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

DENVER MCDONOUGH	:	
	:	**HEARING NUMBER:** 21B-UI-15726
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
CUSTOM-PAK INC LP2	:	
	:	
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, 96.5-1

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds the administrative law judge's decision is correct. The administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED**.

The Employer submitted additional evidence to the Board which was not contained in the administrative file and which was not submitted to the administrative law judge. While the additional evidence was reviewed for the purposes of determining whether admission of the evidence was warranted despite it not being presented at hearing, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

The key to our consideration of the submission is whether if due diligence had been used, the evidence could have been presented to the administrative law judge. The Employer asserts that it did not *receive* the evidence until after the hearing. But for us the issue is why? If the evidence did not exist until after the hearing, then of course due diligence could not have produced it. Or if the Employer did not know about the potential evidence until after the hearing, then due diligence again would be satisfied if a prompt request was made. Or even if the Employer promptly requested the evidence before the hearing but there was a delay in the response until after the hearing this *perhaps* would satisfy due diligence although it would raise the question of why a continuance was not sought.

But in its application the Employer gives no details about when the documents were requested, how it came to be that the Employer knew to make the request, etc. The Employer mentions a subpoena, but we have no record of a subpoena in the file that was provided to us by Workforce. The Employer says the evidence was "not available" before the hearing. But why? Was it not available just because it had not been received, but the reason it had not been received was that it had not yet been requested? If so, then due diligence is not satisfied. In fact, the notice of hearing was issued on January 13, and the hearing was on January 27. The first page of the proffered documents show "Requested On: Mon 01 Feb 2021 20:38:44." This is after the hearing. Now we appreciate that a police department might have different units approve a request, and fulfill that request. So maybe the February 1 date is an internal request date, and not actually the date the Employer made the request of the police. But "maybe" isn't good enough to get the new evidence in. The Employer needed to explain to us, preferably with supporting affidavits, when **it** first took actions to seek the documents, and also explain why action was not taken sooner. This the Employer has not done, although we do point out the opportunity for rehearing.

Consideration of the new and additional evidence is denied, and accordingly none of the new and additional information submitted has been relied upon in making our decision, and none of it has received any weight whatsoever, but rather all of it has been wholly disregarded.

Finally, despite our ruling today, we direct the parties' attention to Iowa Code §96.5(2)(b), which states: "if gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers." The cancellation of wage credits means that, even if the Claimant earns ten times his benefit amount following his discharge from this Employer, he may never collect benefits chargeable to the Employer. Gross misconduct, meanwhile, is "deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act." Iowa Code §96.5(2)(c). In Iowa, "[a]n indictable offense means a common law or statutory offense presented on indictment or on county attorney's information, and includes all felonies and all indictable misdemeanors punishable by a fine of more than $500 or by imprisonment in the county jail for more than 30 days." 871 IAC 24.32(3)(b); *accord* Iowa Code §801.4(8)(" 'Indictable offense' means an offense other than a simple misdemeanor.") Obviously, theft at the level the Employer claims may be shown would meet this definition. Moreover, the causal standard isn't that the Employer has to have in its mind that the Claimant committed theft, or even misconduct, and this is why it discharged him. All that is required is that the claimant "loses employment as a result of an act constituting an indictable offense…" The discharge need only be a "result" of an act constituting an indictable offense, not because the Employer believed the Claimant guilty of an indictable offense. For example, suppose a Claimant repeatedly steals from a cash register, lies about it to the Employer, and is fired for being a bad teller – not for theft, but for incompetence. If that Claimant later pleads to theft of that money, then the Claimant would have lost employment as a result of the indictable offense, even though the Employer did not believe it to be theft at the time. Were the rule otherwise the devious employee would be rewarded for successful concealment of the crime.

The parties should be aware that a determination of gross misconduct "may be **redetermined within five years** from the effective date of the claim." Iowa Code §96.5(2)(c) (emphasis added). Thus the issue of gross misconduct might be determined in the future (as late as September, 2025). This means if the Employer becomes aware that the Claimant has been convicted of, or plead to, an indictable offense based on misappropriation of the wrenches then the Employer should immediately notify Workforce of this fact so that if gross misconduct is found

then recoupment of benefits can occur and the Employer's account can be relieved of all charges. Naturally if the Claimant is never charged, or is acquitted, or the charges are dropped then no finding of gross misconduct would then be made.

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James M. Strohman

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Ashley R. Koopmans

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Myron R. Linn

RRA/fnv