

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MOUSSA PEPOUNA
Claimant

CITY OF DES MOINES PAYROLL DEPT-B
Employer

APPEAL 19A-UI-10341-SC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/20/19
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

On December 2, 2019, Moussa Pepouna (claimant) filed an appeal from the November 26, 2019, reference 01, unemployment insurance decision that denied benefits based upon the determination City of Des Moines Payroll Dept-B (employer) discharged him for dishonesty on November 11, 2019. After due notice as issued, a telephone hearing was scheduled on December 31, 2019 for appeal 19A-UI-09446-SC-T. However, on December 24, 2019, Iowa Workforce Development (IWD) issued an unemployment insurance decision, reference 02, which amended reference 01, stating the claimant was discharged for dishonesty on September 12, 2019.

The telephone hearing was held on December 31. The amended decision was given a new appeal number and the parties waived notice for the new appeal. The claimant participated personally. The employer participated through Allison Lambert, Human Resource Business Partner, and Adam Smith, Deputy Public Works Director. The employer was represented by Luke DeSmet, Attorney. The Claimant's Exhibits A through I and the Employer's Exhibits 1, 2, and 4 were admitted without objection. The Employer's Exhibits 3 and 5 were admitted over the claimant's objections based on relevance.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as Public Works Operation Manager beginning on December 1, 2014, and was separated from employment on October 11, 2019, when he was discharged. The claimant reported directly to Sara Thies, Street Maintenance Administrator. The claimant was responsible for supervising and managing the winter emergency road crew and pothole or road repairs, among other things. He supervised numerous employees including Kevin Decker, Pothole Patching Section Chief. The claimant had ongoing performance issues which began in 2017.

The employer has an electronic system where residents can contact the city to report potholes or roads in need of repair. The residents will usually include their name, address, and a

summary of the complaint. The complaint generates a HEAT ticket which is assigned to a pothole repair crew. The crew will patch the pothole and report the ticket as completed. Decker or the claimant would review the work and close the ticket once the work was adequately completed. The road work needs to be completed and the tickets closed only after the work is completed as the city can be liable if a resident injures themselves or their property is damaged as a result of the pothole after the city had notice of the defect.

In March 2019, the employer took action with regard to the backlog of HEAT tickets. Decker was counseled about the situation and placed on a performance improvement plan (PIP). The next day, the employer held a pre-determination hearing regarding the claimant's performance issues related to reporting to work on time, providing appropriate management of the winter emergency crew, and inappropriately using city resources. On March 21, he was placed on administrative leave and did not return until April 10. On April 12, he was given a "[t]hree day unpaid suspension and last chance warning" for the issues identified. (Exhibits E and 1) On April 16, he was placed on a PIP. (Exhibits I and 2) Both documents warned that any further performance issues would result in the end of his employment.

In July, Thies again addressed the number of open HEAT tickets and pothole backlog with the claimant. (Exhibit F) The claimant was directed to update management with a report on the backlog and establish a plan to minimize the backlog. However, the backlog persisted.

In September, Jonathan Gano, Public Works Director, asked Thies to review HEAT tickets closed by the claimant to verify the work was being completed. On September 11, Thies reported to Gano that she had reviewed 30 of the tickets closed by the claimant in August and determined six of them had been closed prematurely as the work had not been completed. (Exhibit G) On September 12, a pre-determination hearing was held in which the claimant was informed of Thies' investigations and findings. The claimant maintained the work had been completed before the tickets were closed and the pre-determination hearing was postponed so further investigation could be conducted.

On September 16, the claimant provided a written response and photo or video evidence related to each ticket. The claimant acknowledged that he closed one of the tickets without the work being completed. He explained that the street in question was scheduled to be part of a more permanent repair within the year, so he believed there was no harm in closing the ticket. Between September 16 and September 23, Adam Smith, Deputy Public Works Director, reviewed the tickets from Thies' investigation and the claimant's explanations. (Exhibit 5) He concluded the work had not been done on five of the closed tickets. He also concluded that the claimant's response to management was misleading or dishonest as the road for the ticket the claimant acknowledged closing without the work being completed was not scheduled for more repairs in the next five years.

As part of his investigation, Smith also reviewed ten of the forty tickets closed by the claimant from September 16 through September 20. (Exhibit 3) He determined three of the tickets were properly closed as the work had been completed. However, he also determined, on September 17 and 18, the claimant prematurely closed seven of the tickets selected for review as the road repairs had not been completed. The claimant was discharged on October 11 for ongoing performance issues, specifically prematurely closing HEAT tickets, and misrepresenting facts to management during the investigation.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following

factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The findings of fact show how the disputed factual issues were resolved. After assessing the credibility of the witnesses who testified during the hearing, the reliability of the evidence submitted, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge attributes more weight to the employer's version of events. The claimant contends the tickets were closed after the work was completed. However, the argument is not persuasive based on Smith's investigatory documents and the claimant's admission in his September 16 email that he closed a ticket without the work being completed.

The employer has met the burden of proof to establish that the claimant acted deliberately and with recurrent negligence in violation of company policy, procedure, or prior warning. The employer has an interest in trusting its employees and properly maintaining streets for residents. The employer gave the claimant a last chance warning in April for failing to properly maintain streets, among other things. On September 12 at the pre-determination hearing, the employer notified the claimant that they believed he was prematurely closing HEAT tickets which was an offense that would result in discipline. The claimant provided misleading or false information during the investigation into the incidents that led to the pre-determination hearing. Additionally, after the hearing, the claimant continued to prematurely close HEAT tickets without ensuring the work was completed. The claimant's dishonesty during the investigation was a deliberate disregard of the employer's interests and his repeated failure to accurately perform his job duties after having been warned is evidence of negligence or carelessness to such a degree of recurrence as to rise to the level of disqualifying job-related misconduct. Accordingly, benefits are denied.

DECISION:

The December 24, 2019, reference 02, unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.



Stephanie R. Callahan
Administrative Law Judge

January 8, 2020
Decision Dated and Mailed

src/scn