decisions. Iowa Code §17A.19(10)(h). Here the agency whose decision is under review is the Iowa Employment Appeal Board. The Iowa "precedent" cited by Claimant are not decisions made by the EAB, but rather decisions made by Administrative Law Judges with IWD.

Pursuant to Iowa Code §84A.1 "[t]he department of workforce development is created to administer the laws of this state relating to unemployment compensation insurance, job placement and training, employment safety, labor standards, and workers' compensation."

Meanwhile DIA is created in Iowa Code §10A.102. In particular Iowa Code §10A.601 provides that "[a] full-time employment appeal board is created within the department of inspections and appeals..." EAB members are also appointed by the Governor for a term of years. Their salaries are set by the Governor, and they can only be removed from office by the Governor. Iowa Code §10A.601(2). In the context of unemployment compensation the Iowa Supreme Court has explained that the decision on appeal "is not the administrative law judge's decision, which is merely proposed agency action. It is the decision of the Employment Appeal Board, which modified his proposed decision." *Richers v. Iowa Dept. of Job Service*, 479 N.W.2d 308, 311 (Iowa 1991). The "final agency action" which is for review in this matter is the decision of the Employment Appeal Board. The EAB is an attached unit to the DIA, and the EAB is an entirely separate and independent agency from IWD. Thus the EAB cannot be reversed for failure to follow IWD decisions which were never appealed to the EAB, and which are not prior decisions of the agency whose decision is the subject of this Petition. The Claimant cites no **EAB** decision from which the decision under appeal deviates without adequate explanation, and so cannot demonstrate error under §17A.19(10)(h).

As for the cited court decisions, the only Iowa precedent is cited to address a point the EAB did not rule on. The Claimant cites to cases trying to establish that the leave of absence was not voluntary. As discussed in Argument III below, this was not a ground for the EAB's ruling and so has no relevance whatsoever. The out-of-state precedent is *Kennedy v. Florida UAC*, 46 So. 3d 1192 (DCA 2010). As explained by the board, that case is all of one paragraph, and holds simply that the claimant there was not fully employed. It says nothing about the issue of availability, which is the sole issue in this case. The other cited case is an unreviewed agency decision from out of state. It is not precedent at all, and as explained by the EAB in its decision, is based on a different statutory scheme. This last point disposes of the citation of foreign statutes. Iowa does **not** have a specific provision granting benefits to apprentices. The fact that other states do have such a provision does not change Iowa's statute, and indeed tends to suggest that without such an explicit statutory provision those states would not have allowed benefits either.

G. THE EAB RULING COMPORTS WITH POLICY AS WELL AS THE LITERAL TERMS OF THE STATUTE: The obvious purpose of the Employment Security Law is employment security. It was enacted in

the 1930's to deal with widespread economic insecurity. The benefit account is used to "maintain[n] purchasing power and limi[t] the serious social consequences of poor relief assistance..." Iowa Code §96.2. None of this is concerned with providing paid instruction to workers who are job attached.

In 2009, during the *Great Recession*, the federal Department of Labor addressed various innovative programs designed to connect unemployed workers with employers, including registered apprenticeships. Among the topics discussed by the DOL were the unemployment benefits issues posed by those in apprenticeships. The Training and Guidance Letter, which the Board quoted at length, emphasizes that "Federal law prohibits the payment of UC to an individual who is not unemployed for some portion of the week in which UC is claimed, unless specifically authorized by Federal law. As a result, states' attempts to develop innovative models to assist UC recipients' return to work must adhere to this requirement." *TEGL 12-09*[10], (DOLETA 1/29/2010), p. 5. The Department of Labor, the same agency responsible for the registered apprenticeship regulations cited by Claimant, also emphasized the importance of the availability

[10] Online: https://wdr.doleta.gov/directives/attach/TEGL/TEGL12-09acc.pdf

requirement. "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." *Id.* at 7. The DOL then sets out the same exceptions as discussed by the Board. Of course, federal law *allows* for these exceptions, but it does not describe their contours. For example, federal law allows for an approved training exception to availability, but it is state law that implements that exception and which determines whether a particular program is in fact approved training. Thus, the DOL does not state that there is a federal concept of approved training that encompasses apprenticeships, but instead merely "**encouraged** states to **broaden** their definition of approved training and to implement procedures that would facilitate individuals' participation in training..." *Id.* at 7 (emphasis added). Iowa just didn't do this, and it was not federally *required* to do this. *C.f. Bailey v. Employment Appeal Board*, 518 N.W.2d 369, 370 (Iowa 1994). Thus, the EAB was bound to find that this case was not one of approved training, and no one argues otherwise. The point, of course, is that the same exceptions of approved training, partial unemployment, and temporary unemployment are discussed by the DOL in the same manner as the

Board: *unless* the worker falls within an exception the worker would not be eligible for benefits while in training, even if not getting paid. The problems with ignoring the exceptions and just paying out benefits for training are explicit: "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. In addition, money may not be withdrawn from the unemployment fund to make incentive payments to employers to hire UC claimants." *Id*. at 6. Thus, as a matter of UC policy, unless one of the specific exceptions applies, UC cannot be paid to apprentices just because we like apprenticeship programs.

