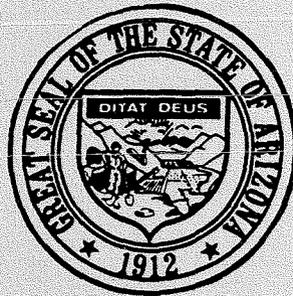


State of Arizona

Department of Economic Security

UNEMPLOYMENT INSURANCE PRECEDENT DECISIONS



Volume I

Benefits

Contributions

Numbers 101-140, inclusive

1982

UNEMPLOYMENT INSURANCE PRECEDENT COMMITTEE

1141 East Washington, Phoenix, Arizona 85034

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F O R E W O R D

Volume I contains decisions of the Arizona Unemployment Insurance Appeals Board which have been designated precedent decisions numbered PD-101 to PD-140, inclusively. These decisions are compiled for publication in order to make them available for reference and use by the public, and by the Department of Economic Security.

The decisions included will be followed by the Unemployment Insurance Program, the Office of Appeals and related activities within the Department regarding similar questions of law and fact arising after the publication of the decisions in this precedent manual.

This manual will be reviewed periodically, and, as appropriate, decisions will be deleted when, for example, there has been a change in statute, case law, or department regulation. Individuals or entities who wish to receive notice of any such updates should immediately request same in writing from the Unemployment Insurance Precedent Committee, giving their names, addresses, and number of copies desired.

To afford ease of reference and use, the case heading, format and citations have been standardized, the titles of the parties have been capitalized, typographical, spelling and grammatical errors have been corrected, and personal identifiers have been removed with the exception of the surnames of individuals or titles of entities. When the findings of fact of an Appeal Tribunal were incorporated by the Board in its decision by reference, they were reproduced within brackets in the Board's decision to assure understanding.

This volume and published decisions are available for a nominal fee, to defray the cost of publication and distribution, from the Department's Authority Library located at 1717 W. Jefferson, Phoenix, Arizona 85007, (602) 255-4777.

To refer to a decision published in this volume, include names of the parties and the precedent number. For example:

Doe v. Widget, Inc., PD-100

All inquiries concerning precedent decisions, other than those regarding their purchase, should be directed to the Arizona Unemployment Insurance Appeals Board, 34 W. Monroe, Suite 800, Phoenix, Arizona 85003, (602) 255-3841.

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UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision
No. PD- 101

Formerly Decision No.
B-66-79 (AT 4340-79)

In the Matter of:

EICHER,

AND

DEL WEBB DEVELOPMENT,

Claimant.

Employer.

D E C I S I O N
REVERSED

This matter is before the Appeals Board upon a petition for review filed on behalf of the Employer through its representative. The petition is based upon a decision issued by an Appeal Tribunal on July 25, 1979 which held:

The determination of the deputy is reversed. The claimant was discharged for reasons other than misconduct in connection with the work, and no penalty is applicable. ...

The Appeals Board has carefully examined the information and the evidence contained in the file, and has reviewed the transcript of the hearing held before the Tribunal, and from this evidence finds:

The Claimant was employed as a heavy-duty mechanic for approximately five months, on a full-time basis, at an hourly wage of \$8.65.

It is customary practice that each mechanic in this

employment will clean and maintain his own work area. The mechanics working for this Employer understand and accept that premise.

On June 6, 1979 the date of the Claimant's separation, there was no mechanic work immediately available for the Claimant to perform. The one other heavy-duty mechanic was out in the field on a job. The Claimant, having no work to do, asked the foreman what work he could do. The foreman requested the Claimant to clean up the work area, which included the area of the other mechanic who was in the field. The Claimant responded that he would clean up his 'own mess', but not the area of the other mechanic, stating: "I am not a janitor". At this point, the equipment superintendent, who had heard the shop foreman's request and the Claimant's reply, advised the Claimant that inasmuch as there was no work immediately available for him, he should clean the general work area. Again, the Claimant's reply was "I am not a janitor ... I'll clean my mess up but I won't clean Grigsby's (the other mechanic) mess up."

The Employer was unwilling to permit the Claimant to leave for the day inasmuch as he could be needed for mechanical work momentarily.

The Claimant admittedly refused to follow the instructions given him by both the foreman and superintendent to clean the work area, contending "I felt as if I was being used ... to get me to quit. ... I say because they are cutting down on forces is all. And I wasn't going to be no janitor. I consider myself ... professional. ... So I am a diesel mechanic. I am not a janitor."

After refusing to clean the areas as instructed, the

superintendent discharged the Claimant.

It is uncontroverted that the Claimant was a capable mechanic and, had it not been for this incident, would have continued in the employment. The Claimant, however, was not replaced.

The sole issue before this Board is whether the Claimant's discharge was predicated upon "misconduct in connection with the work."

'Misconduct', for the purpose with which we are here concerned, is defined in pertinent part as follows:

Misconduct within the meaning of an unemployment compensation act excluding from its benefits an employee discharged for misconduct, must be an act of wanton or wilful disregard of the employer's interest, ... a disregard of standards of behavior which the employer has the right to expect of his employee, ... an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer.

The Tribunal properly cited the applicable Benefit Policy Rule, but failed in its application thereof in reaching its decision. The applicable rule, R6-3-51255, cited by the Tribunal, provides in pertinent part as follows:

1. An employer has the right to expect that reasonable orders, given in a civil manner, will be followed and that a supervisor's authority will be respected and not undermined. There is no precise rule by which to judge when a dispute with a supervisor constitutes insubordination if insolence, profanity, or threats are not involved. The pertinent overall consideration is whether the worker acted reasonably in view of all the circumstances. Some examples of insubordination are:

- a. Refusal to follow reasonable and proper instructions; or
- b. Insolence in actions or language, profanity, or threats toward a supervisor without due provocation;
or

- c. Refusal to accept assignment to suitable work.

