

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**KEVIN HART
PO BOX 402
MARCUS IA 51035**

**MARCUS-MERIDEN-CLEGHORN
COMMUNITY SCHOOL DISTRICT
400 E FENTON
PO BOX 667
MARCUS IA 51035-0667**

**Appeal Number: 04A-UI-10458-RT
OC: 08-22-04 R: 01
Claimant: Respondent (2)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.5-1 – Voluntary Quitting
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Marcus-Meriden-Cleghorn Community School District, filed a timely appeal from an unemployment insurance decision dated September 15, 2004 reference 01, allowing unemployment insurance benefits to the claimant, Kevin Hart. After due notice was issued, a telephone hearing was held on October 19, 2004, with the claimant participating. Jan Brandhorst, Superintendent of Schools, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development unemployment insurance records for the claimant. Employer's Exhibits 1 and 2 were admitted into evidence.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits 1 and 2, the administrative law judge finds: The claimant was employed by the employer as a full-time superintendent of schools from July 1, 2001 until he resigned effective June 30, 2004. On January 26, 2004, the claimant submitted a written letter of resignation to be effective June 20, 2004, as shown at Employer's Exhibit 1. The employer accepted the written letter of resignation. On or about January 22, 2004, after an official school board meeting, the claimant met with three school board members, including the president, vice president, and a senior board member. The board members informed the claimant that all the board members were agreed that the board wanted his resignation and he was told that if he did not resign he would be forced out. The board explained that they wanted the claimant's resignation because of a lack of trust. The claimant then resigned, as shown at Employer's Exhibit 1. The school board had another official meeting scheduled for January 26, 2004, which agenda was posted on January 23, 2004, including a heading for "resignation." No name was mentioned for the resignation. The claimant was also asked to resign because of continuing alcohol drinking problems.

In the claimant's second year of employment, 2002 - 2003, the claimant was asked by two board members to do something about his alcohol drinking. Although the claimant testified he did not feel that he had an alcoholism problem, the claimant went through treatment during that school year. The board had had some evidence of the claimant's alcohol consumption and had made this request.

Finally, at 3:00 a.m. on January 12, 2004, the claimant was arrested for operating a motor vehicle while intoxicated. The claimant was not on school business at the time. Ultimately, the claimant received a deferred sentence or a deferred judgment. The claimant's arrest was published in a local newspaper, the LeMars Sentineal, as shown at Employer's Exhibit 2. The claimant's resignation was also contained in the Cherokee Times, referring to his citation for OWI, also as shown at Employer's Exhibit 2. It was after the claimant's arrest for OWI that the board requested his resignation. The board felt that the claimant's drinking and the OWI charge were a deterrence to his effectiveness as a superintendent in the employer's school district. The employer has no specific rules, nor were there any specific provisions in the claimant's contract about an arrest or conviction of a criminal offense. The claimant's school district was one of two schools in Iowa to receive a Blue Ribbon award based upon test scores and other criteria related to its students. The employer's school board consists of seven members. Pursuant to his claim for unemployment insurance benefits filed effective August 22, 2004, the claimant has received unemployment insurance benefits in the amount of \$2,254.00 as follows: \$322.00 per week for seven weeks, from benefit week ending August 28, 2004 to benefit week ending October 9, 2004.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. He is.

Iowa Code Section 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.

871 IAC 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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.26(21) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

The first issue to be resolved is the character of the separation. The employer's witness, Jan Brandhorst, Superintendent of Schools, testified that the claimant was asked to resign in early 2004 and did so, as shown at Employer's Exhibit 1. Mr. Brandhorst also testified that he had no evidence that the claimant would have been discharged by the school board, who has the authority to hire and fire superintendents. The claimant testified that he was asked to resign by three members of the school board on January 22, 2004, and told that if he did not resign he would be forced out. The claimant also testified that the three board members with whom he

met informed him that the entire board wanted his resignation. There are seven board members. Under the evidence here, the administrative law judge is constrained to conclude that the claimant was compelled to resign when he was given the choice of resigning or being discharged, and this is not considered a voluntary leaving. It is true that only three of the seven board members met with the claimant on January 22, 2004 to ask for his resignation, but the three board members who met with the claimant informed the claimant that all of the board members wanted his resignation and that they would force him out. The claimant had no reason to believe otherwise. The administrative law judge notes that the board agenda for the meeting of January 26, 2004, which agenda was posted on January 23, 2004, reflected a "resignation" on the agenda without giving a name. This was before the claimant actually resigned or even informed anyone on the board that he would be resigning. Accordingly, the administrative law judge concludes that the claimant was forced to resign or be discharged and his resignation was not voluntary and, therefore, the claimant's separation is treated as a discharge at least for the purposes of determining his entitlement to receive unemployment insurance benefits.

