

**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**

**NATHAN L BERRY SR
7304 SW 14TH ST
DES MOINES IA 50315**

**DES MOINES INDEPENDENT COMMUNITY
SCHOOL DISTRICT
ATTN: BUSINESS/FINANCE
1801 16TH ST
DES MOINES IA 50314-1902**

**Appeal Number: 05A-UI-04770-RT
OC: 04/10/05 R: 02
Claimant: Respondent (2)**

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 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Des Moines Independent Community School District, filed a timely appeal from an unemployment insurance decision dated April 29, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Nathan L. Berry, Sr. After due notice was issued, a telephone hearing was held on May 25, 2005, with the claimant not participating. The claimant did not call in a telephone, 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. Cathy McKay, Risk Manager, participated in the hearing for the employer. Employer's Exhibits One and Two were admitted into evidence. The administrative law judge takes official

notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witness, and having examined all of the evidence in the record, including Employer's Exhibits One and Two, the administrative law judge finds: The claimant was employed by the employer as a full-time bus driver from January 24, 1994, until he was discharged on March 16, 2005, as shown at Employer's Exhibit Two. The claimant was discharged for violating a "last chance" agreement dated July 23, 2003. On that occasion the claimant was given a "last chance" agreement to be in effect for two years for previous disciplinary issues. The claimant was informed that if further violations or misconduct occurred worthy of discipline, that he could be discharged. On July 30, 2004, the claimant used a school bus and a bus driver to run a personal errand for the claimant. On August 18, 2004, the claimant called in late. Finally, on August 26, 2004, the claimant left work before the end of his shift for personal business without authorization or informing anyone or obtaining permission. However, the claimant reported those hours as if he had worked.

For these incidents the claimant was placed on a paid administrative leave on August 31, 2004 and was paid through and until his discharge on March 16, 2005. The claimant was not immediately discharged because there were a number of matters that had to be dealt with. The claimant's discharge had to be reviewed by the deputy superintendent and the affirmative action officer and others, as per the "last chance" agreement. There also had to be an investigation performed, and there were other litigation matters pending. As soon as all of these matters were dispensed with, the claimant was discharged. The claimant did not actually work for the employer after August 31, 2004. Pursuant to his claim for unemployment insurance benefits filed effective April 10, 2005, the claimant has received no unemployment insurance benefits. Iowa Workforce Development records show no weekly claims.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. He is not because he has received no benefits.

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).

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer's witness, Cathy McKay, Risk Manager, credibly testified that the claimant was discharged on March 16, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for a current act of disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for a current act of disqualifying misconduct. Ms. McKay credibly testified that on July 23, 2003, the claimant was placed on a "last chance" agreement to be effective for two years for previous disciplinary issues. The claimant was informed in that agreement that if he committed misconduct or had further violations which could result in discipline, that he could be discharged. Thereafter, on July 30, 2004, the claimant used a school bus and a driver to run a personal errand. On August 18, 2004, the claimant called in late. Finally, on August 26, 2004, the claimant left work for personal business without authorization or permission, or informing anyone, but reported the time on his time sheet as if he had actually worked for the employer during that period of time. The claimant was then placed on administrative leave on August 31, 2004 for these matters. Because of the necessity to have the claimant's discharge reviewed by the deputy superintendent, the affirmative action officer and others, and because there were other litigation matters pending, and finally because of an investigation, the claimant was not formally discharged until March 16, 2005. However, the claimant never actually worked for the employer after August 31, 2004. He was on a paid administrative leave and was paid through March 16, 2005.

The administrative law judge first concludes that the claimant's actions giving rise to his administrative leave, after having been placed on a "last chance" agreement in July 2003, were deliberate acts or omissions constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evince a willful or wanton disregard of the employer's interests and, at the very least, are carelessness or negligence in such a degree of recurrence all as to establish disqualifying misconduct. Further, the administrative law judge concludes that because the claimant was almost immediately placed on administrative leave pending review by various school officials and pending certain litigation and investigations, that the claimant was not discharged for past conduct. A discharge for misconduct cannot be based on past acts. However, the administrative law judge concludes here that the claimant's discharge was not based on past acts. The claimant was placed on administrative leave almost immediately after the final act on August 26, 2004 that gave rise to his discharge. However, because of other matters, the claimant was not formally discharged until March 16, 2005, but the administrative law judge concludes that this delay does not establish that the claimant was discharged for past conduct.

In summary, for all of the reasons set out above, the administrative law judge concludes that the claimant was discharged for a current act of disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies such 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 no unemployment insurance benefits since filing for such benefits effective April 10, 2005. Iowa Workforce Development records show no weekly claims. Since the claimant has received no unemployment insurance benefits, he is not overpaid any such benefits.

DECISION:

The representative's decision of April 29, 2005, reference 01, is reversed. The claimant, Nathan L. Berry, Sr., is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for a current act of disqualifying misconduct. Since the claimant has received no unemployment insurance benefits, he is not overpaid any such benefits.

kjw/pjs