The thrust of that rule as applied to the facts in the case before us, is found in the following language contained therein:

1. An employer has the right to expect that reasonable orders, given in a civil manner, will be followed. ... The pertinent overall consideration is whether the worker acted reasonably in view of all the circumstances. Some examples of insubordination are:

- a. Refusal to follow reasonable and proper instructions.

The Tribunal did not address itself to the proper criteria. The test is not whether the work was 'suitable' but, rather, whether the Claimant refused to follow 'reasonable and proper instructions' of the Employer. The Claimant was hired as a heavy-duty mechanic at a wage of \$8.65 hourly. This position carried with it the accompanying responsibility to maintain a clean work area. The Claimant accepted this responsibility as a part of the employment. The occasion having presented itself wherein the Claimant was temporarily without mechanical work, or any other work to perform, the Employer requested that he clean up the work area ordinarily used by another mechanic who was otherwise occupied in the Employer's business. No reduction in pay would inure to the Claimant fulfilling the request, nor, would it be a detail foreign to the Claimant. The Claimant had no other work to do at the time the order was given; the work could have been accomplished quickly.

The record is devoid of evidence which would support a finding that the Employer's instructions to the Claimant were other than reasonable. Likewise, there is no evidence suggesting impropriety in the instruction.

Clearly, the Employer had every right, and certainly the authority, to request the Employee perform a task in the pursuit of the Employer's business. There is no question that the assignment was unsuitable; the function was a part of the employment.

Directing ourselves to consideration of 'whether the worker acted reasonably in view of all the circumstances', consider the definition of reasonable as found in Webster's New Collegiate Dictionary:

Agreeable to reason; having the faculty of reason; possessing sound judgment

In this light, consider the Claimant's statements in support of his refusal: "I'll clean up my mess, but I won't clean up Grigsby's." "I felt as if I was being used ... to get me to quit."; "I wasn't going to be no janitor."

It is notable that the Claimant was not replaced following his discharge, a factor which may well be indicative of an Employer's motive. In this case, however, the evidence does not support a finding that the separation of the Claimant from the employment concealed a purposeful personnel reduction; the contrary, rather, in view of the evidence, is indicated.

Based upon the record and the evidence herein contained, the conclusion is warranted that the Claimant was discharged for misconduct in connection with the work in that the Claimant refused, without good cause, to follow the reasonable and proper instruction of his Employer.

DECISION

The decision of the Appeal Tribunal is reversed.

The Claimant was discharged for misconduct in connection with the work and is disqualified from June 3, 1979 until August 11, 1979, with a deduction of eight times his weekly benefit amount (\$680.00) from his total award.

The Employer's experience rating account shall not be charged for benefits paid the Claimant as a result of this employment.

This decision creates an overpayment because the Claimant received benefits during part or all of the period of disqualification.

DATED this 10th day of November, 1979.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Mary A. Bass, Chairman

E. D. Crowley, Member

Eugene R. Murray, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON May 18, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision
No. PD-102

Formerly Decision No.
B-341-79 (AT 5442-79)

In the Matter of:

GORDON,

AND

CITY OF PAGE,

Claimant.

Employer.

D E C I S I O N
AFFIRMED

THE EMPLOYER petitioned for review of the Tribunal's decision issued October 2, 1979, which held the Claimant's discharge was not disqualifying and that the Employer's account shall be subject to charges for benefits paid the Claimant.

The Board has carefully reviewed the entire record in this matter, including the transcript and exhibits. The contentions raised in the petition have been considered.

THE BOARD FINDS the following salient facts:

The Claimant had worked as a building inspector for a city in Arizona approximately three years before his discharge on May 25, 1979. The discharge was due to an error he had made in approving construction which was in violation of the city's building code.

One of the Claimant's duties as building inspector, was to make on-site inspections of new residential construction for the

purpose of ensuring compliance with the city's building and zoning code. The city has a building code requirement which provides residential homes must have at least a ten-foot setback from the side property line.

In the fall of 1978, the Claimant made an inspection of a construction site, and, based upon that inspection, authorized the laying of the foundation of a residential home. The foundation was, in fact, approximately two and one-half feet from the side property line, rather than the prescribed ten feet. He determined that the proposed foundation had the proper setback by sighting along metal pins which he assumed represented the property corners. The error in the Claimant's sighting occurred because the pin he relied upon as indicating the northeast corner of the property was, in fact, a pin marking a change from a curved boundary to a straight-line boundary. The Claimant found no other pin in that location and assumed this was the property corner pin. The pin which correctly marked the property corner was missing on the day the Claimant examined the property; the property corner was accurately (sic) approximately nine and one-half feet from the pin the Claimant used.

The foundation contractor was also present at the site when the Claimant made his inspection. Evidence was presented showing that the foundation contractor also believed that the pin marking the change in boundaries was the true northeast corner pin. The Claimant testified he relied on the representation of the foundation contractor that this was the corner pin. The Claimant further testified that when the pins seem to be in

proper position, it is his custom to make a visual inspection of the site to determine whether there are proper setbacks. Thus, since the pins seemed properly placed on this particular site, he made only a visual inspection, and determined therefrom that the foundation was of the required setback.

The Employer alleged that the Claimant had made an error in the setback of a mobile home in 1977 by making a visual inspection, and therefore should have been on notice that visual inspection was not an acceptable nor accurate method of determining the proper setback. The Claimant denied that he was under a duty to inspect that mobile home for setback.

It is undisputed that the work performance of the Claimant was satisfactory until the discovery of the setback error and resultant discharge. It may be noted that the error did not surface until approximately eight months after its commission.

