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

DAYLE E EDEN	:	
	:	**HEARING NUMBER:** 16B-UI-09607
Claimant	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
VAN BUREN COUNTY	:	
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, 96.3-7

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Dayle Eden (Claimant) began her employment with Van Buren County (Employer) on December 29, 1989 and was employed until July 30, 2015, when she was discharged. The Claimant's discharge was then placed in abeyance from July 30, 2015 until August 9, 2015, to provide the claimant an opportunity for a "name saving" hearing. The Claimant's discharge became effective August 9, 2015, when the Employer concluded that the original decision to terminate Ms. Eden should stand. The stated reasons for the discharge were that the Claimant had established a password for documents she had created on the Employer's computer, she had taken confidential county records home, and that she deleted certain history information from a Department computer on June 25, 2015. The Employer failed to prove that the Claimant took confidential county records home.

Ms. Eden was employed as Office Manager for the Van Buren County Sheriff's Department and also performed as needed as a dispatcher and jailer. Ms. Eden was employed full time. Her immediate supervisor was Sheriff Tedrow.

The Sheriff contracts out for information technology services with a firm called PCS. Sometime before December 23, 2013 a PCS employee, named Kendall Sinn, was at the Sheriff's department performing his regular job tasks. The Claimant brought to his attention that her computer was running slowly. Mr. Sinn installed a program called C-Cleaner on the Employer's computer. This program deletes off computer files that are generated by the computer in the course of use, such as, cached files, internet browsing history, and various histories of recent items accessed by various applications running on the machine. On December 23, 2013 the C-Cleaner program was copied to a shared drive accessible by any Sheriff's Department computer connected to the network.

In October 2014, Sheriff Tedrow first became aware that unauthorized software had been installed on the computer in Ms. Eden's office. Shelli Tedrow was at that time using Ms. Eden's office computer terminal temporarily and had discovered that files and historical data that would normally be in the computer were missing. The missing information was items such as what files had previously been opened in word processing software, what system searches had been performed recently, what internet sites had recently been viewed, and what internet searches had recently been performed. The matter was reported to the Sheriff, and he investigated and confirmed that a county software vendor had installed the "C-Cleaner" software on Ms. Eden's office computer after Ms. Eden had complained her office computer was running slowly.

After conferring with the company owner, the Sheriff determined that the installation of the software on the Claimant's office computer had been done when the worker was on another service call and the installation of the software had not been at the request of the Sheriff's Department. There had been no billing or record of the installation to the Department. The Claimant had not informed her supervisor, the Sheriff, that her computer was running slowly or that the software had been installed or that she was using it.

The Sheriff took no action at that time except to monitor the situation with the use of an additional system that the computer company had suggested. At the Department's request, the computer service company installed a program that allowed the Sheriff to monitor the use of the "C-Cleansing" program, as well as other activities at the Claimant's assigned workstation, without the knowledge of the Claimant. Screen shots submitted by the Employer generated by this monitoring software date to at least October 13, 2014.

At 6:00 a.m. on June 27, 2015 Lacey Weller, the dispatching supervisor, came on duty. She accessed the computer in the Department's dispatch center. Ms. Weller discovered an open screen showing that the "C-Cleaner" software had been installed on the dispatch computer and found that items that certain items, and history had been deleted. Ms. Weller investigated and determined that the Claimant had been the last person to use the dispatch computer prior to the discovery. The Claimant had worked from 6:00 a.m. until 6:00 p.m. on June 26.

Sheriff Tedrow interviewed Ms. Eden and the employee who had used the dispatch computer prior to Ms. Eden's shift. He questioned both about the deletion of items and use of software to delete the items and removing the history. Both denied deleting items or using software to do so. During a later interview the Claimant stated that she had used the computer cleaning program on her office computer but denied using the same software on the dispatch center computer. She stated only that she "might have done so" and when asked for the third time she stated that she "could not remember."

The Employer then terminated the Claimant for the stated reasons listed above.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2016) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.

"This is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects 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 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).

It is the duty of the Board as the ultimate trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The Board, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, as well as the weight to give other evidence, a Board member should consider the evidence using his or her own

observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what evidence to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence the Board believes; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). The Board also gives weight to the opinion of the Administrative Law Judge concerning credibility and weight of evidence, particularly where the hearing is in-person, although the Board is not bound by that opinion. Iowa Code §17A.10(3); *Iowa State Fairgrounds Security v. Iowa Civil Rights Commission*, 322 N.W.2d 293, 294 (Iowa 1982). The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence considering the applicable factors listed above, and the Board's collective common sense and experience. We have found credible the testimony from the Claimant about her activities at the Employer, including her denial of having confidential documents, and about her use of the Employer's computer system.

We examine the three bases for the discharge in turn.

First we take up the question of removal of confidential documents. We find credible the testimony of the Claimant that she removed no such documents, and that any supposed admission was a misunderstanding. The documents the Claimant admitted to having were not confidential, and the Employer has not proven that she did remove confidential documents.