More recently the DOL addressed the situation where "excepted" federal workers are forced to work without pay during a government shutdown. The DOL explained that "the Department has a longstanding legal interpretation dating to nearly the inception of the

Federal-state Unemployment Insurance system, providing that 'unemployment' must include a reduction in work hours, and not merely a reduction in earnings." *UIPL* 3-22, p. 3 (DOL ETA 11/22/21)[11]. Thus the DOL concluded that "[e]xcepted Federal employees working full-time during a Federal government shutdown are not 'unemployed' for UC purposes, and are thus ineligible to receive UC." *Id*. This guidance makes clear that working without getting paid, while unfortunate and perhaps addressable by other means, simply is not a risk covered by the unemployment insurance system.

Iowa has in fact implemented several laws in favor of apprenticeships, none of which mention receiving unemployment benefits. Future ready apprenticeships are created in Iowa Code chapter 15C. A fund for other forms of apprenticeship is created in Iowa Code chapter 15B. These chapters provide for apprentice funds that provide moneys to qualifying apprenticeship sponsors. No mention of paying benefits to the apprentices is made, and no mention of unemployment benefits is made. Naturally, if the policy in favor of apprenticeships extended so far as to provide unemployment benefits

11 https://wdr.doleta.gov/directives/attach/UIPL/UIPL_03-22_acc.pdf.

during *any* apprentice training, then the Code would say so. Since it does not we are left only with the generally applicable exceptions to the availability requirement.

Iowa does address certain exceptions to availability which do allow for payment of benefits to those who are in training. There's Department Approved Training. Iowa Code §96.4(6)(a). There's federally approved training for workers unemployed by foreign competition. Iowa Code §96.4(6)(b) (citing 19 U.S.C. §2296(a)). And there's training implemented as part of a voluntary shared work[12] program. Iowa Code §96.40(10)(b). The limitations in these exceptions make clear that there is no *general* "we like apprenticeship training" exception to the availability requirements. "Generally, the express mention of one thing in a statute implies the exclusion of others....Thus, when a legislative body delineates exceptions, it is

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[12] VSW is a scheme where rather than fully layoff a subset of workers in a work unit, the employer can layoff all the work unit but only partially. A somewhat enhanced benefit is allowed by altering how wage offsets are calculated. The math works out so that now partially unemployed workers spread the pain, each gets more benefits plus salary than they'd get in benefits alone, but the charge to the employer is the same. VSW plans must be approved by the agency. These plans can include a training element, and time off spent in this training, even if for an entire week, is compensable time. Such benefits are charged to the state fund.

presumed that no others were created or intended." *Locate.Plus.Com v. Iowa Dep't of Transportation*, 650 N.W.2d 609, 618 (Iowa 2002); *see also 2 Jabez Gridley Sutherland, Statutes & Statutory Construction* § 4916 (3d ed. 1943 & Supp. 1971)("[T]he enumeration of exceptions from the operation of a statute indicates that it should apply to all cases not specifically excepted."); *Bouvier's law Dictionary*, p. 2161 (8th. Ed. 1914)("Exceptio probat regulam de rebus non exceptis - An exception proves a rule concerning things not excepted."); *Metcalfe's Case*, 11 Coke 38, 41 (1617)[13] ("exceptio probat regulam..."). Therefore, the fact that there are delineated training exceptions to the availability requirement, but that the training in this case does not fall within any of them, implies that the general rule of requiring availability applies to this case.

Finally, Iowa's apprenticeship laws are concerned with providing incentives to employers to have apprenticeship programs. The Claimant undermines this policy by arguing that the Employer pay for all related classroom instruction, else be on the hook for

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[13] https://books.google.com/books?id=pPWmBSBPhU0C&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false. In the pdf the case starts at 87th page and the maxim is at the 93rd.

unemployment for all time spent in classroom instruction by every apprentice. And this undermining of policy does nothing to advance the policies of the Employment Security Law, as the DOL makes clear. Perhaps the legislature should create a fund to supplement department approved training and to pay workers while in apprenticeship classroom instruction. But until it does there is no such benefit. As the Board put it, "[t]he benefit account of the unemployment compensation fund is not a job training fund." (App. at p. 378).

III. The EAB Did Not Rule on A Voluntary Leave of Absence Theory And May Not Be Reversed For A Ruling It Did Not Make

A. PRESERVATION OF ERROR: The EAB agrees that the Claimant preserved error on the issue of whether the agency can be reversed for a ruling it did not make.

B. NO RULING ON VOLUNTARY LEAVE OF ABSENCE: The Claimant spends considerable time in his brief, and returns to the issue over and over, on whether the time spent in training constituted a voluntary leave of absence. Under Workforce regulations a claimant is not able to collect benefits while on a voluntary leave of absence. 871 IAC 24.23(10). The EAB raised this issue, but did not rule on it. In the

end, the EAB simply did not base its decision on this issue: "we forbear on a remand for the time being and **leave unresolved the leave of absence issue**...." (App. at p. 369) (emphasis added). The Administrative Law Judge did not mention the issue at all. The issue on this appeal is, as the EAB put it, "the more basic question of availability *vel non*." (App. at p. 369). If the EAB were affirmed on this "more basic question," there would be no need to decide if the Claimant could *also* be found ineligible on the leave of absence theory. Being unavailable once is enough.