An Employer's witness, the Assistant Building Inspector for the city, testified that inspectors do not routinely survey the land to determine the proper setback. He further testified he assumes that pins and stakes are placed properly when he goes out to inspect a site, and when he finds pins in the ground, he makes only a visual inspection to determine whether there is compliance with the setback requirement.

A building inspector for Flagstaff, who was familiar with the building site in question, testified that he would not have handled the inspection any differently than had the Claimant. He also testified that he frequently relies on the building contractor's representation as to what constitutes the corner pin.

The error committed by the Claimant, in his inspection of the site did not come to the attention of the City Manager until May, 1979. The Claimant was thereupon discharged solely on the basis of that error.

Department Regulation A.C.R.R. R6-3-51300 provides in part:

- A.1. A worker has the implied duty of performing his work with ordinary care and diligence and of making reasonable efforts to live up to such standards of performance as are required by his employer. Misconduct generally arises when a worker knowingly fails to exercise ordinary care in the performance of his duties.
2. "Ordinary care" means that degree of care which persons of ordinary prudence are accustomed to exercise under the same or similar circumstances, having due regard to his or others' rights and safety and to the objectives of the employer. This standard is general and application will vary with the circumstances. For example, the ordinary care expected of a precision engineer will vary considerably from the care expected of a ditch digger. The accepted standard of performance establishes what is ordinary care.
3. This does not mean that every claimant discharged because of unsatisfactory work performance is subject to disqualification. In the absence of gross carelessness or negligence, or recurrence of ordinary carelessness or negligence, the claimant's failure to perform his work properly is presumed to be attributed to good faith error in judgment, inability, incapacity, inadvertence, etc. A conscientious employee may be unable to perform his duties to the satisfaction of his employer because of limited mental capacity, inexperience, or lack of coordination. If such person is discharged for unsatisfactory work his discharge is not for misconduct.

Department Regulation A.C.R.R. R6-3-51190(B)(2)(6) provides in pertinent part:

When a discharge has been established, the burden of proof rests on the employer to show that it was for disqualifying reasons. this

burden may be discharged by an admission by the claimant, or his failure or refusal to deny the charge when faced with it.

Since a discharge has been established, the burden of proof rests on the Employer to show that it was for disqualifying reasons.

A witness for the Employer testified that the Claimant had previously committed an act of negligence which was similar to the act which caused his present discharge. The Claimant denied he was negligent in the previous instance. There is clearly insufficient evidence to relate the alleged prior incident in establishing a recurrence of negligence on the part of the Claimant. Therefore, unless the mistake that precipitated his discharge was one of gross carelessness or negligence, his discharge is not for misconduct under the benefit policy rules.

Gross negligence is defined as "the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. ...Gross negligence is a manifestly smaller amount of watchfulness in circumspection than the circumstances require of a person of ordinary prudence....That entire want of care which would raise the belief that act or omission complained of was

the result of conscious indifference to the rights and welfare of persons affected by it" [See Black's Law Dictionary, 5th Edition]

The Claimant made a visual inspection of the lot in question by sighting along the pins in the ground. He also testified that he relied on the representation of the foundation contractor as to which pins marked the corners. The evidence establishes that building inspectors customarily followed these practices.

The record eminently supports a conclusion that the Claimant's error was not due to conscious indifference to the rights and welfare of his Employer and others. The Claimant exercised that standard of care which was customary in his capacity and in his occupation. The Tribunal properly concluded that the Claimant's discharge was not disqualifying.

DECISION

The decision of the Appeal Tribunal is affirmed. The Claimant's discharge was for reasons other than misconduct in connection with the work.

The Employer's experience rating account shall be subject to charges for benefits paid the Claimant as a result of this employment.

DATED this 25th day of February, 1980.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Mary A. Bass, Chairman

E. D. Crowley, Member

Eugene R. Murray, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON May 18, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision

No. PD-103

Formerly Decision No.
B-1110-80 (AT 7438-80)

In the Matter of:

HAPP,

Claimant.

D E C I S I O N

REVERSED

THE CLAIMANT has petitioned for review of the decision of the Appeal Tribunal which held that the Claimant was unavailable for work and ineligible for unemployment insurance from August 24, 1980, through October 4, 1980.

After initial review of this matter, the Appeals Board, by its order dated January 23, 1981, ordered that additional evidence be taken by the Appeal Tribunal. Pursuant to this order, a further hearing was held on February 11, 1981, at which time the Claimant and a witness for the Department of Economic Security appeared and testified.

This matter is again before the Board. The entire record herein has been carefully reviewed, including the transcripts and the exhibits. The contentions raised in the petition have been considered:

The findings of fact, as determined by the Appeal Tribunal,

contain no material error and are therefore adopted by the Board as its own [as follows].

[The claimant graduated from high school in 1976. Thereafter, he began attending college on a regular full-time basis. He had a full-time student status through May of 1980. In August of 1980, he re-entered school. He is registered for seven hours. Additionally, he is finishing seven additional incomplete hours. He attends class Monday, Wednesday, and Friday, from 7:40 to 10:30 a.m. His make-up classes require that he study and take tests. The make-up tests are in classes that extend through 11:30 a.m.; however, adjustments can be made with respect to the make-up tests.

Since the second quarter of 1979 (the beginning of the claimant's base period) he has been working both as a student employee at the university he is attending and as a part-time worker with an outside employer. The aggregate of the two jobs did not serve to make him a full-time employee while attending school.

The claimant's primary interest is in the computer field, and his recent employment has been in this type of work. Previously he has done work as a grocery store stock and courtesy clerk. The claimant has sought employment through government agencies; he has contacted some private employers in the computer field. He contacted one small grocery chain.