Second, the password protection has not been proven to be misconduct. The most relevant policy at the Employer provides that "employees must inform their department heads of voice mail, e-mail, and computer passwords or access codes." None of this refers to codes to access data files. Even if it did all that is required is "informing" the Employer. There is nothing specific enough to put the Claimant on notice that password locking a file will result in termination rather than a request to provide the password. We note that the only mention of password protecting files is to say "[t]he use of personal passwords …does not restrict the County's ability to access..files." This seems to indicate that protected files would be protected from co-workers, but not the county. Had the Employer found the protected file, asked for the password, and the Claimant refused our conclusion likely would be different. But as it is the password protection of a word processing file is no more than an instance of good faith error of judgment in an isolated instance.

This brings us to the big issue in the case, the use of C-Cleaner. As an initial matter the installation was done in order to address a slow computer, a business reason, and by an authorized vendor. It was not the Claimant's fault that the vendor did not make a record, and we find no misconduct in connection with the installation of the program. As for the use, frankly, it weighs heavily against the Employer that it knew about this many months before and yet only decided to monitor its use. If it was such a big concern why did the Employer just let it go on? Add to this that the mere deletion of a few history items does not strike us as something that threatens the Employer's interests in any substantial way. If it does threaten the County's interests then it is not obvious, and thus we'd expect the Employer to explain why it is so important that usage history not be deleted. This was not done beyond the Employer's concern that the Claimant was "hiding something" and that the records involved are open records. But the Employer monitored the Claimant's activity covertly for many months, and still did not find anything of sufficient

concern to trigger discipline, let alone a discharge. Further, the Claimant testified that she was told that C-Cleaner would speed up her machine, and that she ran it for that reason. So the mere running of C-Cleaner, without more, does not *per se* establish that the Claimant was hiding something, much less that she was violating some policy by hiding something. The same is true of the supposed deletion of public records. With nothing before June that was serious enough to cause a discharge, why not warn the Claimant about the use of the C-Cleaner and leave it at that? The Employer could even have removed the program off its computers – after all, if the running of C-Cleaner was such a concern, why was PCS ever permitted to run the program at the Employer? If the Employer had warned the Claimant then if she used it again she'd have been on notice, and would have been guilty of insubordination. What happened was that more than eight months after the monitoring started, the Claimant seemingly used the C-Cleaner on another machine, again deleting items the importance of which is not established in the record. Only then did the Employer leap into action and terminate the Claimant. We simply do not think that the Employer has demonstrated that the C-Cleaner's use was a willful or wanton disregard of the 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. Even considering the three factors in combination we do not find the Employer proved misconduct. Finally, we do not address any alleged lack of candor from the Claimant during the investigation, because even if we were to find such a lack of candor we find that alleged lack of candor by the Claimant during the investigation was not a factor in the termination decision.

Current Act:

The law limits disqualification to current acts of misconduct:

> *Past acts of misconduct*. While past acts and warning 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.

871 IAC 24.32(8); *accord Ray v. Iowa Dept. of Job Service*, 398 N.W2d 191, 194 (Iowa App. 1986); *Greene v. EAB,* 426 N.W.2d 659 (Iowa App. 1988); *Myers v. IDJS,* 373 N.W.2d 509, 510 (Iowa App. 1985). "[T]he purpose of [the current act] rule is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises. For example, an employer may not convert a lay off into a termination for misconduct by relying on past acts." *Milligan v. EAB,* 10-2098, slip op. at 8 (Iowa App. June 15, 2011). The current act rule also assures that the termination is the result of intentional action. For example, the doctrine assures that an employee who gets sick is not denied benefits simply because he has exceeded the allowable absences under a "point system" for attendance.

In addition to finding that the use of the C-Cleaner did not rise to the level of misconduct, we also find that it was not a current act of misconduct. This is also true of the password protection of files. The record shows that the Employer was aware of the use of the C-Cleaner at least by October of 2014, and that the monitoring program recorded the use of a password on a file as early as February 13, 2015. (Ex. G, p. 40). Yet the Sheriff took no action, not even a verbal warning. To be blunt this case strikes us as a situation where the Employer "save[d] up acts of misconduct [in order to] spring them on an employee when an independent desire to terminate arises…" *Milligan*, slip op. at 8. Yet even if this is not so, the simple fact

is the Employer knew of the repeated use of the C-Cleaner and yet the Employer has not explained how any interest implicated by this use is any different with one County computer than with another. Similarly the Employer's program recorded password protection four months before the suspension, and indeed we have no evidence of a *more recent* password protection. There is no explanation why the password protection could not have been addressed sooner. The reason for the delay – the months' long delay - in taking any action whatsoever is unexplained by any substantial business reason. Thus even if we were to conclude that the C-Cleaner's installation and use constituted misconduct, or that password protection was misconduct – and we do not so conclude – we would allow benefits because the termination was not based on a current act of misconduct.

DECISION:

The administrative law judge's decision dated April 22, 2016 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for no disqualifying reason. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible. The overpayment entered against claimant in the amount of $9,487.00 is vacated and set aside.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv
DATED AND MAILED:_____