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

MICHAEL R GRAVES	:	
	:	**HEARING NUMBER:** 18BUI-09763
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
RYDER INTEGRATED LOGISTICS INC	:	
	:	
Employer	:	

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A, 96.3-7

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Claimant appealed to the Employment Appeal Board the issue of his disqualification from benefits and also on the issue of chargeability of the overpayment in this case. The members of the Employment Appeal Board reviewed the entire record. On the question of whether the Claimant was disqualified from benefits the Appeal Board finds the administrative law judge's decision is correct. The Employment Appeal Board **AFFIRMS** on the Claimant's **disqualification** from benefits.

The Appeal Board finds it cannot affirm the administrative law judge's decision on the chargeability of the overpayment. The Employment Appeal Board **REVERSES** on the overpayment **chargeability** issue as set forth below

As a result the Claimant is still not eligible for benefits but now will **not** be responsible for paying back the overpayment. We find that the overpayment must be charged to the fund rather than to either party.

FINDINGS OF FACT:

The Administrative Law Judge's findings of fact are adopted by the Board as its own.

REASONING AND CONCLUSIONS OF LAW:

The Board adopts the Administrative Law Judge's Reasoning and Conclusions of Law with the exception of the last two paragraphs.

As an initial matter we make clear that the Claimant was disqualified based on the separation from employment, and that **the disqualification decision still stands**. The Board thus adopts as its own all of the Administrative Law Judge's Reasoning and Conclusions of Law with the exception of the last two paragraphs. In lieu of the remainder of the Administrative Law Judge's conclusions of law the Board makes the following Reasoning and Conclusions of Law.

Background of Iowa Code §96.3(7)

Prior to 2008 if a claimant received benefits he should not have received then that claimant was obliged to pay those benefits back. In 2008 the Iowa legislature changed that by passing S.F. 2160. That bill was to deal with the situation where an employer fails to participate in the fact finding process, then shows up at the hearing, and a disqualification based on a quit, or on a discharge, results. When that happens there is very often a resulting overpayment, due in part to the employer's failure to show up at fact finding. To deal with this the law in 2008 was amended as follows (additions in underlining):

> b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, **benefits shall not be recovered from an individual if the employer did not participate in the initial determination** to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. **The employer shall not be charged with the benefits.**
>
> (2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

82 G.A. ch. 1170(bold facing added). Following this provision if an employer failed to participate in the fact finding process, no matter what the reason, then "benefits shall not be recovered" from the claimant. But, at that time, the employer was not charged with such benefits either, and so the fund absorbed the overpayment.

Congress subsequently passed the Trade Adjustment Assistance Extension Act of 2011. Section 252 of that Act provides:

> IN GENERAL.—Section 3303 of the Internal Revenue Code of 1986 is amended
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> … (2) by inserting after subsection (e) the following new subsection:
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> ''(f) PROHIBITION ON NONCHARGING DUE TO EMPLOYER FAULT.—
>
> ''(1) IN GENERAL.—A State law shall be treated as meeting the requirements of subsection (a)(1) only if such law provides that an employer's account shall not be relieved of charges relating to a payment from the State unemployment fund if the State agency determines that—
>
> ''(A) the payment was made because the employer, or an agent of the employer, was at fault for failing to respond timely or adequately to the request of the agency for information relating to the claim for compensation; and
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> ''(B) the employer or agent has established a pattern of failing to respond timely or adequately to such requests.
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> ''(2) STATE AUTHORITY TO IMPOSE STRICTER STANDARDS.—Nothing in paragraph (1) shall limit the authority of a State to provide that an employer's account not be relieved of charges relating to a payment from the State unemployment fund for reasons other than the reasons described in subparagraphs (A) and (B) of such paragraph, such as after the first instance of a failure to respond timely or adequately to requests described in paragraph (1)(A).''.

Public Law 112–40 §252, 125 STAT. 422. Under this provision an employer who was at fault for "failing to respond timely or adequately to the request of the agency for information" and who also had a pattern of such failures had to be charged for any resulting overpayment if state law were to be approved by the Secretary as conforming with federal law. States were given until October of 2013 to conform. *See* Iowa Code §96.11(10)(a) (mandating federal-state cooperation to the fullest extent possible).