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge or a forced resignation, the claimant must have been discharged or forced to resign because of disqualifying misconduct. Although it is a close question, the administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. There are very few facts in real dispute. As noted above, the claimant was forced to resign by the school board. The reason given to him by the school board was a lack of trust; but that emanated from an alcohol problem. In the claimant's second year of employment, school year 2002 - 2003, the claimant was asked by two school board members to attend alcoholism treatment for a potential alcohol consumption problem. The claimant had done certain things evidencing to the board that such treatment was appropriate. The claimant consented. The claimant testified that he did not feel he had a problem with alcoholism, but the administrative law judge notes that the claimant consented to alcoholism treatment and went through a treatment program. It certainly appears to the administrative law judge that the claimant recognized his problem, as did at least some members of the school board, and the claimant attempted to address his problem.

The claimant was arrested for operating a motor vehicle while intoxicated in the early morning hours of January 12, 2004, at approximately 3:00 a.m. The claimant concedes that he was so arrested. The claimant testified that he did not plead guilty, but entered into a plea agreement for a "deferred sentence." Under Iowa Code section 906.1(2) a deferred sentence is a sentencing option whereby the court enters an adjudication of guilt but does not impose a sentence. Therefore, the claimant must have pled guilty before receiving the deferred sentence and the deferred sentence was an adjudication of guilt. Even assuming that the claimant misspoke and what he received was a "deferred judgment," which indicates that both the adjudication of guilt and the imposition of the sentence are deferred, the administrative law judge would conclude nevertheless that the claimant was actually convicted of the offense. In Schilling v. Iowa Dept. of Transportation, 646 N.W.2d 69 (Iowa 2002) the Iowa Supreme Court held that a deferred judgment constitutes a conviction at least to the extent that the conviction is one used to protect the public. The administrative law judge concludes that an OWI charge and conviction is one intended to, among other things, protect the public and that therefore, the claimant was convicted of the offense, whether or not he will be sentenced or a final judgment will be entered. Mr. Brandhorst testified that the board felt that the claimant's problems with alcohol and the OWI charge or conviction would be a deterrence to his effectiveness in the district. The administrative law judge agrees. There is no evidence that the claimant was forced to drive his vehicle while intoxicated, nor forced to go through alcoholic treatment, nor

forced to drink alcohol on any occasion. The administrative law judge is not unmindful of the particular position of the superintendent of schools as the manager of, and guiding influence on, a school district and the particular influence that position has on the students, parents, and community. The position is one of trust and respect. The administrative law judge believes that the claimant's behavior damages both the trust and the respect which the position must have. It also damages the credibility of the position to the students, parents, and community.

The claimant testified that he was not on school business when he was arrested for OWI and it was totally unrelated to his employment. That assumes that the position of superintendent of schools begins and ends at certain times. That position is unlike a position, where from 8:00 a.m. to 5:00 p.m. one is a welder or machine operator, and then ceases to perform that function when he goes home. The superintendent of schools is a superintendent of schools 24 hours a day, seven days a week. Further, in Kleidosty v. Employment Appeal Board, 482 N.W.2d 416 (Iowa 1992), The Iowa Supreme Court held that conduct off the employer's premises and while on the employee's own time can still disqualify an individual from receiving unemployment insurance benefits. It is true that in that case the employer had specific rules prohibiting the behavior for which the claimant was arrested and pled guilty and, here, there is no evidence that the claimant's contract with the employer or the employer itself had specific rules addressing particular criminal behavior. However, the administrative law judge concludes that there is, at least, an implied agreement as part of the duties of a superintendent of schools arising from his contract of employment that he will do nothing to deter the effectiveness of his work for the school district or destroy the required respect and trust noted above. Accordingly, the administrative law judge is constrained to conclude that the claimant's behavior were deliberate acts constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evince a 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 and, at the very least, is carelessness or negligence in such a 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 claimant's duties and obligations to the employer. Therefore, the administrative law judge concludes that the claimant's conduct and behavior were disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$2,254.00 since separating from the employer herein on or about June 30, 2004 and filing for such benefits effective August 22, 2004. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions Iowa law.

DECISION:

The representative's decision dated September 15, 2004, reference 01, is reversed. The claimant, Kevin Hart, is not entitled to receive unemployment insurance benefits until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. He has been overpaid unemployment insurance benefits in the amount of \$2,254.00.

b/b