BEFORE THE EMPLOYMENT APPEAL BOARD

Lucas State Office Building Fourth floor Des Moines, Iowa 50319

:

LORI J CARLSON

HEARING NUMBER: 12B-UI-15271

Claimant,

.

and

EMPLOYMENT APPEAL BOARD

DECISION

TRI-STATE NURSING ENTERPRISES INC:

Employer.

NOTICE

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: 96.5-1

DECISION

UNEMPLOYMENT BENEFITS ARE DENIED

The Claimant appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. Those members are not in agreement. Monique F. Kuester would affirm and John A. Peno would reverse the decision of the administrative law judge.

Since there is not agreement, the decision of the administrative law judge is affirmed by operation of law. The Findings of Fact and Reasoning and Conclusions of Law of the administrative law judge are adopted by the Board and that decision is **AFFIRMED** by operation of law. See, 486 IAC 3.3(3).

A portion of the Claimant's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence were reviewed, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

Monique F. Kuester

DISSENTING OPINION OF JOHN A. PENO:

I respectfully dissent from the decision of the Employment Appeal Board; I would reverse the decision of the administrative law judge. The Claimant was a salaried employee whose hours increased to 45 hours weekly. I do not consider the Claimant to be an "exempt' salaried employee. The Claimant believed she was entitled to overtime and that the Employer was in violation of the law for failing to pay her 4 hours' overtime that the Employer expected of her. The court in *O'Brien v. Employment Appeal Board*, 494 N.W.2d 660 (Iowa 1993) held that the Claimant need not prove that the Employer's actions that triggered the quit were, in fact, illegal. Rather, the court used the reasonable person standard, which indicates if a reasonable person would believe the Employer's actions were illegal, then there is good cause to quit. Based on this rationale, I would conclude that the Claimant should be allowed benefits provided she is otherwise eligible.

John A. Peno	

AMG/fnv