In 2013 the Iowa General assembly passed Senate File 110, titled "An Act relating to conformity with federal law concerning unemployment insurance employer charges and claimant misrepresentation regarding benefit overpayments, providing a penalty, and including applicability provisions." 85 GA ch. 3. A fiscal note was requested regarding Senate File 110 and in that note the Legislative Service Agency observed in its "background" section that the "Trade Adjustment Assistance Extension Act of 2011 ….prohibited states from relieving an employer of benefit charges if the employer, or agent, caused an inappropriate payment." *Fiscal Note of 2-4-2013 on SF 110 – Federal Unemployment Insurance Conformity*. Senate File 110 was enacted into law, and in relevant part it read:

> Section 1. Section 96.3, subsection 7, paragraph b, subparagraph (1), Code 2013, is amended to read as follows:

> (1) (a) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.
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> (b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. ~~The employer shall not be charged with the benefits.~~

85 G.A. Ch. 3. This is the current wording of Iowa Code subsection 96.3(7). Clearly, as permitted by federal law, the Iowa General Assembly charged the employer for overpayment in more situations than *required* by federal law. Under the TAA Extension Act the employer only *has* to be charged if the employer is both at fault for an inadequate response and also has a pattern of such inadequate responses. Iowa has a system of charging for a single inadequate response, and authorizing a ban on representatives who have a pattern of not responding. The way the Iowa law reads, however, the employer is still only charged if the employer failed to "respond timely or adequately to the department's request for information relating to the payment of benefits." The sentence "The employer shall not be charged with the benefits" was struck out, but it was not changed to read "The employer shall ~~not~~ be charged with the benefits." Instead, the charging of the employer is conditioned on an untimely or inadequate response to a request for information. Meanwhile, since 2008, the law has consistently been quite clear that, in the absence of fraud, failure to participate by the employer means the claimant cannot be charged for an overpayment resulting from a subsequent separation disqualification.

Finally, as quoted by the Administrative Law Judge, Iowa Workforce passed a regulation dealing with participation in fact finding by employers. That regulation, however, defines what participation is, and says nothing about what happens if the employer fails to get notice of the fact finding, or otherwise fails to participate for a justifiable reason.

Analysis

We now take up the issue of who can be charged for benefits, party by party We conclude neither party can be charged under the circumstance of this case, and that as a result the fund must absorb the overpayment.

The law could not be clearer that the Claimant cannot be charged. Since 2008 Code section 96.3(7) has provided that, unless fraud or misrepresentation is shown, "benefits shall not be recovered" from a claimant if the employer does not participate in fact finding. We take the provision at its literal word. Thus we ask "was there fraud proven?" Since the answer is "no," we then ask "did the employer

participate?" Since the answer is "no," we must conclude that the Claimant cannot be charged for any overpayment that "occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment." Iowa Code §96.3(7)(b)(1)(b). We thus reverse the charging of the overpayment to the Claimant.

As for the Employer it takes a little more interpretation. The Code states that an employer is to be charged if "the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits…" Iowa Code §96.3(7)(b)(1)(a). Here the Employer did respond to the notice of a fact finding conference by giving a number to be called. The employer supplied an extension, but it appears the fact finder did not dial the extension but rather remained on hold and then gave up. We cannot say that benefits were paid because the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. Instead benefits were paid because the Employer did not receive a timely call from the agency to the extension provided. The Employer thus cannot be charged for the overpayment. Since neither party is to be charged then the overpayment is absorbed by the fund – as was the case between 2008 and 2013.

The charging of the fund is consistent with federal law. Under the TAA Extension Act of 2011 the employer is only *required* to be charged with benefits if the employer not only made an inadequate response, but also had a pattern of such responses. *See generally* UIPL 02-12, *Unemployment Compensation (UC) Program Integrity – Amendments made by the Trade Adjustment Assistance Extension Act of 2011* (making clear that charging only required if a pattern is established). Our ruling is thus consistent with federal law for two reasons. First this Employer did not make an inadequate response, as we discussed above, and second there is no pattern of such inadequate responses shown in this record, nor does the record indicate that such an issue is pending. Our ruling today thus does not endanger our compliance with federal law.

The Claimant and Employer are both relieved of responsibility for the overpayment, and the overpayment is thus to be charged to the fund.

DECISION:

The administrative law judge's decision dated October 10, 2018 is **AFFIRMED ON THE ISSUE OF DISQUALIFICATION FROM BENEFITS.** We affirm the decision that the Claimant was discharged from employment due to job-related misconduct. As a result benefits are withheld until such time as the Claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

The administrative law judge's decision dated October 10, 2018 is **REVERSED ON THE ISSUE OF OVERPAYMENT CHARGING**. The overpayment entered in the amount of $1,745.00 is **not** chargeable to the Claimant and furthermore is also **not** chargeable to the Employer. The Claimant is relieved of the responsibility to pay back the overpayment of $1,745.00, and the Employer's account is not to be charged for those overpaid benefits. Instead, the overpayment in this matter is chargeable to the fund.

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Kim D. Schmett

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Ashley R. Koopmans

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