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

CANDACE K RABORN
44 – 33RD ST
WOODBINE IA 51579

TURNKEY SOLUTIONS
13908 S 226TH AVE
GRETNA NE 68028

Appeal Number: 06A-UI-03895-JTT
OC: 02/13/05 R: 01
Claimant: Respondent (1)

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 96.6(2) – Timeliness of Appeal
Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Turnkey Solutions filed an appeal from the July 28, 2005, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on May 11, 2006. Claimant Candace Raborn participated. Chief Financial Officer Amy Sedlak represented the employer. The administrative law judge took official notice of Iowa Workforce Development records regarding the claim that was effective February 13, 2005, the claim that was effective February 19, 2006, and the employer's contact with the Agency. Department Exhibits D-1, D-2, and D-3 were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On July 28, 2005, an Agency representative mailed the employer's copy of the July 28, 2005, reference 03, decision to an incorrect street address. This error was made despite the fact that the employer had detected the address error prior to the fact-finding interview and provided the correct street address, and despite the fact that the Agency had sent a corrected notice of claim to the employer on July 27, 2005, bearing the correct address: 10935 Harrison St., Lavista, NE 68128. Chief Financial Officer Amy Sedlak represented the employer at the fact-finding interview on July 26, 2005. At the time of the fact-finding interview, the Agency representative advised the parties that a decision regarding the claimant's eligibility for benefits and the employer's liability for benefits would be forthcoming. Despite the fact that the employer never received the promised decision, the employer took no steps to learn whether it had been deemed liable on the claim. When the employer noted no assessment on its Nebraska quarterly statement for benefits paid to the claimant, Ms. Sedlak assumed the employer had not been found liable on the claim.

The employer became aware of the July 28, 2005, reference 03, decision after the claimant filed a new claim for benefits at the beginning of her next benefit year. The new claim for benefits was effective February 19, 2006. On March 1, 2006, the Agency mailed a notice of claim to employer. The Agency again used an incorrect address. This time, the Agency attached *the claimant's* Iowa zip code, 51579, to the employer's address. The correct address was 13908 S 226th Ave, Gretna, NE *68028*. The due date for the employer's protest was March 13. The employer's protest bears a completion date of March 13, but was not faxed to Iowa Workforce Development until March 17. In other words, the Agency failed to note that the employer apparently had an opportunity to submit a timely protest but did not, in fact, submit a timely protest. The employer neglected to bring the erroneous zip code to the Agency's attention at the time it filed its protest to the new claim.

On March 23, 2006, the Agency mailed the March 23, 2006, reference 02, decision to the employer. The Agency continued to substitute *the claimant's* Iowa zip code for the employer's correct Nebraska zip code. The deadline for appeal set forth in the decision was April 2, 2006, which was a Sunday. By operation of law, and as indicated on the decision, the deadline was extended to Monday, April 3. The employer did not receive its copy of the March 23, 2006, reference 02, decision until April 5.

On April 5, the employer filed its appeal of the July 28, 2005, reference 03, decision and the March 23, 2006, reference 02, decision.

Candace Raborn was employed by Turnkey Solutions as a full-time duplication technician from March 28, 2005, until July 1, 2005, when Chief Executive Officer Ray Antoniak discharged her at the end of her 90-day probationary period. At the time Mr. Antoniak discharged Ms. Raborn he told her she was being discharged because she made too many errors and did not take criticism well. Mr. Antoniak did not testify at the appeal hearing. Chief Financial Officer Amy Sedlak testified that the decision to discharge Ms. Raborn was based on four things: being tardy eight times during the course of the employment, production errors, sleeping on the job, and an inability to be counseled. The final incident of tardiness occurred on June 10 and there were not attendance issues thereafter.

The sleeping incident is alleged to have occurred on June 21. Ms. Sedlak was unable to provide testimony regarding who witnessed the alleged offense. At the time of the alleged

incident, Ms. Raborn was assigned to work in the VHS duplication area and was supervised by Lance Baker. Ms. Raborn was required to watch the videotapes she was duplicating. On the date in question, Ms. Raborn was duplicating a lengthy videotape and backed her chair up against a nearby object so she could rest her head against it as she watched the videotape. Ms. Raborn continued to be seated in an upright position in the chair. Ms. Raborn did not in fact sleep. Ms. Raborn was leaning her head back but continuing to view the videotape when Mr. Baker entered her work area. While Mr. Baker was in the vicinity, Ms. Raborn conversed with Mr. Baker about the fact that she did not know how many more minutes were left on the videotape she was reviewing. Soon after Mr. Baker departed, Ms. Raborn became concerned that Mr. Baker might think she had been sleeping and went to Mr. Baker to discuss that concern. Mr. Baker told Ms. Raborn not to worry about it. Mr. Baker is still employed by Turnkey Solutions, but did not testify at the hearing. No further investigation of the matter took place.

