

IOWA DEPARTMENT OF INSPECTIONS AND
APPEALS
DIVISION OF ADMINISTRATIVE HEARINGS
Wallace State Office Building
DES MOINES IOWA 50319

Appeal Number: 12IWD030

Respondent (1)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

This Decision Shall Become Final, as of the date of mailing stated below unless:

ROBERT HENSLEY

1. Either party files a WRITTEN application for a rehearing WITHIN TWENTY (20) DAYS AFTER the date below. The written application must state the specific reasons for the rehearing and the relief sought. If the request for a rehearing is denied or if the rehearing decision is not satisfactory, either party may petition the District Court WITHIN THIRTY (30) DAYS of either action;
OR

**INDIAN HILLS COMMUNITY COLLEGE
HUMAN RESOURCES DEPT.
525 GRANDVIEW AVE. BLDG 1
OTTUMWA, IA 52501**

2. Either party may petition the District Court WITHIN THIRTY (30) DAYS after the date below.

**IOWA WORKFORCE DEVELOPMENT
BARB STANEK, FIELD AUDITOR
IHCC NORTH CAMPUS
15260 TRUMAN STREET
OTTUMWA, IA 52501**

YOU DO HAVE THE RIGHT TO HIRE A LAWYER at your own expense to represent you in these proceedings.

(Administrative Law Judge)

October 26, 2012

(Decision Dated & Mailed)

JOSEPH WALSH, IWD
JOSEPH BERVID, IWD
NICHOLAS OLIVENCIA, IWD
CARIE O'BRIEN, IWD

STATEMENT OF THE CASE

Robert Hensley filed an appeal of a decision issued by Iowa Workforce Development (the Department) dated November 30, 2010. In that decision, the Department determined that an employer-employee relationship existed between Indian Hills Community College and Hensley.

The case was transmitted from Workforce Development to the Department of Inspections and Appeals on July 27, 2012 to schedule a contested case hearing. A Notice of Hearing was mailed to the parties on July 30, 2012. On September 21, 2012, a telephone hearing was held before Administrative Law Judge Laura Lockard. The Department was represented by field auditor Barb Stanek, who presented testimony. Appellant Robert Hensley was present and provided testimony. Sheri Heisdorffer and Mick Lawson were present and represented Indian Hills Community College, but neither presented testimony. The Department submitted Exhibit A (pp. 1-39), which was admitted into the record as evidence.

ISSUE

Whether the Department correctly determined that an employer-employee relationship existed between Robert Hensley and Indian Hills Community College.

FINDINGS OF FACT

Robert Hensley was interviewed on May 3, 2010 by Department investigator Karen von Behren regarding a potential overpayment of unemployment insurance benefits. Hensley signed a statement during that interview indicating that he had been working with C&C Machining through a program with Indian Hills Community College (IHCC). In the statement, Hensley indicates that he was paid by IHCC during the applicable time period, received a W-2, and had taxes taken out by IHCC. Hensley indicated that he started being paid by IHCC in approximately July, 2009 and worked fairly steadily through January 23, 2010. Hensley indicated that he had reported the amounts he was paid by IHCC when claiming unemployment insurance benefits, but had reported it as self-employment income. During their interview, Hensley presented von Behren with a letter from Mick Lawson, assistant to the President at IHCC, which stated that Hensley was an independent contractor. (Exh. A, pp. 29, 30-32; Stanek testimony).

Based on the letter from IHCC identifying Hensley as an independent contractor, von Behren requested that the Department investigate to determine whether Hensley should properly be classified as an employee of IHCC or an independent contractor. Field auditor Barb Stanek was assigned to conduct the investigation. Stanek sent questionnaires to IHCC and Hensley requesting information. (Stanek testimony).

IHCC returned the Questionnaire for Determining Status of Workers, which was completed by Human Resources director Bonnie Campbell. The questionnaire lists Hensley as a "part-time trainer" and indicates that he started working for IHCC on January 4, 1999. Campbell indicated that Hensley worked "as needed" and was paid on an hourly basis. Campbell indicated that IHCC has the right to direct and control the manner in which services are performed, has the right to discharge Hensley at any time, and that Hensley could terminate services at any time without incurring liability or penalty. Campbell indicated that IHCC considered Hensley to be an employee. (Exh. A, pp. 24-28).

Hensley also returned a Questionnaire for Determining Status of Workers. He indicated that he was required to perform the services for IHCC personally and that he worked at a third party location and at his home office. Hensley indicated that the work he did for IHCC was performed under a training grant. He indicated that he provided the equipment, supplies, tools, and vehicle for the job. Hensley also indicated that IHCC did not have the right to direct and control the manner in which he performed the services. Hensley wrote "NA" next to questions about whether IHCC had the right to discharge him and whether he could terminate services at any time without incurring liability or penalty. (Exh. A, pp. 18-21).

Hensley also wrote a letter to Stanek regarding the work he performed for IHCC. In the letter, he stated that he performed "ISO consulting duties" for C&C Machining from

April, 2009 through completion of the project in January, 2010. Hensley listed his duties, including internal auditor training, leading audits/establishing audit schedule, conducting audits, writing quality manual, writing quality procedures, conducting management reviews, employee training, and documenting key measures. Hensley stated that he provided all materials and resources. He also asserted that he was paid through IHCC every two weeks after submitting his hours. (Exh. A, p. 22).