The claimant obtained student work through the university where he is attending. He is working on that job 20 hours per week. He expects to graduate in May 1980.]

with the following additions which reflect additional evidence presented at the evidentiary hearing ordered by the Board:

During the six-week period from August 24, 1980 through October 4, 1980, the Claimant testified, his job search was focused upon full-time employment in the computer field and delivery jobs. Every Monday, Wednesday, and Friday he would check the job board at a local university for job openings. He testified that each time he checked the job board he would find at least three, and sometimes as many as seven openings for either delivery or computer work. He would

then contact these employers by telephone to set up personal appointments for Tuesdays and Thursdays. He testified that most of these positions would be filled when he contacted the employer, or more work experience than he had was required. He also checked personally with the State Job Service and State hiring facility twice a week, and submitted an unspecified number of applications there for review by potential employers. On the Employment Service registration form the Claimant indicated he preferred to work after 12:00 noon. An employee of the State Job Service testified that given the Claimant's preference, no referrals would be made for the Claimant for employment which required him to work during the morning hours. No referrals were forthcoming from Job Services. He also checked the Sunday newspaper want ads for openings, which resulted in three personal contacts with potential employers.

The Claimant telephoned every messenger service listed in the yellow pages of the telephone book. No full-time job openings were located as a result of this effort. All but one of these employers refused to accept an application. The Claimant was offered a part-time job with this employer; however, the Claimant declined, and accepted another part-time computer job at the local university. He testified that most of the other delivery jobs for which he applied required either a reliable car, which he did not have, or heavy lifting. He stated he accepted part-time employment because he was desperate for income.

The Claimant testified he had a back injury and therefore cannot now work at a job which requires heavy or constant lifting. He testified he has applied at only one convenience market and no grocery stores, because these jobs require such lifting.

His mother is an office manager at the one chain convenience market at which the Claimant submitted an application. His mother believed she might be influential in locating a position for the Claimant which did not require heavy lifting, but she later declined to exert her influence on his behalf because of a subsequent series of robberies which, she decided, made such work unsafe.

The Claimant testified that most of the employers he contacted required more experience

in clerical skills than he possessed. The Claimant testified he did not send out resumes to potential employers.

A State Job Service representative testified work is available for the Claimant for the hours he prefers, and that the second shift (afternoon and evening hours) was preferred by many employers for entry-level workers in the computer field. She testified other employers had various shifts available.

She also testified that sending out resumes to potential employers, as well as contacting associates and friends concerning job openings, checking the job board at the local university, following up on newspaper want ads and checking with the Job Service, were the customary methods of obtaining work in the computer field. She stated that job openings were sparse (during the time considered), for unskilled workers such as delivery positions.

Throughout the six-week period in question, the Claimant made nine personal contacts with potential employers, plus bi-weekly personal contacts with the State Job Service. The Claimant obtained part-time work in the computer field, and testified that he was continuing his search for full-time work.

The Claimant had about one year and two months' part-time experience in the computer field prior to the period in question. He testified that, although he preferred to complete his classes and acquire a degree, such was not more important to him than working full time. He indicated that a degree was not of great importance in his field, and even if he could not complete his classes, he would probably receive credit for the class work already completed. The Claimant had about \$350 invested in school for tuition and books during the period in question. He would have adjusted his schedule to fit around his work hours. The previous semester he received incompletes in two classes because of his inability to attend them due to employment requirements.

The university the Claimant was attending considered 12 credit hours per semester as full-time attendance.

Department regulation A.C.R.R. R6-3-5205 provides in pertinent part:

A.R.S. § 23-771 of the Employment Security Law of Arizona provides in part:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

* * *

3. He is able to work, and is available for work.

* * *

2. Availability for work is defined as the readiness of a claimant to accept suitable work when offered. To fulfill this requirement all the following criteria must be met:

- a. He must be accessible to a labor market
- b. He must be ready to work on a full-time basis
- c. His personal circumstances must leave him free to accept and undertake some form of full-time work
- d. He must be actively seeking work or following a course of action reasonably designed to result in his prompt reemployment in full-time work.

3. The criterion is availability for work, rather than availability of work. The willingness or unwillingness of employers to hire is not relevant to the issue.

4. The term 'work' means suitable work (work which is in a recognized occupation, for which the claimant is reasonably fitted and which he does not have good cause to refuse).

5. Availability for work is a relative term. The objective of availability is to determine if a claimant is genuinely and regularly attached to the labor market. Availability for work also is the relationship between the restrictions imposed upon a claimant and the job requirements of the work which he is qualified to perform. It implies that restrictions do not unduly lessen the possibilities

of his accepting suitable work. Unreasonable restrictions which substantially limit employment opportunities result in unavailability. (Whether the restrictions are unreasonable depends upon their source, as well as their effect upon the possibilities of employment.)

A.C.R.R. R6-3-1805(B) states:

An individual is presumed to be unavailable for work for any week of unemployment if such individual is a student; provided, however, that such presumption may be rebutted upon a showing to the satisfaction of this Department that such individual was, in fact, available for work. For purposes of this Regulation, a student is an individual who is registered for full-time attendance at, and regularly attending an established school, college or university, or similar institutions for academic learning, or who has so attended during the most recent regular term (emphasis added).

This benefit policy rule defines an individual as a student only where:

- (1) that individual is registered for full-time attendance, and
- (2) regularly attending such classes.

The university at which the Claimant was registered defines full time as 12 semester credit hours. Here, the Claimant was only registered for 7 semester credit hours. Although he was also completing 7 semester hours of incompletes, he was not required to attend any classes in order to complete such credit. Therefore, such courses did not restrict the hours he was available for work. Thus, we find that the Claimant was not a full-time student within the meaning and intent of the Employment Security Law.

