IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

HEATHER L RIES Claimant **CITY OF ELDORA** Employer	**APPEAL 17A-UI-12489-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/05/17** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the November 28, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on December 28, 2017. The claimant participated and was represented by attorney Raphael Scheetz. The employer participated through City Manager Dave Mitchell.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part-time as a paramedic RN exception from December 8, 2016, until this employment ended on October 1, 2017, when she was discharged.

On June 19, 2017, claimant was on a call with crew chief Kristin Brady. During the call, claimant administered a schedule 1 narcotic to a patient, but had five milligrams leftover. The employer's protocol requires schedule 1 narcotics to be wasted, or disposed of, in front of another employee and the waste log to be signed off on to ensure proper disposal. Claimant knew and understood this policy. Claimant testified, on June 19, she communicated to Brady that she was going to waste the drug and waited until she believed she was watching to waste the remainder into the sharps disposal container in accordance with the employer's procedures. When claimant later asked Brady to sign the waste log she indicated she could not sign the log

because she did not see her waste the narcotic. Claimant was suspended effective June 21, 2017 for violating the narcotic wasting procedures and was subsequently discharged on October 1, 2017. The employer testified it delayed in discharging claimant from employment due to an external investigation by the Department of Criminal Investigations (DCI).

The claimant filed a new claim for unemployment insurance benefits with an effective date of November 5, 2017. Both the employer and the claimant participated in a fact finding interview regarding the separation on November 27, 2017. Claimant has not received any benefits to date. The fact finder determined claimant qualified for benefits.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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:
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> 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).

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).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

Iowa Admin. Code r. 871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011).

Despite its own investigation being completed and resulting in claimant's suspension, the employer did not actually discharge her until the completion of the DCI investigation. The employer knew about the issue on June 21, 2017, but made the business decision to delay discharging her from employment until October 1, 2017, pending the outcome of an investigation conducted by DCI. The delay of more than three months indicates the employer has not established a current or final act of misconduct. As no current act of misconduct has been established, benefits are allowed, provided claimant is otherwise eligible. Furthermore, given the lack of credible evidence, the employer failed to establish misconduct even were it current.

The conduct for which claimant was discharged was, at best, an isolated incident of poor judgment, but more likely the result of a miscommunication. Claimant testified she believed she was following the proper wasting procedure and that Brady observed her wasting the narcotic. It was not until later claimant learned Brady did not see her complete the wasting procedure. Claimant had no prior disciplinary action. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a

disciplinary warning. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Benefits are allowed, provided claimant is otherwise eligible. The issues of overpayment and participation are moot.

DECISION:

The November 28, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The issues of overpayment and participation are moot.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

nm/scn