The assumption of the Claimant's brief seems to be that if he can establish he was not on a voluntary leave of absence then he would thereby prove he is eligible for benefits. This assertion is refuted by logic, and common sense.

Now it is true that if you are on leave of absence, then you are not available to work. This is a statement in the form "If **A** [on leave] then **Not B** [not available]." The Claimant now asserts if he is not on a voluntary leave of absence then he is available. This is the statement "If Not A [not on leave] then B [available]." He has negated "A" to get "Not A" then negated "Not B" to get "Not Not B," which is "B." So he takes a true conditional statement and from this concludes that the

negative of the premise implies the negative of the conclusion. This is our old friend, the fallacy of the inverse where the second term is stated originally in the negative. As explained by Judge Tabor:

> [T]he fallacy of the inverse (otherwise known as denying the antecedent) [is] the incorrect assumption that if P implies Q, then not-P implies not-Q." *See NLRB v. Noel Canning*, 134 S. Ct. 2550, 2603 (2014) (Scalia, J., concurring in the judgment); *see also Posen Const., Inc. v. Lee Cty.*, 921 F. Supp. 2d 1350, 1364 (M.D. Fla. 2013) ("The problem with denying the antecedent [P] is that there is a logical disconnect between the antecedent [P] and the consequent [Q] such that the predictive behavior of the consequent [Q] is not accurately linked to the nonoccurrence of the antecedent [P].").

Ackerman v. State, No. 16-0287 (Iowa App. 5/3/2017). In the Claimant's argument the only twist is that the conclusion is stated in the negative. The problem for Claimant is that when we have a statement saying "A implies Not B" then the two conditions are mutually exclusive **but** not necessarily jointly exhaustive[14]. For example, it is true that "If I am in Iowa, then I am not in Florida" (*A implies not B*). As a matter of logical necessity the contrapositive of this is also true, so we can say "If I am in Florida, then I am not in Iowa" (*B implies not A*). **But** since Florida and Iowa do not exhaust the list of the places I can be, it does **not** follow that I can say "If I am not in

[14] Or in the language of sets, not all disjoint sets are complements.

Iowa, then I am in Florida" (*Not A implies B*). To assert otherwise is but the "fallacy of the inverse" where the second term is stated in the negative. In other words, you cannot be **inside** both Iowa and Florida at the same time, but you can be **outside** both. Similarly, you cannot be both available to work and also on a voluntary leave of absence, but you can be *not* available for work even though *not* on a leave of absence. Thus a worker who is working full time cannot also collect unemployment benefits. That worker is not on a leave of absence, and yet is denied benefits because "[t]he claimant's availability for other work is unduly limited because such claimant is working to such a degree that removes the claimant from the labor market." 871 IAC 24.23(23). Or again, consider someone who is laid off, files for benefits, and then is imprisoned for 30 days. Under the Claimant's argument since he is not making wages while in jail, and is not on a *voluntary* leave of absence in jail, it follows he is eligible for work and therefore should get benefits. This, of course, is wrong: "If a claimant is in jail or prison, such claimant is not available for work." 871 IAC 24.23(12). So, not being on a voluntary leave of absence is *necessary* for being available to work. It is not, however, *sufficient* to establish availability. As the Board put it: "Being on a leave of absence is just

one way of not being available to work. It's not the only way." (App. at p. 369). What this means is that if the Court affirms the finding that the Claimant was not available, and did not meet any of the exceptions to the availability requirement, then a remand on the leave of absence issue would accomplish nothing. In other words, the Board did not err when finding that the Claimant is unavailable *regardless* of whether or not he is on a leave of absence.

Even if the Court were to think the voluntary leave issue must be addressed the only remedy would be a remand. This is because in judicial review cases "[t]he court's role is to review the specific action taken by the agency...," *Johnston v. IDOT*, 958 NW 2d 180, 184 (Iowa 2021), and "in judicial review proceedings the district court exercises only appellate jurisdiction and has no original authority to declare the rights of parties or the applicability of any statute or rule." *Black v. University of Iowa*, 362 NW 2d 459, 462 (Iowa 1985) (*quoting Public Employment Relations Board v. Stohr*, 279 N.W.2d 286, 290 (Iowa 1979)). So even if the Court finds that case boils down to the leave of absence issue, that is no basis for reversal. A remand would be required.

CONCLUSION

The district court did not err in affirming the Board's affirmance of the Administrative Law Judge's finding that the Claimant was not eligible for benefits during the week in question.

REQUEST FOR ORAL ARGUMENT

Appellee requests to be heard orally at the time of final submission of this matter.

Respectfully submitted,

Rick Autry
Attorney

CERTIFICATE OF COMPLIANCE

This Brief complies with the typeface requirements and type-volume limitation of I.R.A.P. 6.903(1)(d) and I.R.A.P. 6.903(1)(g)(1) or (2) because this this brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains 11,739 words excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Rick Autry
Attorney