

**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**

**DENNIS L SCHLEEF
1127 CENTRAL AVE SW
LEMARS IA 51031**

**SECURITAS SECURITY SERVICES
USA INC
c/o SHEAKLEY UNISERVICE INC
PO BOX 429503
CINCINNATI OH 45242-9503**

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LEMARS IA 51031-0336**

**Appeal Number: 04A-UI-00346-RT
OC: 12-31-03 R: 01
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 96.5-1 – Voluntary Quitting
Section 96.5-2-a – Discharge for Misconduct
Section 95.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Securitas Security Services USA, Inc., filed a timely appeal from an unemployment insurance decision dated December 31, 2003, reference 01, allowing unemployment insurance benefits to the claimant, Dennis L. Schleef. After due notice was issued, a telephone hearing was held on February 2, 2004, with the claimant participating. The claimant was represented by Jim Bybee, Attorney at Law. Roberta Torskey, Branch Manager in Omaha, Nebraska, participated in the hearing for the employer. The employer was represented

by Terry Clayton of Sheakley/Uniservice, Inc. Claimant's Exhibit A was not admitted into evidence. Claimant's Exhibit B was admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

The claimant subpoenaed a witness, Dennis Folkema, who appropriately called in a telephone number where he could be reached for the hearing. The administrative law judge reached Mr. Folkema at 2:11 p.m. Mr. Folkema said he would be available later when it would be his turn to testify. However, when the administrative law judge tried to call Mr. Folkema at 3:05 p.m., 3:06 p.m., 3:08 p.m. and 3:09 p.m. at another phone number, the administrative law judge was unable to reach Mr. Folkema. Because of certain concessions made by the employer, Mr. Folkema's testimony was not necessary and he was not thereafter called.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Claimant's Exhibit B but excluding Claimant's Exhibit A, the administrative law judge finds: The claimant was employed by the employer as a full-time security guard at the Wells Blue Bunny Dairy in LeMars, Iowa from December 20, 2002 until he separated from that employment on December 4, 2003. The employer provides security services for Wells Blue Bunny Dairy in LeMars, Iowa. When the claimant was hired, he was hired by Dennis Folkema who was the claimant's supervisor until Mr. Folkema separated approximately December 2003. When the claimant was hired, he was informed that he would be hired for the security at Wells Blue Bunny Dairy in LeMars, Iowa. He was not told anything about being relocated. The claimant lives in LeMars, Iowa and has a radio shop in LeMars, Iowa. The employer was aware of the claimant's radio shop when he was hired and this was a favorable point for hiring the claimant.

Among the duties of the claimant was to provide security for Wells Blue Bunny Dairy and to check identification badges of employees coming into the plant. The claimant was instructed by Mr. Folkema when hired, and thereafter in writing, that when an employee arrived for work without a security badge or identification, the claimant was to call that employee's supervisor and then it was up to the supervisor whether to admit the employee or not. Wells Blue Bunny Dairy began to believe that the claimant was being too confrontational and restrictive in checking badges and identifications. Approximately three or four weeks before the claimant's separation, he was given an oral warning by Roberta Torskey, Branch Manager in Omaha, Nebraska, about being too restrictive and rigid with his checking of identification. She asked the claimant to "back off" and be more flexible. The claimant received no other warnings.

Wells Blue Bunny Dairy then instructed the employer to remove the claimant. On December 4, 2003, Ms. Torskey went to LeMars, Iowa and informed the claimant that he was being removed from his position as a security guard at Wells Blue Bunny Dairy in LeMars, Iowa because he was too rigid and confrontational with employees. He was not discharged from his employment with the employer but informed that there were other positions available but not in LeMars, Iowa. The employer had other positions for the claimant, perhaps in Sioux City, Iowa, but not in LeMars, Iowa. The claimant's residence is approximately one mile from the Wells Blue Bunny Dairy plant. The claimant's residence is approximately 26 miles from the outskirts of Sioux City, Iowa. The claimant informed Ms. Torskey that he did not want to relocate or take a position outside of LeMars, Iowa. The claimant had never expressed any concerns to the employer about his working conditions nor had he ever indicated or announced an intention to quit if any of his concerns were not addressed. Following the September 11 matter in the United States,

Wells Blue Bunny Dairy increased the security and became more strict. The claimant was aware of this.

Pursuant to his claim for unemployment insurance benefits filed effective December 7, 2003, the claimant has received unemployment insurance benefits in the amount of \$1,976.00 as follows: \$247.00 per week for eight weeks from benefit week ending December 13, 2003 to benefit week ending January 31, 2004.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from the employment was a disqualifying event. It was not.
2. 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.

