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

DENNIS R GREMMER Claimant, and CITY OF WESLEY Employer.	: : : : : : : :	**HEARING NUMBER:** 09B-UI-10034 **EMPLOYMENT APPEAL BOARD DECISION**

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-a

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Dennis R. Gremmer, worked for the City of Wesley from May of 2006 through September 18, 2008 as a full-time employee performing snow removal, lawn care, garbage route assistance, sewer work, etc. (Tr. 3) The claimant's position required him to have a valid driver's license. (Tr. 4) During the month of August of 2008, however, his driver's license was revoked. (Tr. 3) The City learned of his revocation via their insurance carrier who informed them that "… [they] could not allow Mr. Gremmer to drive any vehicles or run any type of equipment…" (Tr. 7)

At a city council meeting on September 18th, the employer informed Mr. Gremmer that they would be able to guarantee him approximately 20 hours a week to do shop work (Tr. 7, 8, 12, 14) or whatever

Craig Larson (city maintenance department head) needed him to do, outside of driving a city vehicle.

(Tr. 7, 11) The claimant believed he would only be able to ride on the back of the garbage truck, which would take approximately 3-4 hours a week. (Tr. 4) Mr. Gremmer told the employer that he would look for additional part-time work to which they agreed they would work with his schedule. (Tr. 4, 7, 13, 15)

The next day (Friday), Mr.Gremmer did not report to work because he went job-hunting. (Tr. 4, 6, 12) Over the weekend, he heard "through the grapevine" that someone was hired to replace him. (Tr. 9, 16) On September 22nd (Monday), the city council held a special meeting to determine who to hire part-time in place of Mr. Gremmer. (Tr. 11, 12) That same day, the claimant contacted Craig to inquire if he needed assistance with the garbage route on Tuesday. Craig informed him that he didn't need him because he'd already hired someone over the weekend. (Tr. 4, 5, 6, 14-16) Mr. Gremmer assumed he was laid off. (Tr. 5)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2007) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
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> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as

defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to

misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

The record establishes that there was a lack of clear communication on both parties' parts with regard to whether or not the claimant quit. Although the claimant lost his driver's license and was prohibited from driving any city vehicles, the employer nonetheless offered the claimant continued employment, i.e., part-time with a guarantee of 20 hours a week. (Tr. 7, 8, 12, 14) Mr. Gremmer does not dispute that the employer's testimony which specifically indicated that he would be primarily working with Craig doing whatever was needed that didn't require the claimant to drive a city vehicle. Although the claimant voiced his concern about whether the employer could successfully give him more than 3-4 hours weekly, and stated his intention to look for other work, the claimant equivocated as to whether he would continue with such part-time work.

When the claimant failed to report to work or contact the employer that Friday, the day after their meeting, the employer naturally sought a replacement for those hours the claimant used to cover. It was not unreasonable for the employer to hire someone in his stead considering he could no longer perform the driving functions of his job. The fact that Mr. Gremmer was also unavailable for any other work that Craig may have needed that Friday also gave rise to the inference that the claimant may have quit his employment.

Mr. Gremmer's testimony that he assumed he was laid off when he heard the employer hired a replacement is not wholly without merit. However, it would seem that one would not rely solely on 'rumor', alone, without questioning the employer about one's employment status, first. The claimant's testimony that Craig told him he didn't need him because he hired someone is not probative that the employer severed their employment relationship without further inquiry. The court in LaGrange v. Iowa Dept. of Job Service, (Unpublished, Iowa App. 1984) held that a claimant's belief that he was terminated without further inquiry is the equivalent of a voluntary quit without good cause attributable to the employer.

Although there is no evidence that the claimant was discharged from his employment, the claimant's circumstances, i.e., perceived 'layoff,' can be analogous to the separation dilemma in LaGrange. In LaGrange, the claimant had a drinking problem that with the assistance of the employer, the claimant began treatment. The employer put the claimant on notice that if he took one more drink after the initiation of the treatment, he would be terminated. One evening, the claimant went to a bar knowing that his employer would be there. The LaGrange bought both the employer and himself a beer. LaGrange subsequently quit coming to work 'assuming' he'd been terminated. The employer, however, had not terminated him and was willing to discuss the matter. The court held that the claimant's assumption was a mistake. His failure to return to work was a voluntary quit without good cause attributable to the employer.

We conclude that the facts of this case as to Mr. Gremmer's assumption he was laid off to be comparable to that of LaGrange. The claimant in this case, admittedly, failed to get clarification as to whether or not he still had a job. Rather, he simply failed to return on his own initiation. Based on this record, we conclude that the claimant failed to satisfy his burden of proving that his quit was with good cause attributable to the employer.

DECISION:

The administrative law judge's decision dated November, 14, 2008 is **REVERSED**. The claimant initiated his own separation. As such, his separation was a voluntarily quit without good cause attributable to the employer.

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Elizabeth L. Seiser

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Monique F. Kuester

AMG/ss

DISSENTING OPINION OF JOHN A. PENO:

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.

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John A. Peno

AMG/ss

The employer submitted a request to present new and additional evidence to the Employment Appeal Board in his written argument. The new and additional evidence consisted of affidavits and a timecard to be submitted for the Board's review. The employer's request was denied because good cause was not established for why such evidence was not presented at the hearing. See 486 IAC 3.1(7).

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John A. Peno

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Elizabeth L. Seiser

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Monique F. Kuester

AMG/ss