

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

DONALD KRABER  
926 NW MAPLE  
ANKENY IA 50023

ANKENY COMMUNITY SCHOOL DISTRICT  
ATTN PAYROLL DEPARTMENT  
306 SW SCHOOL ST  
ANKENY IA 50021-0189

Appeal Number: 05A-UI-08093-RT  
OC: 07-03-05 R: 02  
Claimant: Appellant (2)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-3 – Failure to Accept Work  
Section 96.4-3 - Required Findings (Able and Available for Work)  
Section 96.5-1 – Voluntary Quitting  
Section 96.5-2-a – Discharge for Misconduct  
Section 96.7-2-a-2 – Employer Contributions and Reimbursements  
(Different Employment - Benefits Charged)  
Section 96.4-5 – Benefits Based on Service for an Educational Institution

STATEMENT OF THE CASE:

The claimant, Donald Kraber, filed a timely appeal from an unemployment insurance decision dated August 2, 2005, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on August 25, 2005, with the claimant participating. Anne Laing, Associate Superintendent, participated in the hearing for the employer, Ankeny Community School District. The administrative law judge takes official notice

of Iowa Workforce Development Department unemployment insurance records for the claimant. Although not set out on the notice of appeal, the parties permitted the administrative law judge to take evidence on and decide, if necessary, the following issues: 1. Whether the claimant is disqualified to receive unemployment insurance benefits because he refused to accept suitable work under Iowa Code section 96.5-3; 2. Whether the claimant is ineligible to receive unemployment insurance benefits because he is, and was, at relevant times, not able, available, and earnest and actively seeking work; and 3. Whether the claimant is ineligible to receive unemployment insurance benefits because he is employed by an educational institution, between academic years or terms and has reasonable assurance.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time bus driver from 1995 until he separated from his employment on May 27, 2005, which was the end of the 2005-2006 school year. Prior to that time, the employer had made a decision to out source its bus transportation to a profit company, Durham Bus Service. The employer notified all of its bus drivers by letter dated, June 30, 2005, that their contract was completed at that time and they would no longer be employed by the employer. However, the bus drivers were fully aware of this prior to that time.

In the spring of 2005, the claimant went to the payroll department and spoke to Jeannie Ruff, and informed her that he was not going to work for Durham Bus Service because they did not have any "fringies." While employed by the employer, he had sick leave and other fringe benefits, including a significant retirement plan through Iowa Public Employees Retirement System (IPERS). The claimant was, in the summer of 2005, offered a position with Durham Bus Services paying approximately \$16.51 per hour, for five hours a day, for five days a week or a gross weekly wage of \$412.75. The claimant's average weekly wage for unemployment insurance benefit purposes is \$582.20. This offer was made no later than the fifth week of the claimant's unemployment and should have paid 100 percent of the claimant's average weekly wage. Durham Bus Service also did not provide sick leave. While employed with the employer, the claimant had a sick leave package or policy.

The claimant has placed no physical restrictions or training restrictions on his ability to work. The claimant has placed no day or time restrictions on his availability for work. The claimant is earnestly and actively seeking work by making two in-person job contacts each week.

#### REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is disqualified to receive unemployment insurance benefits because he refused to accept similar work. He is not disqualified for that reason.
3. Whether the claimant is ineligible to receive unemployment insurance benefits because at relevant times he was not able, available, and earnest and actively seeking work. The claimant is not ineligible for those reasons.
4. Whether the claimant is ineligible to receive unemployment insurance benefits because he is employed by an educational institution between successive academic years or terms and has

reasonable assurance of performing the same or similar services in the new academic year, as he did in the old academic year. The claimant is not ineligible for these reasons.

Iowa Code section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

- a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

- a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The parties agree that the employer outsourced its bus transportation and therefore, notified the claimant, no later than June 30, 2005, that he would no longer be employed by the employer. The employer simply did not have a position for the claimant since it had ended its own transportation system. Accordingly, the administrative law judge concludes that the claimant was laid off for a lack of work and this is not disqualifying. Even if the claimant had been discharged, there is no evidence that the claimant was discharged for disqualifying misconduct.

and he would not be disqualified as a result of a discharge. There is not a preponderance of the evidence that the claimant left his employment voluntarily. It is true that the claimant informed the employer that he was going to retire, but he informed the employer of this because the claimant did not intend to go to work for the Durham Bus Service, which was the profit company chosen by the employer to take over its transportation system. Accordingly, the administrative law judge concludes that the claimant is not disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided he is otherwise eligible.