The Claimant's availability for work must be decided in accordance with A.C.R.R. R6-3-5240(A)(5), which states:

Part-time school attendance does not necessarily

affect a claimant's availability for work, if it is shown that the schooling is only incidental to full-time employment and there is a reasonable expectancy that he may obtain full-time work for which he is qualified during the hours he is free to accept such work. Whether the claimant could or would, if necessary, change his school hours to accept full-time work; whether he has invested a substantial amount in tuition, fees, or in special equipment; or whether he will lose credit if he leaves before the completion of the course are important factors in determining his availability.

A claimant who leaves full-time work to enroll for part-time schooling renders himself unavailable for work during the period he is attending school because he has shown schooling is not incidental to full-time employment.

Pursuant to this benefit policy rule, the Claimant is required to show:

- A. That his schooling is incidental to full-time work, and
- B. There is a reasonable expectancy that he can obtain full-time work for which he is qualified during his free hours.

The following factors must be considered:

1. Whether the Claimant would, if necessary, rearrange his class schedule to accommodate his work.
2. The amount the Claimant has invested in his schooling.

We have previously held that the key criterion is whether the Claimant can obtain full-time work for which he is qualified during his free hours. The evidence of record reveals that, in the Claimant's field of computer work, work was available during the second shift afternoon and evening hours, and that some employers preferred workers at the Claimant's experience level to work the second shift hours rather than the first shift morning and afternoon hours.

The evidence reflects that, although the Claimant preferred to complete his classes, his main objective was to establish himself in a position in the computer field, and would give up his classes or reschedule them to accomplish his goal of working full time in his field.

Thus, we find that the Claimant's school attendance did not cause him to be unavailable for work within the meaning and intent of the Employment Security Law and applicable benefit policy rules.

The remaining issue for our consideration is whether the Claimant's work search was adequate. Eligibility for benefits is not established by a showing of a passive willingness to work.

A.C.R.R. R6-3-52160 provides:

Effort to secure employment or willingness to work (able and available)

A.1. In order to maintain continuing eligibility for unemployment insurance a claimant shall be required to show that, in addition to registering for work, he has followed a course of action reasonably designed to result in his prompt reemployment in suitable work. Consideration shall be given to the customary methods of obtaining work in his usual occupation or for which he is reasonably suited ... (emphasis added).

The applicability of the above-cited benefit policy rule is not subject to any hard and fast standard, and the adequacy of a Claimant's work search must be determined on a case by case basis. A Claimant must act in good faith and make a reasonable and active search for work. Indicative of the Claimant's good faith is evidence as to efforts which he has made in his own behalf to obtain work.

Here, we have evidence that the Claimant actively sought out those positions available by checking the want ads, the job board at a local university twice weekly, and reporting to the State Job Service. He focused his efforts on a variety of jobs for which he might be qualified. Even though he did not, during the period in question, send out resumes to prospective employers, his remaining efforts closely paralleled those efforts which were considered by a State Job Service representative to be the customary method of obtaining employment in the Claimant's field.

We do not find that the Claimant's acceptance of part-time employment is persuasive evidence that his interest in working was confined exclusively to part-time work. The evidence reveals that his acceptance of such work arose because of a need for income, and that he continued to seek full-time work.

The Board, considering all of the circumstances of this case, finds the Claimant's efforts constituted a reasonable effort to become reemployed. We find the Claimant was available for work.

DECISION

The decision of the Appeal Tribunal is reversed.

The Claimant was available for work and eligible for benefits

from August 24, 1980 through October 4, 1980, if otherwise qualified.

DATED this 26th day of March, 1981.

UNEMPLOYMENT INSURANCE BOARD

Mary A. Bass, Chairman

E. D. Crowley, Member

Eugene R. Murray, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON May 18, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision
No. PD- 104

Formerly Decision No.
B-1357-80 (AT 7144-80)

In the Matter of:

DOMINGUEZ,

AND

CITY OF PHOENIX,

Claimant.

Employer.

D E C I S I O N
REVERSED

THE EMPLOYER has petitioned for review of the decision of the Appeal Tribunal which held the Claimant was discharged for reasons other than misconduct connected with the work.

The Appeals Board has carefully reviewed the record in this case, including the exhibits and the transcript. The contentions raised in the petition have been considered.

We find no material error in the findings of fact, which are substantially undisputed. We therefore adopt the Tribunal's findings of fact as our own. [The Appeal Tribunal decision contains the following findings of fact]

[The claimant had approximately one and one-half years' employment with "X" City. He was in his last job as a groundskeeper approximately six months. At the time of his separation he worked as a lawnmower operator on a crew supervised by M. "A", a Foreman I.

By regular practice the claimant and other workers were transported to the job site in a city vehicle. Also by regular practice the crew members in the claimant's crew left their lunch pails in the truck which was regularly used by Mr. A. Generally the truck was at the work site during break time at 9:00 a.m. and at lunch time at 11:30 a.m. However, on certain occasions, because of business matters, Mr. A would be away from the job site at these times and this resulted in an off-scheduled break time or lunch time for the workers.

On or about July 14, 1980, the claimant and the crew had been transported to the work site. The claimant became aware that Mr. A was planning to leave with the truck. Knowing that he wished to eat something from his lunch pail the claimant removed it from the truck. Mr. A observed the claimant removing the lunch pail from the truck and he directed the claimant to return it. The claimant resisted verbally. Mr. A got out of the truck and ordered him to return the lunch box to the truck. He refused. Due to the action of either one or both of the parties they moved very close to one another (in testimony each contending it was the other). At some point the claimant demonstratively and at least with some force poked his finger into the chest of Mr. A. Mr. A then struck the claimant on the nose (accidentally with little force, by Mr. A's testimony; deliberately and with full force by the testimony of the claimant). Both testified that the other agitated for a fight.

