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

BARBARA L ARNOLD	:	
	:	**HEARING NUMBER:** 11B-UI-16749
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
VON MAUR INC	:	
Employer.		

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Barbara L. Arnold, was employed by Von Maur, Inc. from July 12, 2004 through November 9, 2010 as a full-time merchandise processor. (Tr. 4, 10) At the start of her employment, she received personnel handbook containing the employer's 'Code of Conduct' for which she signed in acknowledgement of receipt. (Exhibit 1-p.2-4) She was later issued the 'Amendments' to the employer's manual for which she signed on two different occasions (March 30th, and August 27, 2009). (Exhibit 1-p.5-6)

The claimant's job responsibility included either scanning a barcode, making sure the merchandise coming already has a UPC ticket, or ticketing the item with the store's own ticket at the distribution center. The claimant is also required to "…notate the time, how many units, what [she's] done in that amount of time…" inter alia. (Tr. 6) The employer issued numerous warnings, including critiques, to

the claimant for

various infractions (attendance, attitude and accuracy). (Tr. 5-6, 13, Exhibit 1-p. 7-14) Specifically, Ms. Arnold received two written warnings for inaccuracies, poor attitude, etc., back on June 1, 2010 and August 6, 2010. (Tr. 5, 7, Exhibit 1-p. 13-14) The June incident involved the claimant having to quit in the midst of an order. When another employee stepped in to continue, it was discovered that the claimant missed ticketing 12 units of that order. (Tr. 6) Ms. Arnold would count the boxes without opening them to check or count the merchandise; she would merely multiple the number of boxes times the number of units listed on the boxes. (Tr. 11) When she made a similar error in August, that second written warning included a caveat, "Consistent improvement must be seen, or termination will result." (Tr. 7, 13, Exhibit 1-p.13)

On November 3rd, the employer held a meeting to ensure employees used the correct and uniform counting method on an upcoming order (AMSCAN). (Tr. 15, 17) The claimant did not report to this meeting, but Liz Lee (a co-worker) showed her the proper counting method, which involved opening the boxes and checking the merchandise individually. (Tr. 17, Exhibit A)

On November 8, 2010, the claimant failed to properly process a work order and falsified the number of units in one order she had already processed by indicating that "…she started an order at 6:15 a.m.; completed checking…at 6:30 a.m. … [and that] it was 624 pieces [she checked]…" (Tr. 4-5, 6, 8) The claimant would have generally averaged 220 units per hour according to the computer system which calculated "…what the average should be for that specific type of work…" (Tr. 9) When questioned, Ms. Arnold responded that that was how everyone was counting. (Tr. 5) Her error and falsification affected other employees' production. (Tr. 7) The employer terminated her.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2009) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
>
> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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.

The Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

The record establishes that the claimant received numerous warnings regarding inaccurate work and failure to follow procedures. She was also warned about her attitude and attendance for which her last written warning put her on notice that her job was in jeopardy if consistent improvement did not occur. (Tr. 7, 13, Exhibit 1-p.13) The final incident occurred on November 8th where the claimant left a counting project and another employee filled in discovering that the claimant engaged in an inaccurate method of counting, which inflated her piece rate leading to the falsification of the claimant's count. The issue of how to properly count this order was addressed in a November 3rd meeting with staff to clarify procedures. Although the claimant was not there, she admits that Liz Lee explained the proper procedure the following day. (Tr. 17, Exhibit A) Thus, Ms. Arnold's failure to use the proper procedure for which she, admittedly, had knowledge can only be construed as an intentional and blatant disregard for the employer's interests, particularly in light of her past warnings. Her excuse, in essence, that 'everybody else does it this way' is not credible and lacks merit. Based on this record, we conclude that the employer has satisfied their burden of proof.

DECISION:

The administrative law judge's decision dated January 26, 2011 is **REVERSED**. The claimant was discharged for disqualifying misconduct. Accordingly, she is denied benefits until such time she has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. See, Iowa Code section 96.5(2)"a".

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Monique F. Kuester

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Elizabeth L. Seiser

DISSENTING OPINION OF JOHN A. PENO:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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John A. Peno

And lastly, since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule:

871 Rule of two affirmances. IAC 23.43(3)

a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.

b. However, if the decision is subsequently reversed by higher authority:

(1) The protesting employer involved shall have all charges removed for all payments made on such claim.
(2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
(3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

Thus the Employer's account may not be charged for any benefits paid so far to the Claimant for the weeks in question, nor will the Claimant be required to repay benefits already received.

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John A. Peno

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Elizabeth L. Seiser

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Monique F. Kuester

AMG/fnv