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

MICHAEL R ESTEP
4107 220TH ST
GEORGE IA 51237

AG PROCESSING INC A COOPERATIVE
C/O JOHNSON AND ASSOCIATES
TALX UC EXPRESS
PO BOX 6007
OMAHA NE 68106-6007

Appeal Number: 06A-UI-00010-RT
OC: 11-27-05 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 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Ag Processing, Inc., a Cooperative, filed a timely appeal from an unemployment insurance decision dated December 22, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Michael R. Estep. After due notice was issued, a telephone hearing was held on January 18, 2006, with the claimant participating. David Nestor, Plant Operations Manager, and Monte Kramme, Shift Supervisor, participated in the hearing for the employer. Philip Abels, Plant Operations Superintendent, was available to testify for the employer but not called, because his testimony would have been repetitive and unnecessary. Employer's Exhibits One and Two were admitted into evidence. The administrative law judge takes official

notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

On January 13, 2006, at 9:09 p.m., the claimant faxed Iowa Workforce Development a request for subpoenas of certain documents. The Appeal's Section was then closed and did not open until Tuesday, January 17, 2006, because of the weekend and the holiday for Martin Luther King's birthday. When the administrative law judge received the subpoena request on Tuesday January 17, 2006, he called the claimant at 2:52 p.m. The administrative law judge informed the claimant that the request for a subpoena was not timely and the Appeal's Section had no time to get this subpoena out and allow the employer time to obtain the documents and provide them to the parties and that therefore the administrative law judge was going to deny the claimant's request for a subpoena. The administrative law judge did inform the claimant that the administrative law judge could keep the record open and issue the subpoenas and once the documents were exchanged reconvene the hearing to consider the documents. At the completion of the hearing the administrative law judge concluded that the subpoenaed documents were not necessary and the claimant agreed.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One and Two, the administrative law judge finds: The claimant was employed by the employer, most recently as a process operator, from November 9, 1998 until he was effectively discharged on October 18, 2005. The claimant's last day of work was October 17, 2005, and he was told not to work until he heard from the employer. A letter dated October 21, 2005, was sent to the claimant by certified mail return receipt requested informing him of his discharge but this letter was not received in the mail by the claimant until October 28, 2005. On October 27, 2005, the claimant was told by David Nestor, Plant Operations Manager and one of the employer's witnesses, that he had been discharged. The claimant was discharged for allegedly failing to follow the instructions of his supervisor, Monte Kramme, Shift Supervisor and one of the employer's witnesses.

On the night of October 17, 2005, Mr. Kramme told the claimant orally not to speed up the process over 70 tons per hour. The claimant believed that this would be an average of 70 tons per hour. Mr. Kramme went into the electrical room and noticed that the conveyor speed was up from 51 to 57. Mr. Kramme could not tell from that what the tonnage was so he went back to the control room where the claimant was and noted that the tonnage at the time was in excess of 70 tons per hour. He asked the claimant what was going on and he told the claimant that the process of over 70 tons was exactly what he was not supposed to do. The claimant responded that he was just trying to monitor the 70 tons per hour as an average. Mr. Kramme then showed the claimant that one of the tables was overflowing and the claimant reduced the conveyor speed to 51, which reduced the tonnage rate to 70 tons per hour. Although one table was slightly overflowing, no loss of product occurred and the employer suffered no damages. The claimant completed his shift and did not raise the rate again. Mr. Kramme reported this behavior to Philip Abels, Plant Operations Superintendent, who then reported the claimant's behavior to Mr. Nestor on October 18, 2005. Mr. Nestor gathered information about the claimant and then discharged the claimant as noted above. Mr. Nestor did not talk to the claimant between October 17, 2005 and his discharge.