Ms. Sedlak was unable to say when the most recent "production error" occurred or to provide meaningful information regarding any particular instance where Ms. Raborn made a production error.

REASONING AND CONCLUSIONS OF LAW:

The first issue for the administrative law judge is whether the employer's appeal of the July 28, 2005, reference 03, decision should be deemed timely. The administrative law judge concludes it should.

Iowa Code section 96.6-2 provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to

> both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The ten-day deadline for appeal begins to run on the date Workforce Development mails the decision to the parties. The "decision date" found in the upper right-hand portion of the Agency representative's decision, unless otherwise corrected immediately below that entry, is presumptive evidence of the date of mailing. Gaskins v. Unempl. Comp. Bd. of Rev., 429 A.2d 138 (Pa. Comm. 1981); Johnson v. Board of Adjustment, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

An appeal submitted by mail is deemed filed on the date it is mailed as shown by the postmark or in the absence of a postmark the postage meter mark of the envelope in which it was received, or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion. See 871 AC 24.35(1)(a). See also Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983). An appeal submitted by any other means is deemed filed on the date it is received by the Unemployment Insurance Division of Iowa Workforce Development. See 871 IAC 24.35(1)(b).

The evidence in the record establishes that more than ten calendar days elapsed between the mailing date and the date this appeal was filed. The Iowa Supreme Court has declared that there is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and that the administrative law judge has no authority to change the decision of a representative if a timely appeal is not filed. Franklin v. IDJS, 277 N.W.2d 877, 881 (Iowa 1979). Compliance with appeal notice provisions is jurisdictional unless the facts of a case show that the notice was invalid. Beardslee v. IDJS, 276 N.W.2d 373, 377 (Iowa 1979); see also In re Appeal of Elliott, 319 N.W.2d 244, 247 (Iowa 1982). The question in this case thus becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. Hendren v. IESC, 217 N.W.2d 255 (Iowa 1974); Smith v. IESC, 212 N.W.2d 471, 472 (Iowa 1973). The submission of an appeal beyond the statutory or regulatory deadline will be considered timely if the evidence establishes that the delay in submission was due to Agency error or misinformation or to delay or other action of the United States Postal Service. 871 IAC 24.35(2). No submission shall be considered timely if the delay in filing was unreasonable, based on the circumstances in the case. 871 IAC 24.35(2)(c). The evidence in the record establishes that the employer was denied a reasonable opportunity to file a timely appeal by virtue of errors committed by Iowa Workforce Development and did not unreasonably delay in submitting an appeal after receiving notice.

Based on the evidence in the record and application of the appropriate law, the administrative law judge deems the employer’s appeal timely and concludes that the administrative law judge had jurisdiction to decide the merits of the employer’s appeal.

The next question is whether the evidence in the record establishes that Ms. Raborn was discharged for misconduct in connection with the employment. It does not.

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).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The evidence in the record fails to establish a "current act" of misconduct that might provide a basis for disqualifying Ms. Raborn for unemployment insurance benefits. The weight of the evidence fails to establish that Ms. Raborn slept while on duty on July 21. Even if Ms. Raborn had slept on duty, the employer's ten-day delay in taking any action on the matter would have caused the incident to no longer constitute a "current act" of misconduct. The evidence indicates that Ms. Raborn's final instance of tardiness occurred on June 10. Regardless of whether the tardiness would have been deemed an excused or unexcused absence under the applicable law, the employer's 21-day delay in taking action on the matter caused the incident to no longer constitute a "current act" of misconduct. The employer presented minimal evidence to support the allegation that Ms. Raborn was negligent and/or careless in performing her duties or that she reacted inappropriately to the employer's criticisms. The employer has failed to provide available direct and satisfactory evidence of misconduct to corroborate and/or substantiate its multiple allegations of misconduct.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Raborn was discharged for no disqualifying reason. Accordingly, Ms. Raborn is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Raborn.

DECISION:

The employer's appeal was timely. The Agency representative's decision dated July 28, 2005, reference 03, is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

jt/kkf