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: Morris Martin was employed by CRST from August 26, 2004 until August 12, 2005. He was a full-time van driver, taking employees from the Fontana, California, terminal to motels, clinics, and other destinations required by their jobs.

During the course of his employment, the claimant was verbally warned by Don Prechtl about using the company van for personal uses. It had been reported that he was seen driving the van around town with a female companion. He was told this was not acceptable and could lead to discharge.

On August 12, 2005, the claimant was to pick up some over-the-road drivers at their motel and bring them to the terminal. He was to be at the motel at 6:30 a.m., but did not appear. Another employee went from the terminal to the motel in his own vehicle and did not see the van in the parking lot, and when the employer attempted to call Mr. Martin, there was no answer.

The claimant finally called Cindy Stevenson, a training person, around 2:00 p.m., and said he had “run out of gas.” He did not say where this occurred or what he was doing when it happened. Ms. Stevenson contacted Safety Manager George Brandmeyer, who consulted with the vice president of safety operations, and the decision was made to discharge the claimant for misuse of company property. He was told by Ms. Stevenson later that day.

Morris Martin has received unemployment benefits since filing a claim with an effective date of August 21, 2005.

The record was closed at 8:18 a.m. At 10:05 a.m. the claimant called and requested to participate. He had received the notice of the hearing and followed the instructions to provide a telephone number where he could be reached. However, he did not read the notice carefully to know the hearing time was Iowa time, not California time. He was not available at the phone number provided at the time the hearing was scheduled.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes he 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.

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 claimant had been advised that he was not to use the company van for personal use. The final incident was his failure to appear as scheduled to transport drivers from the motel to the terminal. He did not notify the employer until eight hours after his scheduled pick up and then only offered the explanation that he "ran out of gas." The only way he could have run out of gas was if he was using the company van for personal use overnight, since he had no other assigned duties prior to 6:30 a.m. The claimant was not authorized to use the van for any other purpose than to transport employees of CRST, and his personal use of the van is a violation of company policy and the direct orders of his supervisor. This is conduct not in the best interests of the employer and the claimant is disqualified.

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 claimant has received unemployment benefits to which he is not entitled. These must be recovered in accordance with the provisions of Iowa law.

The next issue is whether the record should be reopened. The judge concludes it should not.

871 IAC 26.14(7) provides:

> (7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.
>
> a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.
>
> b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.
>
> c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

At issue is a request to reopen the record made after the hearing had concluded. The request to reopen the record is denied because the party making the request failed to participate by reading and following the instructions on the hearing notice.

The claimant was not available at the phone number provided at the time the hearing was scheduled to begin. This does not constitute good cause to reopen the record.

DECISION:

The representative's decision of September 12, 2005, reference 01, is reversed. Morris Martin is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount provided he is otherwise eligible. He is overpaid in the amount of $1,944.00.

bgh/kjw