871 IAC 24.26(1) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

- (1) A change in the contract of hire. An employer's willful breach of contract of hire shall not be a disqualifiable issue. This would include any change that would jeopardize the worker's safety, health or morals. The change of contract of hire must be substantial in nature and could involve changes in working hours, shifts, remuneration, location of employment, drastic modification in type of work, etc. Minor changes in a worker's routine on the job would not constitute a change of contract of hire.

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 first issue to be resolved is the character of the separation. The employer maintains that the claimant voluntarily quit on December 4, 2003 when he refused a transfer or relocation or to consider a position other than in LeMars, Iowa. The claimant maintains that he was discharged on that date. Although it does not really make a difference in regards to the claimant's entitlement to unemployment insurance benefits, the administrative law judge concludes that the claimant left his employment voluntarily. The evidence establishes that the claimant was not discharged from his employment with the employer, Securitas Security Services USA, Inc., but was removed from one assignment at Wells Blue Bunny Dairy in LeMars, Iowa. No one told the claimant that he was discharged by the employer. The claimant was informed that he could relocate and that the employer had other positions which he might consider in Sioux City, Iowa, or elsewhere but not in LeMars, Iowa. Accordingly, the administrative law judge concludes that the claimant left his employment voluntarily when he refused to relocate and take other positions away from LeMars, Iowa. The issue then becomes whether the claimant left his employment without good cause attributable to the employer.

The administrative law judge concludes that the claimant has met his burden of proof to demonstrate by a preponderance of the evidence that he left his employment with the employer herein with good cause attributable to the employer. The evidence establishes when the claimant was hired on or about December 20, 2002, that he was hired specifically for a security guard position at Wells Blue Bunny Dairy and that no other positions were mentioned to the claimant. There is no evidence that the claimant was informed that he would have to relocate or that he would not always be at Wells Blue Bunny Dairy. The claimant then worked at Wells Blue Bunny Dairy for almost one year. The employer then removed the claimant from his position at Wells Blue Bunny Dairy in LeMars, Iowa but had no other positions available for the claimant in LeMars, Iowa. The closest potential position was in Sioux City, Iowa, at least 26 miles from the claimant's residence in LeMars, Iowa and his radio shop in LeMars, Iowa. The administrative law judge concludes that by removing the claimant from his position at Wells

Blue Bunny Dairy in LeMars, Iowa where the claimant resided and offering him positions elsewhere involving a commute of at least 26 miles was a willful breach of the claimant's contract of hire as established when the claimant was hired, which breach would be substantial involving location of employment. A commute of at least 26 miles over 1 mile is a substantial change. The administrative law judge further concludes as noted below that the change was not justified by the claimant's behavior. The claimant did not really have an opportunity to express any concerns to the employer or indicate or announce an intention to quit to the employer because he was informed on December 4, 2003 that he would no longer be assigned to Wells Blue Bunny Dairy and that there were no other positions for him in LeMars, Iowa and that he would have to at least go to Sioux City, Iowa. It was clear to the claimant as it is to the administrative law judge that this was a "done deal" and it was no good for the claimant to express concerns or threaten to quit. In fact, the claimant expressed those concerns and indicated an intention to quit when he specifically refused to relocate or consider positions in Sioux City, Iowa at the time he was told he would have to relocate.

Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant left his employment voluntarily with good cause attributable to the employer, and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

Even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant committed no acts of disqualifying misconduct. The evidence establishes that the claimant was removed from his security guard position at Wells Blue Bunny Dairy because he was too restrictive with checking ID's. However, the evidence does establish that security at Wells Blue Bunny Dairy became more strict after the September 11 ordeal. Further, the evidence establishes that the claimant was instructed by his then supervisor, Dennis Folkema, to call the supervisor of any employee who arrived at work without an identification badge or ID. This was then reduced to writing. The claimant carried out these instructions but Wells Blue Bunny Dairy began to believe that the claimant was too restrictive and asked the employer to remove him. The claimant only received one oral warning which was three or four weeks prior to his separation from his employer. The administrative law judge concludes on the evidence here that the claimant's behavior was not a deliberate act of omission constituting a material breach of his duties nor does it evince a willful or wanton disregard of the employer's interests nor is it carelessness or negligence to such a degree of recurrence as to establish disqualifying misconduct. At the very most, the claimant's behavior were good faith errors in judgment or discretion and these are not disqualifying misconduct. Accordingly, even should the claimant be considered to have been discharged, the administrative law judge would conclude that the claimant was discharged but not for disqualifying misconduct and he would still not be disqualified to receive unemployment insurance benefits.

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.

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 \$1,976.00 since separating from the employer herein on or about December 4, 2003 and filing for such benefits effective December 7, 2003. 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 December 31, 2003, reference 01, is affirmed. The claimant, Dennis L. Schleef, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible. 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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