

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

MICHAEL G VAN GORDER

Claimant

and

B & D SERVICES INC

Employer

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HEARING NUMBER: 16B-UI-06757

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

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

DECISION

UNEMPLOYMENT BENEFITS ARE DENIED

The Claimant appealed to the Employment Appeal Board the issue of her 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 with the exception of the final sentence.

REASONING AND CONCLUSIONS OF LAW:

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 conclusions of law found on page two and through the sentence "Benefits are denied" on page three of the Administrative Law Judge's decision. In lieu of the remainder of the Administrative Law Judge's conclusions of law the Board makes the following Reasoning and Conclusions of Law.

As we have ruled in the past, when an Employer fails to participate in the fact finding, but this is because of an error of Iowa Workforce, then the fund is charged for the resulting overpayment. Here the Employer did call during the fact finding conference but was not connected and did not receive a call back.

The Claimant cannot be charged. 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. Finding no fraud we thus reverse the charging of the overpayment to the Claimant.

As for the Employer it takes 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 calling in. 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. 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.

DECISION:

The administrative law judge's decision dated July 6, 2016 is **AFFIRMED ON THE ISSUE OF DISQUALIFICATION FROM BENEFITS**. We affirmed 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 July 6, 2016 is **REVERSED ON THE ISSUE OF OVERPAYMENT CHARGING**. The overpayment entered in the amount of \$1,247 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 \$1,247, 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.

The claimant has requested this matter be remanded for a new hearing. The Employment Appeal Board finds the applicant did not provide good cause to remand this matter. Therefore, the remand request is **DENIED**.

Kim D. Schmett

Ashley R. Koopmans

James M. Strohman

RRA/fnv