IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

WILLIAM V BENVENUTI
Claimant

DES MOINES IND COMMUNITY SCH DIST
Employer

APPEAL NO. 17A-UI-02314-TNT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/12/17
Claimant: Respondent (1)

Iowa Code § 96.5(2)a -- Discharge

STATEMENT OF THE CASE:

The Des Moines Independent Community School District, the employer, filed a timely appeal from a representative's decision dated February 28, 2017, reference 01, allowing benefits, finding that the claimant was dismissed on August 15, 2016 under non-disqualifying conditions. After due notice was provided a telephone conference hearing was held on March 23, 2017. The claimant participated. The employer participated by Ms. Rhonda Wagoner, Benefit Specialist, Employer's Exhibits 1 through 9 were admitted into the hearing record.

ISSUE:

The issue is whether the claimant was discharged from misconduct in connection with his employment.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: William Benvenuti began employment with the Des Moines Independent Community District on October 18, 2004. Mr. Benvenuti held a position of full-time bus driver and was paid by the hour. His immediate supervisor was Todd Liston. Mr. Benvenuti last performed services for the school district during the first week of May 2016. Mr. Benvenuti performs his school bus driver duties for the school district during the school terms as set by the school district each year. During the periods between academic years or terms the claimant provides no services to the employer and is not compensated. At the conclusion of the Spring 2016 school term, the claimant was given reasonable assurance that his employment as a school bus driver would resume when the Fall 2016 school year began.

During the second week of August 2016, the claimant "self-reported" to his supervisor at the school district that he had "been arrested" for possession of methamphetamine and drug paraphernalia. The school district had also become aware of Mr. Benvenuti's arrest because it had been reported at a local television station, identifying Mr. Benvenuti as a "school bus driver". Mr. Benvenuti had self-reported the incident because he believed that the school district's policy required drivers to report driving infractions and other incidents that might later affect their ability to continue driving for the district, and he knew reports had to be made within

three business days. The claimant believed that the rule was in place, even in the summer months, because the school district needed advance notice of any factors that might affect the driver's ability to perform his duties for the school district when school resumed.

The school district set August 15, 2016 for a meeting with the claimant, to afford him an opportunity to present information to the school board about the incident reported to the school district by the claimant, by online access and by news coverage. During the meeting, Mr. Benvenuti said that he had been "arrested" for possession of methamphetamine and drug paraphernalia. At that time, the claimant intended to plead not guilty to the criminal charges and made no admissions that he was guilty, but only that he had been arrested for them. The claimant believed that the board would take no final action regarding his employment during the meeting, but would place him on administrative leave pending a resolution of his guilt or innocence in the courts.

Because the charges, the online information, and the television report reflected that the claimant had been arrested for possession of methamphetamine and drug paraphernalia, the claimant was considered to be in violation of the district's policies that included; "gross misconduct unbecoming an employee, possession of a controlled substance and that the claimant had engaged in an act which endangered the safety, health, and well-being of another person and was of a sufficient magnitude to cause gross discredit to the organization." The claimant was informed at the conclusion of the meeting of the school district's decision to discharge him from employment based upon his arrest for drug charges and the publicity that surrounded it. After being informed of the decision to terminate him, Mr. Benvenuti, through his union representative, requested permission to resign in lieu of being discharged. The district agreed and claimant was allowed to resign in lieu of being discharged on August 15, 2016.

It appears that the claimant, through his attorney, initially pled not guilty to the charges but later entered a guilty plea in consideration for probation and a deferred sentence.

The school district employment handbook lists offenses that can result in disciplinary action. Among the offenses listed that may result in immediate discharge are: fighting, gross misconduct unbecoming an employee, conviction of a felony by a court of proper jurisdiction that is relevant to a job position, possession of a controlled substance, and any act which endangers the safety, health or well-being of another person or is of a sufficient magnitude to cause disruption of work or gross discredit to the organization.

It is the claimant's position that the incident resulting in his arrest occurred on August 11, 2016, during a period of lay off from his employment with the school district. At that time, he was performing no services for the school district and was not being paid by the school district. The claimant self-reported the incident because he and other drivers had been instructed by their supervisor that they should report any incidents that might prevent the drivers from reporting back to work when the next school term began or may affect the driver's licensing status to continue to perform his or her duties. It is the claimant's further position that because he had made no admissions of guilt and had initially pled not guilty to the charges, his expectation was that he would be placed on administrative leave from the time of his future recall to work until the criminal charges that had been brought against him were resolved.

