

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRYAN A EARLEY
Claimant

APPEAL NO. 13A-UI-02702-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ROBERT J MALLOY JR
BOB MALLOY SODDING CO
Employer

OC: 07/22/12
Claimant: Appellant (1)

Section 96.5(2)a – Discharge
871 IAC 26.8(5) – Decision on the Record

STATEMENT OF THE CASE:

An appeal was filed from an unemployment insurance decision dated February 27, 2013, reference 03, that concluded the claimant was disqualified for unemployment benefits. A telephone hearing was scheduled for April 3, 2013. The appellant did not participate in the hearing. Based on the appellant's failure to participate in the hearing, the available administrative file, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law and decision.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

The parties were properly notified of the scheduled hearing on this appeal. The appellant provided a telephone number where he could be reached for the hearing. That number was dialed twice at 8:58 a.m. and once each at 8:59, 9:00, 9:03, 9:07, 9:10 and 9:15 a.m. The only response was a busy signal. The appellant did not contact the Appeals Section before the record was closed at 9:16 a.m.

The administrative law judge has conducted a careful review of the available administrative file to determine whether the unemployment insurance decision should be affirmed.

The record was closed at 9:16 a.m. At 9:20 a.m. the appellant called and requested to participate. He had elected to use a cell phone despite the recommendation against it and the phone was not operating properly. He did not call in at 9:05 a.m. as instructed when he did not receive a call from the judge by that time.

REASONING AND CONCLUSIONS OF LAW:

871 IAC 26.8(3), (4) and (5) provide:

Withdrawals and postponements.

(3) If, due to emergency or other good cause, a party, having received due notice, is unable to attend a hearing or request postponement within the prescribed time, the presiding officer may, if no decision has been issued, reopen the record and, with notice to all parties, schedule another hearing. If a decision has been issued, the decision may be vacated upon the presiding officer's own motion or at the request of a party within 15 days after the mailing date of the decision and in the absence of an appeal to the employment appeal board of the department of inspections and appeals. If a decision is vacated, notice shall be given to all parties of a new hearing to be held and decided by another presiding officer. Once a decision has become final as provided by statute, the presiding officer has no jurisdiction to reopen the record or vacate the decision.

(4) A request to reopen a record or vacate a decision may be heard ex parte by the presiding officer. The granting or denial of such a request may be used as a grounds for appeal to the employment appeal board of the department of inspections and appeals upon the issuance of the presiding officer's final decision in the case.

(5) If good cause for postponement or reopening has not been shown, the presiding officer shall make a decision based upon whatever evidence is properly in the record.

The administrative law judge has carefully reviewed evidence in the record and the available administrative file and concludes that the unemployment insurance decision previously entered in this case is correct and should be affirmed.

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.

The appellant did receive the notice of the hearing and did provide a phone number where he could be contacted. He was also advised not to wait more than five minutes after the scheduled start time for the hearing and if the judge had not called him by that time, to contact the Appeals Section. The notice of the hearing also recommends against the use of cell phones to avoid problems with reception. Mr. Earley did not follow either of those instructions. Although the appellant may have intended to participate in the hearing, he failed to make sure he had an operational phone and did not call in five minutes after the start time when the judge's call had not been received. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. The appellant did not establish good cause to reopen the hearing. Therefore, his request to reopen the hearing is denied.

DECISION:

The unemployment insurance decision dated February 27, 2013, reference 03, is affirmed. The decision finding the claimant disqualified for benefits remains in effect.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/pjs