Iowa Code section 96.5-3-a provides:

An individual shall be disqualified for benefits:

3. Failure to accept work. If the department finds that an individual has failed, without good cause, either to apply for available, suitable work when directed by the department or to accept suitable work when offered that individual. The department shall, if possible, furnish the individual with the names of employers which are seeking employees. The individual shall apply to and obtain the signatures of the employers designated by the department on forms provided by the department. However, the employers may refuse to sign the forms. The individual's failure to obtain the signatures of designated employers, which have not refused to sign the forms, shall disqualify the individual for benefits until requalified. To requalify for benefits after disqualification under this subsection, the individual shall work in and be paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

a. In determining whether or not any work is suitable for an individual, the department shall consider the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness, prior training, length of unemployment, and prospects for securing local work in the individual's customary occupation, the distance of the available work from the individual's residence, and any other factor which the department finds bears a reasonable relation to the purposes of this paragraph. Work is suitable if the work meets all the other criteria of this paragraph and if the gross weekly wages for the work equal or exceed the following percentages of the individual's average weekly wage for insured work paid to the individual during that quarter of the individual's base period in which the individual's wages were highest:

(1) One hundred percent, if the work is offered during the first five weeks of unemployment.

(2) Seventy-five percent, if the work is offered during the sixth through the twelfth week of unemployment.

(3) Seventy percent, if the work is offered during the thirteenth through the eighteenth week of unemployment.

(4) Sixty-five percent, if the work is offered after the eighteenth week of unemployment.

However, the provisions of this paragraph shall not require an individual to accept employment below the federal minimum wage.

The administrative law judge concludes that the employer has the burden to prove that the claimant has refused to accept suitable work. Norland v. Iowa Department of Job Service, 412 N.W.2d 904, 910 (Iowa 1987). The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant refused to accept suitable work. The evidence does establish that the claimant was offered a position with Durham Bus Service, the profit company who took over the transportation services for the employer. Neither party could specify the date of the offer. The administrative law judge concludes that the offer came no later than five weeks into the claimant's unemployment. The position with Durham Bus Services would have paid approximately .30 cents per hour more than the \$16.21 per hour that he was receiving from the employer herein, so his hourly wage would have been \$16.51 per hour. The evidence also establishes that the claimant would have worked approximately five hours a day, five days a week for a gross weekly wage of \$412.75. This is significantly less than the claimant's average weekly wage of \$582.20 and therefore, the offered position would not be suitable because of the pay. The administrative law judge further concludes that the offered position would not be suitable because it did not have a sick leave policy. While employed by the employer the claimant had a sick leave policy. Durham Bus Service had no sick leave policy. The administrative law judge concludes that the absence of a sick leave policy would also make the offer of work from Durham Bus Services unsuitable. The claimant chose not to accept the position with Durham Bus Service. The administrative law judge concludes that the claimant did not refuse to accept suitable work, because the offer of work was not suitable and, therefore, he is not disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided he is otherwise eligible.

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".

The administrative law judge concludes that the claimant has the burden to prove that he is able, available, and earnest and actively seeking work under Iowa Code section 96.4-3 as otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has met his burden of proof to demonstrate by a preponderance of the evidence that he is and was able, available, and earnest and actively seeking work. The claimant credibly testified that he has placed no physical or training restrictions on his ability to work and has placed no time or day restrictions on his availability for work. The claimant further testified that he was earnestly and actively seeking work by making two in-person job contacts each week. There is no evidence to the contrary. The administrative law judge notes that the claimant is working part-time for Durham Bus Service while seeking full-time work. Accordingly, the administrative law judge concludes that the claimant is able, available, and earnest and actively seeking work and is not ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to

the claimant provided he is otherwise entitled to such benefits and remains able, available, and earnest and actively seeking work.