Mr. A finally directed the claimant to get into the truck so that he could be taken to higher supervision for resolution of the matter. The claimant refused. Mr. A went to Mr. "B", his supervisor, (a Foreman II). Mr. B returned with Mr. A to the job site. Mr. B reviewed the matter with the claimant and Mr. A, but made no specific decision on the matter.

On or about July 16, 1980, a meeting was held in which the claimant and Mr. A gave their respective accounts of the confrontation. Thereafter, the claimant was given a third written warning, which made him vulnerable to discharge, which was carried out on July 18, 1980. Written warnings which the claimant had received prior to the incident of July 14 concerned matters unrelated to the July 14 incident.]

In the petition, the Employer, through its representative, contends misconduct has been established by virtue of the

Claimant's refusal to comply with the orders of his foreman, and his violation of an accepted rule.

Briefly, the salient facts center on a situation which arose when the Claimant was given a direct order by his foreman, which he disobeyed. The Claimant, a groundskeeper, was assigned to mowing grass on city property; he, as well as his fellow workers, was transported to the place of work in a truck and disembarked. The Claimant removed his lunch box from the truck and was ordered by his foreman to replace it. He refused.

Because of his refusal to replace his lunch box, the foreman ordered the Claimant to get in the truck and accompany him to see the supervisor. Again, the Claimant refused. Tempers flared, and a physical altercation occurred as a result of this episode, wherein both parties participated.

The Claimant does not dispute that he refused to comply with the orders of his foreman (Tr. pp. 60, 63).

The following testimony provides insight:

[Ms. Lumm]

"Q Could you tell us why he's no longer working for the City of Phoenix?

[Foreman]

A He refused to take a direct order. I gave him a direct order and he refused to do it.

Q When did this take place?

A On July 14th at 6:30 in the morning.

Q What direct order did you give him?

A I told him to place his lunch box in the truck because it wasn't lunch time and it wasn't break time.

Q Is it - why would you ask him to

place it in the pickup truck?

A Because that's where we always keep our lunch and he was going to be mowing grass, and in no way he can be carrying his lunch and pushing the mower at the same time.

Q Do you have any idea why he would have gone up to take the lunch box out of the truck?

A Well, I had got complaints before from the other men that work with the man that as soon as I would leave the man would sit down and eat his lunch. And that was one reason why I told him to keep his lunch in the truck, because everyone else kept it on there and it wasn't break time or lunch time. (Tr. pp. 8,9).

* * *

Q How exactly did you phrase your instructions to him?

A I told him not to - I said, leave your lunch in the - I told him to leave his lunch in the truck because it wasn't break time and it wasn't lunch time.

Q What time was break time scheduled?

A 9:00.

Q And lunch time scheduled at what time?

A 11:30.

Q And for you to go pick up this mower, how long - had you done this type of thing before from the job locations?

A Yes.

Q How long does it typically take?

A 20 to 30 minutes over there, and it's about 20 minutes over there, 10 minutes to load it up and then 20 minutes back..

Q And did Mr. Dominguez make any response at all when you asked him to return the lunch box to the pickup truck?

A He said that he didn't have to do anything I tell him to do, it's just because I had a white shirt on I wasn't a foreman. He didn't have to do it.

Q Did you ask him - what happened from there?

A Then he said - well, that's when well, when I asked him to put it back he said he didn't have to do it. Then I told him to get in the truck because I was going to take him back into the office. And =

Q Why - I'm sorry - why were you going to take him back into the office?

A Because he didn't want to do what I told him. I did tell him to put his lunch box in there, and then I said, well, get in the truck so - that way he can go and talk to the foreman, the one who worked as a supervisor - and he refused to get in the truck.
(Tr. pp. 10, 11).

* * *

[Mr. Banda]

Q Mr. Navarro, are there any rules that prohibit an employee from taking his lunch pail from the pickup truck?

[Foreman]

A Not that I know of.

Q Are there any standing orders at the service center that prohibit an employee from taking his lunch pail from the pickup truck?

A I don't know. (Tr. p. 17).

* * *

[Mr. Banda]

Q Do you, Mr. Navarro, know why he refused

that direct order?

A No. (Tr. p. 18).

* * *

Q Have you ever given a direct order to any of the other employees that work with you to leave their lunch pail on the pickup truck?

A No, because they all leave it in the truck." (Tr. p. 18).

The claimant testified as follows:

[Mr. Banda]

"Q Had you ever taken your lunch box with you before?

A Never.

Q That was the very first time?

A Yeah, that was the first time. (Tr. p. 63).

* * *

[Ms. Lumm]

Q Mr. Dominguez, why would you not go back in the truck to the main office with Mr. Navarro?

[Mr. Delgadillo]

A Well, the reason I didn't go back with him to the office is because we had already exchanged words.

[Ms. Lumm]

Q If you felt Mr. Navarro should not make you leave your lunch on the truck, couldn't you have talked to a higher supervisor about it by going back to the office?

A He wants me to explain - could you ask the question again?

[Mr. Mason]

A All right, could you repeat the

question again, please?

[Ms. Lumm]

Q If you felt Mr. Navarro did not have the right to make you leave your lunch pail in the truck, then couldn't you have talked to a higher foreman by going to the office?

[Mr. Delgadillo]

A Yes, that's right. (Tr. pp. 63,64).

* * *

[Hearing Officer]

Q Did you tell Mr. Mills through the interpreter that the lunch box was yours and that you would do with it what you wanted to do?

[Claimant]

A Well, I told him that I wanted to keep my lunch pail because sometimes the foreman would leave and wouldn't come back until after the break time.

Q How was he planning to eat and continue to work? How were you planning to eat and continue to work?

A I always had an apple in my lunch box, and I could do that - I could eat it and work at the same time.

