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

KEVIN L JONES
2815 FAIR AVE
DAVENPORT IA 52803

PLEASANT VALLEY COMMUNITY
SCHOOL DISTRICT
ATTN SECRETARY
PO BOX 332
PLEASANT VALLEY IA 52767-0332

Appeal Number: 05A-UI-08561-RT
OC: 07-03-05 R: 04
Claimant: Respondent (1)

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, 4th 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.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a - Discharge for Misconduct
Section 96.5-1 – Voluntary Quitting
Section 96.4-5 – Benefits Based on Service for an Educational Institution
Section 96.4-3 - Required Findings (Able and Available for Work)
Section 96.5-3 – Failure to Accept Work
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Pleasant Valley Community School District, filed a timely appeal from an unemployment insurance decision dated August 9, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Kevin L. Jones. After due notice was issued, a telephone hearing was held on September 15, 2005 with the claimant participating. Jim Spelhaug,

Superintendent of Schools, participated in the hearing for the employer. Mike Clingingsmith was available to testify for the employer but not called because his testimony would have been repetitive and unnecessary. Claimant's Exhibit A was admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Claimant's Exhibit A, the administrative law judge finds: The claimant was employed by the employer as a full-time assistant vehicle mechanic and occasional substitute bus driver from November 5, 2001 until he was laid off for a lack of work on June 30, 2005. The employer maintained its own transportation system for the students and the claimant was hired as a mechanic to work on the school buses. Effective July 1, 2005, the employer contracted its bus service out to a private company, First Student, Inc. This private company is a profit corporation. First Student, Inc. would also be responsible for the upkeep and maintenance of the school buses. Therefore, the claimant's position with the employer was eliminated and he was laid off for a lack of work. See Claimant's Exhibit A. First Student, Inc. provides no other educational functions other than the bus transportation.

Sometime in the end of May or June of 2005 but before July 1, 2005, First Student, Inc. offered the claimant a position paying between $16.00 or $16.25 per hour. The claimant's hours and days worked were not settled in this offer. Assuming a 40 hour week, the claimant's gross weekly wage would be between $640.00 and $650.00. The claimant's employment with First Student, Inc. would be at the same location as he had been working for the employer. The employer's job functions for First Student, Inc. would be the same as for the employer, mechanic for school buses. In terms of fringe benefits, the claimant would have paid approximately $67.00 for dental and health insurance under the employer's plan and would have paid between $201.00 and $250.00 under the plan by First Student, Inc.

The claimant has placed no physical restrictions or training restrictions on his ability to work. The claimant has placed no hour or day restrictions or earning restrictions on his availability for work. The claimant is earnestly and actively seeking work by making two in-person job contacts each week. The claimant filed his claim for unemployment insurance benefits effective July 3, 2005 and began a benefit year beginning January 3, 2005. Pursuant to that claim, the claimant has received unemployment insurance benefits in the amount of $3,105.00 as follows: $345.00 per week for nine weeks from benefit week ending July 16, 2005 to benefit week ending September 10, 2005. For benefit week ending July 9, 2005, the claimant had vacation pay in an amount sufficient to cancel benefits for that week. The claimant's average weekly wage for unemployment insurance benefit purposes is $558.13.

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 ineligible to receive unemployment insurance benefits because he is still employed with an educational institution but is off work between successive academic years or terms and has reasonable assurance that he will be performing the same services in the new

academic year or term as he did in the old. The claimant is not ineligible to receive unemployment insurance benefits for this reason.

3. Whether the claimant is ineligible to receive unemployment insurance benefits because at relevant times he was not able, available, and earnestly and actively seeking work. The claimant is not ineligible to receive unemployment insurance benefits for this reason.

4. Whether the claimant is disqualified to receive unemployment insurance benefits because he refused to accept suitable work. The claimant is not disqualified to receive unemployment insurance benefits for this reason.