Iowa Code section 96.7-2-a(2) provides:

2. Contribution rates based on benefit experience.

a. (2) The amount of regular benefits plus fifty percent of the amount of extended benefits paid to an eligible individual shall be charged against the account of the employers in the base period in the inverse chronological order in which the employment of the individual occurred.

However, if the individual to whom the benefits are paid is in the employ of a base period employer at the time the individual is receiving the benefits, and the individual is receiving the same employment from the employer that the individual received during the individual's base period, benefits paid to the individual shall not be charged against the account of the employer. This provision applies to both contributory and reimbursable employers, notwithstanding subparagraph (3) and section 96.8, subsection 5.

An employer's account shall not be charged with benefits paid to an individual who left the work of the employer voluntarily without good cause attributable to the employer or to an individual who was discharged for misconduct in connection with the individual's employment, or to an individual who failed without good cause, either to apply for available, suitable work or to accept suitable work with that employer, but shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The amount of benefits paid to an individual, which is solely due to wage credits considered to be in an individual's base period due to the exclusion and substitution of calendar quarters from the individual's base period under section 96.23, shall be charged against the account of the employer responsible for paying the workers' compensation benefits for temporary total disability or during a healing period under section 85.33, section 85.34, subsection 1, or section 85A.17, or responsible for paying indemnity insurance benefits.

The administrative law judge concludes that the claimant is no longer in the employment of a base period employer and, even if he was, he is not receiving the same employment from the employer as he did in his base period and therefore, the account of the employer herein shall not be relieved of charges for any unemployment insurance benefits to which the claimant is entitled.

Iowa Code section 96.4-5-b provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

5. Benefits based on service in employment in a nonprofit organization or government entity, defined in section 96.19, subsection 18, are payable in the same amount, on the same terms and subject to the same conditions as compensation payable on the same basis of other service subject to this chapter, except that:

b. Benefits based on service in any other capacity for an educational institution including service in or provided to or on behalf of an educational institution while in the employ of an educational service agency, a government entity, or a nonprofit organization, shall not be paid to an individual for any week of unemployment which begins during the period between two successive academic years or terms, if the individual performs the services in the first of such academic years or terms and has reasonable assurance that the individual will perform services for the second of such academic years or terms. If benefits are denied to an individual for any week as a result of this paragraph and the individual is not offered an opportunity to perform the services for an educational institution for the second of such academic years or terms, the individual is entitled to retroactive payments of benefits for each week for which the individual filed a timely claim for benefits and for which benefits were denied solely by reason of this paragraph.

871 IAC 24.51(6) provides:

School definitions.

(6) Reasonable assurance, as applicable to an employee of an educational institution, means a written, verbal, or implied agreement that the employee will perform services in the same or similar capacity, which is not substantially less in economic terms and conditions, during the ensuing academic year or term. It need not be a formal written contract. To constitute a reasonable assurance of reemployment for the ensuing academic year or term, an individual must be notified of such reemployment.

The administrative law judge concludes that the employer herein, Ankeny Community School District is an educational institution. See 871 IAC 24.51(1). The administrative law judge further concludes that his employment with the educational institution ended on May 27, 2005. The claimant was so informed of this, no later than by letter dated June 30, 2005. The claimant did not have reasonable assurance of performing the same services in the new or ensuing school year, 2005-2006, that he performed in the prior school year, 2004-2005. Further, the administrative law judge concludes that Durham Bus Services is a profit company and is not an educational institution and the claimant's opportunity to go to work for them would not trigger the between terms denial of unemployment insurance benefits in Iowa Code section 96.4(5)(b). Accordingly, the administrative law judge concludes that the claimant is not in the employment of an educational institution between successive academic years or terms and does not have reasonable assurance and therefore, the claimant is not ineligible to receive unemployment insurance benefits.

#### DECISION:

The representative's decision of August 2, 2005, reference 01, is reversed. The claimant, Donald Kraber, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was laid off for a lack of work, or was discharged, but not for disqualifying misconduct and he has not refused to accept suitable work and he is able, available, and earnest and actively seeking work and is not employed by an educational institution between successive academic years or terms and he does not have reasonable assurance of continued

employment with the academic institution. Since the claimant is not receiving the same employment from the employer as he did during his base period, the account of the employer herein should not be relieved of any charges for unemployment insurance benefits to which the claimant is entitled.

dj/pjs