

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

KEVIN D DENIKE

Claimant

and

RIVERSIDE CASINO & GOLF RESORT

Employer

HEARING NUMBER: 19BUI-06777

**EMPLOYMENT APPEAL BOARD
DECISION**

SECTION: 10A.601 Employment Appeal Board Review

D E C I S I O N

FINDINGS OF FACT:

A hearing in the above matter was held September 19, 2019. The administrative law judge's decision was issued September 23, 2019. The Claimant appealed the administrative law judge's decision to the Employment Appeal Board. The Board, however, is unable to make a decision as to the merits of this case based on incomplete development of issues related to the circumstances surrounding the separation from employment, and the disposition of the criminal case resulting from the arrest.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 10A.601(4) (2019) 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 administrative law judge has an affirmative duty to develop the record. See, *Baker v. Employment Appeal Board*, 551 N.W. 2d 646 (Iowa App. 1996); 871 IAC 26.14(2) ("The presiding officer shall inquire fully into the factual matters at issue..."). Since the record of the hearing before the administrative law judge is incomplete, the Employment Appeal Board cannot make a decision on the merits. For this reason, this matter must be remanded

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for a hearing to take additional evidence on the issues of (1) what were the allegations that formed the basis of the arrest warrant, in other words, what did the Claimant allegedly do that caused him to be arrested, and (2) whether the Claimant in fact did the acts that he was charged with, and (3) what is the disposition of the criminal case including the terms and conditions of such disposition, and the circumstances surrounding the disposition. We note that the Employer has the burden of proof on misconduct, and so the burden of proof concerning what the Claimant did that caused the arrest would be on the Employer, and we recognize that the Claimant may wish to remain silent regarding such issues. We also note that the circumstances surrounding disposition would include whether the disposition was the result of volitional action of the Claimant and whether he was, or should have been, aware of the effect on his employability due to that disposition. See 491 IAC 4.4(3). We also suggest that it would be helpful to have as exhibits the criminal complaint, and any court order, or agreed order, concerning the criminal case. Of course, any other issue relevant to possible disqualification based on the nature of separation from work may also be addressed assuming the parties have adequate notice.

DECISION:

The decision of the administrative law judge dated September 23, 2019 is not vacated at this time and remains in force unless and until the Department makes a differing determination pursuant to this remand. This matter is remanded to an administrative law judge in the Workforce Development Center, Appeals Section for the limited purpose of reopening the record and eliciting additional testimony, and evidence, that is consistent with the Board's concerns set forth in this decision's Reasoning and Conclusions of Law. The administrative law judge shall conduct this supplemental hearing following due notice. After the hearing, the administrative law judge shall issue a new decision, which provides the parties appeal rights.

Kim D. Schmett

Ashley R. Koopmans

RRA/fnv

James M. Strohman