Q Had he - had you done this before?

A I've never done it before.

Q Not having done it before, how did you know that you could do this without having a problem with work?

A I wasn't going to do it exactly while I was working, but in case that break time come up and my lunch box wasn't there that's why I kept it." (Tr. p. 65).

The question which is thus presented is not whether the foreman had authority to take possession of the Claimant's

lunch box, but, rather, whether the conduct of the Claimant in refusing to return the box to the truck, and, additionally, refusing to join the foreman to seek supervisory resolution, constituted misconduct, i.e., insubordination.

A.R.S. § 23-619.01 provides in applicable part:

Misconduct connected with the employment;
wilful misconduct

A. "Misconduct connected with the employment" means any act or omission by an employee which constitutes a material or substantial breach of the employee's duties or obligations pursuant to the employment or contract of employment or which adversely affects a material or substantial interest of the employer.

B. "Wilful or negligent misconduct connected with the employment" includes, but under no circumstances is limited to, the following:

* * *

4. Insubordination, disobedience, repeated and inappropriate use of abusive language, assault on another employee or repeated fighting, refusal to accept an assignment to work at certain times or to perform certain duties without good cause, refusal to follow reasonable and proper instructions given by the employer, or intentional or negligent destruction of the employer's property.

The administrative rule applicable herein provides: A.C.R.R.

R6-3-51255

Insubordination.

1. An employer has the right to expect that reasonable orders, given in a civil manner, will be followed and that a supervisor's authority will be respected and not undermined. There is no precise rule by which to judge when a dispute with a supervisor constitutes insubordination if insolence,

profanity, or threats are not involved. The pertinent overall consideration is whether the worker acted reasonably in view of all the circumstances. Some examples of insubordination are:

- a. Refusal to follow reasonable and proper instructions.

The foreman, it may be pointed out, did not 'take possession' of the Claimant's (or any of the workers') lunch box. The truck was simply the repository. There is a clear distinction between possession and deposit.

In view of the customary practice of leaving the lunch boxes in the truck, and the acceptance and acquiescence in this practice by all the workers, including the Claimant, coupled with the lack of opportunity to eat while working, we cannot concur in the finding that the foreman's instruction was unreasonable or improper.

Not to be ignored is the second refusal to resolve the first. There can be no doubt that the volatile circumstance initially created might well have been resolved by submitting the question to a supervisor. The foreman recognized this. The Claimant should have. The Claimant's refusal to join in an attempt to resolve an obviously work-connected problem is manifest insubordination; the foreman's order to 'see the supervisor' was, in all respects, reasonable; it constituted an immediate attempt to air an immediate problem which, if delayed, could further affect the Employer's interests in the accomplishment of the scheduled work as well as the reaction and attitude of the crew members.

The Claimant's refusal in this regard, standing alone, constitutes insubordinate behavior.

The Board finds that the Claimant wilfully disobeyed lawful and reasonable orders of his foreman, constituting misconduct connected with his employment.

DECISION

The decision of the Appeal Tribunal is reversed.

The Claimant was discharged for misconduct in connection with the work and is disqualified from July 27, 1980 until October 4, 1980, and his total award reduced \$720, eight times his weekly benefit amount.

This decision creates an overpayment if the Claimant was paid benefits during all or part of the period of disqualification.

DATED this 12th day of June, 1981.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Mary A. Bass, Chairman

Eugene R. Murray, Member

Robert D. Sparks, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON May 18, 1982 .

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision

No. PD- 105

Formerly Decision No.
B-224-81 (AT T-153-81)

In the Matter of:

O'REGAN,

AND

MATTHEWS CHEVROLET,

Claimant.

Employer.

D E C I S I O N

REVERSED

THE EMPLOYER has petitioned for review of the decision of the Appeal Tribunal which held the Claimant was discharged for reasons other than work-connected misconduct.

The Appeals Board has carefully reviewed the record in this case, including the exhibits and the transcript. The contentions raised in the petition have been considered.

In the petition, the Employer contends the Claimant's discharge was predicated upon the initial act of insubordination coupled with the promise of continued insubordinate conduct.

The facts of this case, for the Board's purposes, are as follows:

The Claimant, a mechanic, was requested to work on a lube rack on a day that the regular lube man was absent because of illness. (The Claimant had previously performed this work without problem.) The Claimant refused to fill in as requested, assessing as the reason for the refusal that 'it was dirty

and, thus, unsafe.' The Employer then told the Claimant to go home for the day. At this point, the Claimant asked if he were being fired. The Employer stated "no".

The following day the Claimant reported for work and was asked by the Employer if he would work on the lube rack if it became necessary that a fill-in was again required for that job. The Claimant replied that he would not do so if asked. The Claimant was then discharged.

Arizona administrative rule, A.C.R.R. R6-3-51255 provides in pertinent part:

1. An employer has the right to expect that reasonable orders, given in a civil manner, will be followed and that a supervisor's authority will be respected and not undermined. There is no precise rule by which to judge when a dispute with a supervisor constitutes insubordination if insolence, profanity, or threats are not involved. The pertinent overall consideration is whether the worker acted reasonably in view of all the circumstances. Some examples of insubordination are:

- a. Refusal to follow reasonable and proper instructions; or
- b. Insolence in actions or language, profanity, or threats toward a supervisor without due provocation; or
- c. Refusal to accept assignment to suitable work.

The Tribunal has reasoned that because the Claimant was not discharged immediately upon the occurrence of his refusal to perform an assigned task, such conduct cannot be considered misconduct; that the prospective refusal is in futuro and misconduct cannot be predicated upon future conduct. We reject such reasoning as it is applicable to the facts of this case.