On October 12, 2005, the claimant received a written warning for allegedly failing to follow proper procedures in checking a flaker machine before going on break. However, the claimant did check the flaker machine before going on break and when he had returned from break. The

claimant specifically recalled this because he noted that Mr. Kramme had not picked up the first sample which was supposed to have been picked up earlier. A second sample was due at the time so the claimant obtained a second sample for Mr. Kramme. This warning was a final written warning and the claimant was also suspended for two days. The claimant was informed that any further job behavior or job performance issues of any kind would result in his termination. On November 10, 2004, the claimant received a written warning and a three-day suspension, as shown at Employer's Exhibit One, for allegedly failing to monitor operations by opening a slide gate. However, opening the slide gate was not the claimant's responsibility on that occasion. The claimant was working three stories down from where the slide gate could be opened. The employer is supposed to designate someone to open the slide gate and it was not the claimant. In any event, the slide gate was closed. The claimant also received an incident report in September of 2004 for not operating the flaker machine properly and checking it as needed but the claimant had checked the flaker machine as appropriate. Finally, the claimant received a written warning, as shown at Employer's Exhibit One, in December of 2003 for not completing logs properly.

Pursuant to his claim for unemployment insurance benefits filed effective November 27, 2005, the claimant has received unemployment insurance benefits in the amount of $3,184.00 as follows: $398.00 per week for eight weeks from benefit week ending December 3, 2005 to benefit week ending January 24, 2006.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.

2. Whether the claimant is overpaid unemployment insurance benefits. He is 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).

871 IAC 24.32(9) provides:

> (9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

The parties agree that the claimant was discharged but disagree as to the date. The claimant maintains that he was discharged on October 27, 2005, when he was told by David Nestor, Plant Operations Manager, that he was discharged. The employer maintains that the claimant was discharged on October 21, 2005, which is the date of a letter, as shown at Employer's Exhibit Two, sent to the claimant informing the claimant of his discharge. However, the evidence establishes that on or about October 18, 2005, the claimant was informed not to return to work until he had heard from the employer. This appears to be a disciplinary suspension. A disciplinary suspension is considered as a discharge and therefore the administrative law judge concludes that the claimant was effectively discharged on October 18, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6 (2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. Although it is a very close question, the administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witnesses testified that the claimant was discharged for failing to follow the instructions of his supervisor, Monte Kramme, Shift Supervisor and one of the employer's witnesses, on the night of October 17, 2005.

On the night of October 17, 2005, Mr. Kramme orally told the claimant not to speed up the process to exceed 70 tons per hour. The claimant truly believed that this was intended to be an average of 70 ton per hour. Mr. Kramme returned to the electrical room and noticed that the conveyor had speeded up. Mr. Kramme went back to the control room where the claimant was and noted that the tonnage per hour was over 70 tons per hour. Mr. Kramme then confronted the claimant about this. The claimant explained that he was trying to monitor an average of 70 tons per hour which he believed was his responsibility. Mr. Kramme believed that the claimant should keep the process at 70 tons per hour irrespective of an average. Mr. Kramme showed the claimant that one of the tables was slightly overflowing. This overflow caused no loss of product or any damages to the employer. Nevertheless, the claimant reduced the

conveyor speed, which then reduced the tonnage rate to 70 tons per hour, and the claimant completed his shift without further incident. Sometime thereafter, on or about October 18, 2005, Mr. Kramme reported this incident to Philip Abels, Plant Operations Superintendent, who reported this to Mr. Nestor. The claimant was told not to return to work until he heard from the employer.