REASONING AND CONCLUSIONS OF LAW:

Iowa Law Code r. 871-24.26(21) provides that when a claimant is given the choice of being discharged or resigning, the resignation of the claimant is not considered to be a voluntary leaving and is considered a discharge.

The propriety of the employer's decision to discharge Mr. Bevenuti is not the issue. The employer clearly considered it appropriate to discharge the claimant from his position as a school bus driver affective August 15, 2016 because the claimant had been arrested and charged with the crimes of possessing the controlled substance and drug paraphernalia. The claimant's arrest had been widely publicized and because the claimant worked as a school bus driver during the school term, his arrest had reflected negatively on the school district and brought potential discredit to the organization. It appears that under those circumstances the school board felt compelled to take immediate action against Mr. Bevenuti, instead of waiting to discharge him later when he was recalled to work or not recall him to work for the next term, when charges pending against him were verified by a guilty plea, or a finding that the claimant was guilty of the charges by a criminal court.

the third option was not to recall him to work for the next term or the finding that the claimant was guilty of the charges by the criminal court.

The question in this case is whether the employer's decision to "discharge" the claimant on August 15, 2016 for conduct that occurred during the period that he was laid off from employment this was for "misconduct in connection with his employment."

Iowa Code § 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.

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 terminating the claimant's employment, 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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish misconduct in connection with his or her employment at the time of the incident as the reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to that separation.

In this matter, it is clear that the Des Moines Independent School District made a sound and reasonable decision to effectively terminate Mr. Bevenuti from being recalled to any future employment with the school district because he had been arrested for possession of a controlled substance and drug paraphernalia and the claimant's arrest and his position as a school bus driver for the school district had been widely reported. At the time of the incident and the claimant's discharge from employment, Mr. Bevenuti had been laid off by the school district and was performing no services for the school district and was not being paid by the school district. The claimant had been laid off from this work at the end of the Spring 2016 school term. The employer was free to decide not to recall Mr. Bevenuti back to his previous job position when the Fall term began. Mr. Bevenuti, as well, was free not to return to employment with the school district if he chose not to. Mr. Bevenuti informed the school district board that he had been arrested and supplied information about the circumstances, but made no admissions as to his guilt in the matter. At the time that the claimant self-reported the incident and appeared at the August 15, 2016 meeting, he had not entered a guilty plea to the charges against him. The claimant believed that under those circumstances, the board would delay any action and decision on whether or not to recall him back to work for the fall term until the criminal matter was resolved. When the claimant received the unexpected decision from the board to discharge him that day, Mr. Bevenuti asked permission to submit a resignation, not because he desired to quit, but only because he was informed of the discharge and wished to preserve his employment record.

While the employer's decision to inform Mr. Bevenuti on August 15, 2016 of their decision is understandable, the claimant had not been placed on any notice by the school district that conduct during periods of layoff or conduct during periods between academic terms or years could result in a later discharge from employment. The claimant had apparently been instructed only that he should report driving incidents or other similar incidents that might prohibit him from doing his job for the school district when he was later recalled to work. Mr. Bevenuti believed that the requirement that he report any conduct that took place between academic terms or years while he was laid off was to allow the employer to make appropriate decisions about recalling the claimant to work or make alternative plans prior to his recall.

While the decision to discharge Mr. Bevenuti on August 15, 2016 was clearly a sound management decision under the attendant circumstances, the conduct for which the claimant was discharged was not misconduct in connection with his employment with the district at that time. At the time of the incident that caused his discharge, the claimant had been laid off from this work and was not performing any services for the employer and was not being paid by the

employer. The employer was under no legal obligation to recall the claimant back to work at later date. At the time that the incident occurred that resulted in the claimant's separation of employment, he had already been laid-off due to lack of work. The claimant's arrest after he had been laid-off due to lack of work was not misconduct in connection with his employment with the school district at the time of the incident, as he was not currently employed by the school district. Accordingly, the adjudicator's determination that the claimant's discharge had not taken place under disqualifying conditions is correct.

DECISION:

The representative's decision dated May 24, 2017, reference 03, is affirmed. The employer did not meet its burden to show disqualifying misconduct in connection with the claimant's employment. Benefits are potentially allowed if the claimant is otherwise eligible.

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Terry P. Nice
Administrative Law Judge

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Decision Dated and Mailed

scn/rvs