As part of the Department's investigation, Stanek spoke with Mick Lawson at IHCC, who had authored the letter that Hensley submitted to von Behren in support of his assertion that he was an independent contractor. Lawson stated that when he wrote the letter he had not checked with the personnel department, but that he later checked and found out that Hensley was classified as an adjunct professor and employee of IHCC. Lawson submitted another letter, dated June 21, 2010, in which he confirmed that he had mistakenly referred to Hensley as an independent contractor in his previous letter. Lawson stated in the letter that he had verified with the IHCC Dean of Personnel that Hensley was having payroll taxes deducted from his pay and would receive a W-2 for his employment as an instructor in the Customized Learning Division. (Exh. A, p. 29).

At hearing, Hensley testified that his work for IHCC involved working with a company in Centerville, Iowa setting up a quality management system. The IHCC Customized Learning Division helps area employers get the training and resources they need to be competitive. IHCC partners a business with a competent, knowledgeable expert to get the training they need. The expert, who in this case was Hensley, helps the employer work toward a certification that will assist the employer in marketing to a larger clientele. (Hensley testimony).

During his work on the project, Hensley reported to Steve Allison at IHCC; Allison works in the Customized Learning Division and is the contact point for employers in a certain set of counties. Allison asked Hensley to develop the program for this employer. Hensley turned his hours for the project in to Allison and assisted Allison in doing what was necessary to complete the grant. (Hensley testimony).

Records submitted by IHCC to the Department during the Department's investigation into whether Hensley was overpaid unemployment insurance benefits reflect that he was paid \$400 per week from June 28, 2009 through October 24, 2009. In each of those weeks, Hensley worked eight hours. After that point, Hensley's earnings varied, but he continued to be paid by IHCC through at least January 23, 2010. (Exh. A, pp. 33-35).

REASONING AND CONCLUSIONS OF LAW

For purposes of unemployment compensation, an "employer" is defined as an employing unit that, in any calendar quarter in the current or preceding calendar year, paid wages of \$1,500 or more, or employed at least one individual for some portion of a day in each of twenty different calendar weeks during the current or preceding calendar year.¹ "Employment" is defined as service performed for wages or under any contract of

¹ Iowa Code § 96.19(16)(a) (2011).

hire, written or oral, express or implied.² When an employer claims that any employment is not employment under the Iowa Employment Security Law, the burden is on the employer to prove the exemption claimed.³ The Department's regulations do not appear to contemplate an employee challenging a finding that an employer-employee relationship existed, but the clear import of the regulations is to place the burden on the party arguing against an employment relationship to prove an exemption.

In the unemployment compensation context, it is well-settled that "the right to control the manner and means of performance is the principal test in determining whether a worker is an employee or independent contractor."⁴

The relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. An employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so.⁵

The Department's regulations set out in some detail the factors to be considered in determining whether a worker is an employee or an independent contractor.⁶ Factors that support the existence of an employer-employee relationship include:

- Right to discharge an employee without being held liable for damages for breach of contract;
- Furnishing of tools, equipment, material, and a place to work;
- Continuous performance of work for the employer;
- Payment of a fixed wage on a weekly or hourly basis.

Factors that support an independent contractor relationship include:

- Performance of a specific job at a fixed price;
- Following a distinct trade, occupation, business, or profession in which an individual offers services to the public to be performed without the control of those seeking the benefit of his or her training or experience;
- Unreimbursed expenses and fixed, ongoing costs regardless of whether work is currently being performed;
- Significant investment in real or personal property that is used in performing services for someone else;
- Right to employ assistants with the exclusive right to supervise their activity and

² Iowa Code § 96.19(18)(a) (2011).

³ 871 Iowa Administrative Code (IAC) 22.7(3), 23.55(2).

⁴ *Gaffney v. Department of Employment Services*, 540 N.W.2d 430, 434 (Iowa 1995).

⁵ 871 IAC 23.19(1).

⁶ See generally 871 IAC 23.19.

completely delegate the work.⁷

The regulations also provide that if, upon examination of the facts of a case, an employer-employee relationship exists, the designation or description by the parties of their relationship as anything other than an employer and employee is immaterial.⁸

While there are factors in this case that fall on both sides of the employee/independent contractor line, the weight of the evidence supports the conclusion that Hensley was an employee of IHCC and that IHCC had the right to direct and control his work. He was paid on an hourly basis by IHCC for work performed under a grant that was awarded to IHCC. He reported to an IHCC employee and his job title was adjunct professor.

Hensley placed great emphasis on the fact that he provided the materials for the work and that he was not reimbursed for his mileage. Neither of these factors is dispositive. The vast majority of employees are not reimbursed for mileage to get to their workplace; the testimony established that Hensley's primary worksite was a manufacturing organization in Centreville. With respect to materials, the record is not entirely clear as to what materials Hensley provided, but it seems they were in the nature of documents and informational materials. The emphasis in the Department's regulations on tools and materials relates more to the sunk costs that an independent contractor might have that are unrelated to the current job being performed. In a case like this where Hensley's job is to assist in implementing a quality management system, tools and materials are not a significant factor.

Additionally, there does not appear to be any dispute that Hensley could have been discharged at any point if his job performance was unsatisfactory. While the training grant had a specific timeline – Hensley testified at hearing that the goal was nine months to certification for this manufacturing business – there was no contract or agreement that Hensley would work for the duration. He turned in his weekly hours to IHCC and presumably if IHCC had felt his performance was deficient it could have terminated his employment and replaced him without being held liable for damages or breach of contract.

Under these circumstances, the Department's determination that Hensley was an employee of IHCC is correct and must be affirmed.

DECISION

The Department's decision dated November 30, 2010 is affirmed. The Department shall take any action necessary to implement this decision.

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⁷ 871 IAC 23.19.
⁸ 871 IAC 23.19(7).