5. Whether the claimant is overpaid unemployment insurance benefits. He is not.

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 employer's witness, Jim Spelhaug, Superintendent of Schools, credibly testified, and the administrative law judge concludes, that the claimant was laid off for a lack of work on June 30, 2005. The claimant testified that he was discharged per letter shown at Claimant's Exhibit A. However, the letter really indicates that the claimant would be laid off for a lack of work on June 30, 2005. Even if the claimant had been discharged, there is no evidence of disqualifying misconduct. The employer contracted out its transportation services for students to a private profit corporation whose services included the maintenance and upkeep of buses which was the claimant's job function. The claimant's position with the employer, Pleasant Valley Community School District, was eliminated. Accordingly, the administrative law judge concludes that the claimant was laid off for a lack of work and this is not disqualifying and 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 96.4-5-b provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:
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> 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:
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> 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, Pleasant Valley Community School District, is an educational institution. See 871 IAC 24.51(1). However, the administrative law judge is constrained to conclude that the claimant did not receive reasonable assurance that he would be performing the same services for the new school year, 2005-2006, that he performed in the prior school year, 2004-2005, from the employer, Pleasant Valley Community School District. The evidence is clear that the employer was not going to continue the claimant's employment. The claimant may have been offered a position with First Student, Inc., similar to the one he occupied as an employee of the employer, but First Student, Inc. is a profit corporation and cannot be an educational institution. See 871 IAC 24.51. Accordingly, the administrative law judge concludes that the claimant is not employed by an educational institution between two successive academic years or terms and does not have reasonable assurance. Therefore, the administrative law judge concludes that the claimant is not ineligible to receive unemployment insurance benefits as a result of the "between terms denial" for an educational institution. 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:
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> 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 earnestly and actively seeking work under Iowa Code section 96.4-3 or is 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, at relevant times, able, available, and earnestly and actively seeking work. The claimant testified credibly that he has placed no physical restrictions or training restrictions on his ability to work. The claimant also testified credibly that he has placed no restrictions on the days or time when he could or could not work or his wages so as to affect his availability for work. The claimant credibly testified that he is earnestly and actively seeking work by making two in-person job contacts each week. There is no evidence to the contrary. Accordingly, the administrative law judge concludes that the claimant is able, available, and earnestly 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 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.

871 IAC 24.24(8) provides:

(8) Refusal disqualification jurisdiction. Both the offer of work or the order to apply for work and the claimant's accompanying refusal must occur within the individual's benefit year, as defined in subrule 24.1(21), before the Iowa code subsection 96.5(3) disqualification can be imposed. It is not necessary that the offer, the order, or the refusal occur in a week in which the claimant filed a weekly claim for benefits before the disqualification can be imposed.

The administrative law judge concludes that the employer has the burden to prove that the claimant has refused to accept suitable work and should be disqualified as a result. Norland v. Iowa Department of Job Service, 412 N.W.2d 904, 910 (Iowa 1987). The administrative law judge is reluctantly constrained to conclude that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that, even if the claimant was offered suitable work and refused it, he should be disqualified to receive unemployment insurance benefits. The evidence clearly establishes that the claimant filed for unemployment insurance

benefits effective July 3, 2005 and thereby established a benefit year effective July 3, 2005. The evidence is also clear that, although there is no specific date as to when an offer of work was made by First Student, Inc., the offer of work was made prior to July 1, 2005. The evidence is also clear that the claimant refused the offer of work prior to July 1, 2005. Both parties conceded that. Accordingly, the administrative law judge is constrained to conclude that the offer of work and the claimant's refusal did not occur within the claimant's benefit year and, therefore, a disqualification for refusing to accept suitable work cannot be imposed.

Although the administrative law judge does not have to determine whether the offer of work by First Student, Inc. was suitable, the administrative law judge chooses to do so here. The evidence establishes that the claimant was to be paid between $16.00 and $16.25 per hour. The administrative law judge believes that this was for a 40-hour week. The claimant's testimony that he was not given details is equivocal and not entirely credible. Assuming a 40-hour week, the claimant's gross weekly wage under the offer from First Student, Inc. would be between $640.00 and $650.00 per week. This is significantly more than the claimant's average weekly wage of $558.13 and would be suitable in terms of pay. Much was made of the amount that the claimant would have to pay for medical and dental insurance. He would have had to have paid in the 2005-2006 school year approximately $67.00 if he had remained employed by the employer herein. He would have had to have paid between $200.00 and $250.00 per month under First Student, Inc. Under First Student, Inc., the claimant would then have paid between $50 and $60 per week. Even without considering that the claimant would still have paid some amount if remained employed by the employer herein, reducing the smallest gross weekly wage of $640.00 by the most that the claimant would pay for health insurance, the resulting figure would be $580.00 ($640.00 minus $60.00) which would still be significantly more than the claimant's average weekly wage. Since the offer was made prior to the claimant's unemployment, essentially it was made in the first five weeks of the claimant's unemployment and would have to have paid 100 percent of his average weekly wage. It does. The administrative law judge believes that the offer of First Student, Inc. was suitable in all other respects. The claimant would be working at the same location as he had been, the maintenance center in Bettendorf, Iowa. The claimant would have been performing the same job functions that he had for the employer, maintaining and working on buses. Both employers had a retirement policy. Accordingly, the administrative law judge concludes that the offer of work by First Student, Inc. was suitable but, as noted above, the administrative law judge is constrained to conclude that the claimant cannot be disqualified for refusing such an offer because it did not occur within his benefit year. Therefore, 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 96.3-7 provides:

> 7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.
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> 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 administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $3,105.00 since separating from the employer herein on or about June 30, 2005 and filing for such benefits effective July 3, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of August 9, 2005, reference 01, is affirmed. The claimant, Kevin L. Jones, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was laid off for a lack of work and this is not disqualifying. The claimant is not subject to the "between terms denial" for an educational institution and the claimant is able, available, and earnestly and actively seeking work and cannot be disqualified for refusing to accept suitable work because the offer he refused was not made in his benefit year. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

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