The claimant had received several warnings as set out in the Findings of Fact. The most recent warning occurred on October 12, 2005, which was a final written warning coupled with a two-day suspension. This warning and suspension were administered because the claimant allegedly did not check a flaker machine as he was required to do before he went on a break. The claimant credibly testified that he did check the flaker machine because the claimant recalled that Mr. Kramme had not picked up the first sample which had been waiting for him and since it was time for a second sample the claimant took the second sample for Mr. Kramme and checked the machine and then went on his break. The next written warning was eleven months earlier on November 10, 2004 when the claimant received a written warning and a three-day suspension for failing to open a slide gate. However, the claimant credibly testified that he was working three stories down and it was not his responsibility to open the slide gate. The claimant credibly testified that the employer is supposed to designate someone else to open the slide gate and that on this occasion someone else was designated to do so. The claimant also received an incident report in September of 2004 for improperly operating the flaker machine. Finally, the claimant received a written warning in December of 2003 for not completing logs properly. The administrative law judge concludes that the written warning in December of 2003 was for behavior different then his discharge and too remote in time to be of relevance here. The administrative law judge also believes that the incident report in September of 2004 and the written warning on November 10, 2004 are also too remote in time to be relevant here. Those warnings occurred eleven months before the claimant's discharge. Further, the claimant had explanations for both warnings indicating in one case that it was not his responsibility to open the slide gate and that he had operated the flaker machine properly. The claimant did get a written warning and a two-day suspension on October 12, 2005, six days prior to his discharge, for failing to check the flaker machine appropriately. However, the claimant credibly testified that he had checked the flaker machine as noted above.

On the record here, although it is a close question, the administrative law judge is constrained to conclude that the employer has failed to demonstrate by a preponderance of the evidence that the claimant willfully and deliberately failed to follow the instructions of his supervisor, Mr. Kramme on the night of October 17, 2005. It is true that the claimant was told by Mr. Kramme not to speed up the process over 70 tons per hour. However, the claimant credibly testified that he believed this to be an average of 70 tons per hour and he was merely trying to keep the average tonnage at 70 tons per hour. Even though the claimant at some point exceeded 70 tons per hour, there is no evidence that the employer lost any product or suffered any damage. Further, once Mr. Kramme had confronted the claimant, the claimant reduced the speed of the conveyor and no further incidents occurred. Accordingly, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant's behaviors here were deliberate acts or omissions constituting a material breach of his duties and obligations arising out of his worker's contract of employment or that they evince a willful or wanton disregard of the employer's interests and are not, therefore, disqualifying misconduct for those reasons. The more difficult question is whether the claimant's behavior was carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct.

Although it is a very close question, the administrative law judge concludes that the claimant's acts were not carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The administrative law judge finds the claimant's testimony about maintaining an average of 70 tons per hour credible. The employer's witnesses really did not refute this average but merely testified that the claimant had allowed the conveyor to exceed 80 tons per hour. The claimant denies ever reaching 80 tons per hour. The administrative law judge understands that the speed of a conveyor may have to vary in order to average a certain production. The administrative law judge concludes here that the claimant's attempts to do so were not carelessness or negligence. Once Mr. Kramme pointed out to the claimant the overflow, the claimant reduced the conveyor speed and no further incidents occurred. Even if the claimant's act here was carelessness or negligence, the administrative law judge would conclude that it was not in such a degree of recurrence as to establish disqualifying misconduct. It is true that the claimant had received a number of warnings but as discussed above, most are too remote in time or to remote in substance to be of relevance here. The warning of concern to the administrative law judge is the written warning and two-day suspension received by the claimant on October 10, 2005, six days before his discharge. However, the claimant provided a credible and reasonable explanation for his actions on that occasion so as to negate the effects of the written warning and suspension. Accordingly, although it is a close question, the administrative law judge concludes that the claimant's acts were not carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The claimant's behavior may have been inefficiency or unsatisfactory conduct or ordinary negligence in an isolated instance or a good faith error in judgment or discretion but those are not disqualifying misconduct.

In summary, and for all the reasons set out above, although it is a close question, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature, including the evidence therefore. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided he is otherwise eligible.

Iowa Code section 96.3-7 provides:

> 7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.
>
> If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment

compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $3,184.00 since separating from the employer herein on or about October 18, 2005, and filing for such benefits effective November 27, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of December 22, 2005, reference 01, is affirmed. The claimant, Michael R. Estep, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

kkf/kjw