

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

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

Appeal Number: 05A-UI-08562-RT
OC: 07-10-05 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 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Pleasant Valley Community School District, filed timely appeals from unemployment insurance decisions concerning three different claimants as follow: 05A-UI-08563-RT for claimant, Bruce B. Hokanson, decision dated August 9, 2005, reference 01, allowing the claimant unemployment insurance benefits; 05A-UI-08562-RT for claimant, David W. Bulington, decision dated August 9, 2005, reference 01, allowing the

claimant unemployment insurance benefits; and 05A-UI-08565-RT for claimant, Ray Bauwens, decision dated August 9, 2005, reference 02, allowing the claimant unemployment insurance benefits. The three appeals were consolidated for the purposes of the hearing by the administrative law judge because all of the claimants were similarly situated concerning similar facts and issues and the parties consented to the consolidation with the exception of claimant, Ray Bauwens, who failed to participate in the hearing but the administrative law judge nevertheless concluded that Mr. Bauwens claim should be consolidated because of the similarity of the facts and the issues. After due notice was issued, a telephone hearing was held on September 15, 2005 at 10:36 a.m. with claimants Hokanson and Bulington participating. Claimant Bauwens did not participate in the hearing because he did not call in a telephone number, either before the hearing or during the hearing, where he or any of his witnesses could be reached for the hearing, as instructed in the notice of appeal. Jim Spelhaug, Superintendent of Schools, participated in the hearing for the employer. Mike Clingsmith, Chief Financial Officer, was available to testify for the employer but not called because his testimony would have been repetitive and unnecessary. The administrative law judge takes official notice of the Workforce Development records for all of the claimants.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Claimant Hokanson was employed by the employer as a part-time school bus driver from December of 2001 until he was laid off for a lack of work on June 30, 2005. Claimant Bulington was employed by the employer as a part-time bus driver from October of 1999 until he was laid off for a lack of work on June 30, 2005. Claimant Bauwens was employed by the employer as a part-time bus driver, most recently from August 29, 1994 until he was laid off for a lack of work on June 30, 2005.

The employer, a community school district accredited as such in the state of Iowa by the Iowa State Department of Education, determined to outsource its transportation for students. It contracted with First Student, Inc., to provide bus transportation effective July 1, 2005. As a result, all of the employer's bus drivers, including the claimants herein, were laid off for a lack of work effective June 30, 2005 because their positions with the employer were eliminated. Claimant Hokanson was hired by First Student, Inc. on July 18, 2005 and is presently working for it as a bus driver. Claimant Bulington was hired by First Student, Inc. on July 29, 2005 and is presently working for it as a bus driver. Claimant Bauwens was hired by First Student, Inc. on July 29, 2005 and is presently working for it as a bus driver. Although the claimant's may not have received specific written notice of their layoff and the outsourcing of the transportation to First Student, Inc., it was common knowledge throughout the area inasmuch as public hearings were held on the issue. First Student, Inc. is a profit corporation providing no other educational services for the employer or other parties except the transportation of students to school.

Claimant Hokanson has placed no training restrictions or physical restrictions on his ability to work and has placed no time or day restrictions on his availability for work and at relevant times was earnestly and actively seeking work. Claimant Bulington has placed no physical restrictions or training restrictions on his ability to work and has placed no time or day restrictions on his availability for work and at relevant times was earnestly and actively seeking work. Claimant Bauwens did not participate in the hearing to provide evidence as to whether he was able, available, and earnestly and actively seeking work. Each claimant filed for unemployment insurance benefits and received unemployment insurance benefits prior to being fully employed by First Student, Inc.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the separation from employment of the claimants was a disqualifying event. It was not.
2. Whether the claimants are still employed by an educational institution but are off work or temporarily unemployed between successive years or terms with an educational institution and have reasonable assurance that they will be performing the same services in the new academic year or term, 2005-2006, that they performed in the 2004-2005 school year and are therefore ineligible to receive unemployment insurance benefits. The claimants are not ineligible to receive unemployment insurance benefits for this reason.
3. Whether the claimants are ineligible to receive unemployment insurance benefits because at relevant times they were not able, available, and earnestly and actively seeking work. Claimants Hokanson and Bulington are not ineligible to receive unemployment insurance benefits for these reasons.
4. Whether the claimants are overpaid unemployment insurance benefits. Claimants Hokanson and Bulington are 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 evidence establishes that the claimants were laid off for a lack of work and were not discharged for disqualifying misconduct nor did they voluntarily leave their employment without good cause attributable to the employer. The evidence establishes that all of the claimants were employed by the employer as bus drivers but the employer ended their employment on June 30, 2005 when it outsourced its bus transportation to a private company. Accordingly, the claimants positions were eliminated and they were laid off for a lack of work. This is not disqualifying. Accordingly, the administrative law judge concludes that the claimants were laid off for a lack of work and, as a consequence, they are not disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimants, provided they are 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:

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:

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, was an educational institution. The employer is an accredited school district in the state of Iowa. See 871 IAC 24.51(1). However, the administrative law judge is constrained to conclude that the claimants do not have reasonable assurance that they will be performing the same or similar services in the 2005-2006 school year as they did in the 2004-2005 school year from the employer herein. It is true that the claimants have been hired by First Student, Inc., to provide the same or similar services as bus drivers but First Student, Inc. is a profit corporation and is not an educational institution. Therefore, the administrative law judge is constrained to conclude that the claimants do not have reasonable assurance and, further, are not still employed by an educational institution. First Student, Inc. cannot be an educational institution because it is a profit corporation. See 871 IAC 24.51(1). The claimants have been permanently laid off from their employment with an educational institution. The administrative law judge concludes that the "between terms denial" of unemployment insurance benefits applicable to an educational institution does not apply in these situations because the claimants are no longer employed by an educational institution and do not have the reasonable assurance of employment by an educational institution. Therefore, the administrative law judge concludes that the claimants are 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 claimants, provided they are 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:

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 claimants have the burden to prove that they are able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3 or are otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimants Hokanson and Bulington have met their burden of proof to demonstrate by a preponderance of the evidence that they are and were, at relevant times, able, available, and earnestly and actively seeking

work. The claimants testified credibly that they had placed no physical restrictions or training restrictions on their ability to work. The claimants also testified credibly that they had placed no restrictions on the days or time when they could or could not work so as to affect their availability for work. The claimants credibly testified that they were earnestly and actively seeking work. There is no evidence to the contrary. Accordingly, the administrative law judge concludes that the claimants Hokanson and Burlington are and were able, available, and earnestly and actively seeking work and are not ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimants Hokanson and Burlington, provided they are 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.

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 claimants have received unemployment insurance benefits since separating from the employer herein on or about June 30, 2005. The administrative law judge concludes that the claimants Hokanson and Burlington are entitled to these benefits and they are not overpaid such benefits.

DECISION:

The representative's decision of August 9, 2005, reference 01, is affirmed. The claimant, David W. Burlington, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was laid off for a lack of work. He was able, available, and earnestly and actively seeking work and was not subject to the "between terms denial" related to an educational institution. As a result of this decision, he has not been overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

tjc/tjc