

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**PHILLIP P BANHOLZER**  
Claimant

**APPEAL NO. 09A-UI-19160-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OPERATION NEW VIEW**  
Employer

**OC: 03/30/08**  
**Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge  
Section 96.3-7 – Benefit Overpayment

**STATEMENT OF THE CASE:**

Operation New View filed a timely appeal from a representative's decision dated December 17, 2009, reference 03, which found claimant eligible for unemployment insurance benefits. After due notice a telephone conference hearing was held on February 4, 2010. The claimant participated personally. The employer participated by Ms. Joy Davis, Administrator, Karen Conrad, Supervisor, Margie Davis, Transit Driver, Stephanie Wieland, Supervisor, and Peggy Haniford, Program Director. Employer's Exhibits One through Seventeen were received into evidence.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits and whether the claimant has been overpaid job insurance benefits.

**FINDINGS OF FACT:**

Having considered the evidence in the record, the administrative law judge finds: Phillip Banholzer was employed as a part-time Head Start transportation aide from October 28, 2008 until November 25, 2009 when he was discharged from employment. Mr. Banholzer was paid by the hour. His immediate supervisor was Karen Conrad.

Mr. Banholzer was discharged from employment on November 25, 2009 based upon the claimant's continuing failure to follow work directives after being warned. As a transportation aide, Mr. Banholzer's job was to ride on buses conveying Head Start students to school and back each day. The claimant was to maintain order on the bus, insure students were using seatbelts, and generally assist the driver insuring that all students were accounted for and properly transported. Mr. Banholzer was expected to use the seatbelts himself, to avoid the use of personal cell phones and to conduct himself in a professional manner.

On September 15, 2009, the claimant was issued a written warning for sleeping while transporting students, failure to insure students were using seatbelts, failure to use seatbelts himself, and cell phone use. The claimant was also advised to properly perform his duties assisting the Head Start students. Although warned, Mr. Banholzer continued to sleep while transporting Head Start students and to talk on his cell phone. The claimant often did not use seatbelts himself although he was required to do so and to set a good example for the students. Numerous instances where Mr. Banholzer was not following the rules was notated by company employees and brought to the attention of management.

A final decision was made to terminate Mr. Banholzer based upon the company's receipt of a letter of complaint from a student's mother who alleged Mr. Banholzer had made fun of the child, engaged in the use of a cell phone, and asserted the claimant had made questionable comments and innuendos in conversations with her. After reviewing the matter, a decision was made to terminate Mr. Banholzer from his employment based upon his continuing failure to follow job expectations after being warned.

### **REASONING AND CONCLUSIONS OF LAW:**

The question before the administrative law judge is whether the evidence in the record is sufficient to warrant the denial of unemployment insurance benefits. It is.

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.

The evidence in the record establishes that Mr. Banholzer had been verbally warned and counseled on numerous occasions about his ongoing failures to follow company rules about the use of seatbelts, cell phones, and the proper manner in which to interact with Head Start students under his supervision. When the repeated verbal warnings appeared to have no effect, the claimant was issued a written warning on September 15, 2009 and was discharged when individuals associated with Mr. Banholzer continued to report numerous violations of company expectations. The claimant continued to sleep on the job and did not use seatbelts himself. Mr. Banholzer also continued to use cell phones while on the bus in violation of company rules. The claimant also engaged in questionable conduct when dealing with the parent or parents of students.

The administrative law judge is aware that Mr. Banholzer asserts that after being warned he violated no company rules. The administrative law judge concludes the claimant's testimony strains credibility. The evidence in the record establishes numerous violations of company rules after being warned. For these reasons the administrative law judge concludes that the employer has sustained its burden of proof in establishing that the claimant's discharge took place under disqualifying conditions. Unemployment insurance benefits are withheld.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

**DECISION:**

The representative's decision dated December 17, 2009, reference 03, is reversed. Mr. Banholzer is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided that he is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to the UIS Division for determination.

---

Terence P. Nice  
Administrative Law Judge

---

Decision Dated and Mailed

pjs/pjs