

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

BENJAMIN J KING

Claimant,

and

AADG INC

Employer.

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HEARING NUMBER: 10B-UI-05166

**EMPLOYMENT APPEAL BOARD
DECISION**

SECTION: 10A.601 Employment Appeal Board Review

D E C I S I O N

FINDINGS OF FACT:

The notice of hearing in this matter was mailed April 19, 2010. The notice set a hearing for May 18, 2010 in which the issue of the claimant's separation was to be determined. The administrative law judge's decision was issued May 18, 2010, which determined that the claimant was discharged for disqualifying misconduct.

At the hearing, the employer indicated that the claimant had the "odor of alcohol...slight redness of his eyes..." which provided him with 'reasonable suspicion' to subject the claimant to a drug/alcohol test. (Tr. 3-4) The administrative law judge's decision, however, did not address whether the employer was responsible for offering some type of rehabilitation prior to terminating the claimant.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 10A.601(4) (2005) provides:

5. Appeal board review. The appeal board may on its own motion affirm, modify, or set aside any decision of an administrative law judge on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it. The appeal board shall permit such further appeal by any of the parties interested in a decision of an administrative law judge and by the representative whose decision has been overruled or modified by the administrative law judge. The appeal board shall review the case pursuant to rules adopted by the appeal board. The appeal board shall promptly notify the interested parties of its findings and decision.

The Employment Appeal Board concludes that the record as it stands is insufficient for the Board to issue a decision on the merits of the case. There was no testimony elicited as to whether the employer employs at least 50 employees, which would place the employer under the purview of Iowa law that provides for rehabilitation. And if the employer were subject to this statute, was the claimant offered rehabilitation and if not, why?

Iowa Code section 730.5(9) "g" provides:

Upon receipt of a confirmed positive alcohol test which indicates an alcohol concentration greater than the concentration level established by the employer pursuant to this section, and if the employer has at least fifty employees, and if the employee has been employed by the employer for at least twelve of the preceding eighteen months, and if rehabilitation is agreed upon by the employee, and if the employee has not previously violated the employer's substance abuse prevention policy pursuant to this section, the written policy shall provide for the rehabilitation of the employee pursuant to subsection 10, paragraph "a", subparagraph (1), and the apportionment of the costs of rehabilitation as provided by this paragraph.

Since we do not know the answer to these questions, the Board must remand this matter for the taking of additional evidence to determine the answers.

DECISION:

The decision of the administrative law judge dated August 19, 2009 is not vacated. This matter is remanded to an administrative law judge in the Workforce Development Center, Appeals Section, for further development of the record consistent with this decision, unless otherwise already addressed. The administrative law judge shall conduct a hearing following due notice, if necessary. If a hearing is held, then the administrative law judge shall issue a decision which provides the parties appeal rights.

John A. Peno

Elizabeth L. Seiser

DISSENTING OPINION OF MONIQUE F. KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

Monique F. Kuester

AMG/fnv