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

ISAAC D NOTERMAN	:	
	:	**HEARING NUMBER:** 16B-UI-02309
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
AVENIA 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 this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds the administrative law judge's decision is correct. The administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED**.

The Board provides the following discussion and conclusions in addition to the findings and conclusions of the Administrative Law Judge.

If affirming the Administrative Law Judge we considered only whether the Claimant should be charged with the overpayment. In his appeal to the Board the Claimant stated "my point of appeal is the overpayment." He then argued exclusively over whether he should be charged for the overpayment. We thus did not review whether the separation from employment was disqualifying except to the extent that this was relevant to deciding if the Claimant could be charged for benefits.

Neither code nor rule requires that verbal participation of the Employer be simultaneous with the Claimant's participation. Indeed, the regulation allows for participation through documentation alone, thus undermining the idea that both must be on the phone at the same time. *See generally UIPL 02-12, Unemployment Compensation (UC) Program Integrity – Amendments made by the Trade Adjustment Assistance Extension Act of 2011* (making no mention of verbal participation and stating only that "states

must determine whether the employer's or agent's response provides sufficient facts to enable them to make the correct determination under its law"). We are aware that because of the volume the usual practice in the Claims Bureau is that fact finding interviews are not continued to another date. Here the Employer testified at hearing that it first learned of the interview on the day of the interview, and thus it was perfectly reasonable that the Employer was not immediately available. A requirement of simultaneous participation at an informal fact finding would significantly undermine the ability of Workforce to timely process claims. As for the constitution all that is required is a right to a hearing, which the Claimant got before the Administrative Law Judge. At that evidentiary hearing the issues included not only the separation, but also whether the Employer participated at fact finding. The constitution does not require that before information supplied at an informal conference can satisfy a statutory condition of participation that the information must be verbal and simultaneous. The definition of what constitutes participation for the purposes of Iowa Code §96.3(7) does not have a constitutional dimension.

We note further that the HR Generalist testified at hearing that she supplied the exhibits used at hearing to the fact finder. These included photographs of the hole, and over three pages of single spaced text that contained the statements of eye witnesses. The Generalist further supplied the policy the Claimant violated. The Generalist who appeared at fact finding further testified that she supplied the phone number of witnesses, and that she supplied verbal information to the fact finder. There is not much detail on the verbal information relayed to the fact finder, either in the testimony at hearing nor in the notes of the fact finder. We note, however, that the fact finder checked the box indicating that the Employer did participate. This added to the testimony from the Generalist at hearing, and to the notes of the fact finder is sufficient to establish at least a *prima facie* case that the verbal participation was sufficient. The Claimant did not cross exam on the point to develop any rebuttal of the *prima facie* case and we conclude the Employer proved that it met the standard for verbal participation, that is, the information "if unrebutted would be sufficient to result in a decision favorable to the employer." In particular we point out that the mere fact that fact finding notes are brief does not mean that the information supplied necessarily was.

In the alternative documentary participation is established easily. For written participation, "[a]t a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant …[t]he specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy." The Generalist testified she submitted the specific witness statements and the photographs of the hole. She testified she supplied the policy, and the exact date of the incident that caused the termination, which date is not disputed, was supplied in the protest form. She even testified she supplied rebuttal witness contact information. Thus even ignoring that the Employer participated verbally we still would find participation based on its written submissions which, again, were sufficient that "if unrebutted would be sufficient to result in a decision favorable to the employer."

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Kim D. Schmett

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Ashley R. Koopmans

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RRA/fnv James M. Strohman