A.C.R.R. R6-3-5105 provides the following:

1. Definition of "Misconduct"

- a. "Misconduct connected with the work" means any act or omission by an employee which constitutes

a material or substantial breach of the employee's duties or obligations pursuant to the employment or contract of employment or which adversely affects a material or substantial interest of the employer.

b. American Jurisprudence defines "Misconduct Precluding Payment of Unemployment Insurance" as follows: "Misconduct within the meaning of an unemployment compensation act excluding from its benefits an employee discharged for misconduct must be an act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behavior which the employer has the right to expect of his employee, or negligence in such degree or recurrence as to manifest culpability, wrongful intent, or evil design, or show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer."

The evidence clearly establishes that the Claimant was discharged for his conduct on the day preceding the termination (Tr. p. 2) :

[Hearing Officer]

"Q What is the primary reason you discharged him on that day?

[Employer]

A Refusal to work.

Q And when had that occurred?

A Thursday, (unintelligible)

* * *

[Hearing Officer]

Q On Thursday, when you refused to go to the lube pit, did you have any conversation with Mr. Croft about whether you were going to be fired or what?

[Claimant]

A Yes, I asked him. When he said, well, you're going to have to go home, I said, am I going to be fired now, and he goes,

no, Bailey just said to send you home. Mr. Croft didn't fire me, Bailey fired me. That's another correction. And I came in the next day, he said that Bailey thought about it all day and he thought that that was grounds for dismissal. So he is the one that fired me, not Croft, and he had Croft do it for him.

Q Who actually told you that you were fired?

A Croft.

Q What conversation did you have with Mr. Croft when you came in the next day?

A Really, none. I was ready to work. ...
(Tr. p. 10)

* * *

[Mr. Donaldson]

Q All right then, I want to ask you another question. Did you tell Mr. Oregon that Mr. Bailey had decided that he should be terminated?

[Mr. Croft]

A Yeah, I told him we discussed it at that time. I told him it was automatic grounds for dismissal.

Q Well, earlier in your testimony, you said that you were the person that had fired him, and you said that you would not have fired him if, when he'd come to work on Friday he - -

A Right.

Q Would have had a change of attitude about it.

A Right. After I sent him home, I talked to Bill. I told him what was going on, that Dan had been sent home, and he said counsel him tomorrow morning and see how his attitude is, if it's changed any.

Q So there hadn't been a decision made to discharge him prior to Friday?

A Right." (Tr. pp. 12, 13)

It is evident that the decision to discharge the Claimant was made the day following the refusal. We are aware of nothing which precludes the Employer from so acting [See Gardiner vs. ADES, 127 Ariz. 603, 623 P.2d 33 (App. 1981).].

It is undoubtedly true that the Claimant's attitude, i.e., that he would persist in refusing to follow instructions and orders, provided the impetus for the discharge. That posture, in and of itself, falls within the purview of insubordinate conduct, and is an act of insubordination standing alone. A.C.R.R. R6-3-51255(b). "insolence in action or language" (supra).

An Employer is not obliged to retain an employee who promises insubordinate behavior. To so require would impose a burden upon the Employer which is obvious in its import.

The evidence herein clearly dictates a finding of misconduct within the meaning and intent of the Arizona Employment Security Law.

DECISION

The decision of the Appeal Tribunal is reversed.

The Claimant was discharged for misconduct in connection with the employment, and is disqualified from January 11, 1981 until March 21, 1981, and his total award reduced in the amount of \$760, eight times his weekly benefit amount.

The Employer's experience rating account shall not be charged for benefits paid the Claimant as a result of this employment.

This decision may create an overpayment if the Claimant

received benefits during all or part of the period of dis-
qualification.

DATED this 21st day of July, 1981.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Mary A. Bass, Chairman

Eugene R. Murray, Member

Robert D. Sparks, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON May 18, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision

No. PD- 106

Formerly Decision No.
B-279-81 (AT T-221-81)

In the Matter of:

CARLE,

AND

FRY'S FOOD STORES OF
ARIZONA,

Claimant.

Employer.

D E C I S I O N

REVERSED

THE EMPLOYER has petitioned for review of the decision of the Appeal Tribunal which held the Claimant was discharged for reasons other than misconduct connected with her employment.

The Appeals Board has carefully reviewed the record in this case, including the exhibits and the transcript. The contentions raised in the petition have been considered.

In the petition, the Employer contends that contrary to the findings of the Tribunal, the Employer witnesses testified that they had no way of knowing whether the Claimant was working to the best of her ability; that the Claimant was aware of the company's rules concerning shortages and overages; that the rules were reasonable and uniformly enforced; that the Claimant was warned concerning the discrepancies and had extensive experience as a cashier, and that her failure to follow company rules showed

a disregard of her Employer's interest.

A hearing was held at which the Claimant and two Employer witnesses testified and several exhibits were introduced. The Claimant was represented by counsel. The facts are as follows:

The Claimant was employed by the instant Employer on October 4, 1973, first in its head office; since 1977, as cashier in one of its food stores, and was discharged on January 1, 1981 for violation of the company's cash control policy (Exh. 13). This policy statement, posted in October, 1980 in the store where the Claimant worked stated, among others, that when an employee showed a consistent and repeated problem with cash longs and shorts he or she would automatically go on total cash control and accountability, would receive a written warning for the first and second \$3 long or short, a one-day suspension for the third \$3 long or short, and would be discharged after the fourth such discrepancy.

The Claimant received a verbal warning and was placed on cash control on November 24, 1980 due to cash shortage problems. On November 26th she received a written warning for being \$4.96 over. On December 6th she received another written warning after a \$16 shortage. On December 23rd she was suspended for one day for being \$49.77 over. Finally, on December 31st she was \$6 short and was discharged on January 1.

Previously, before posting of the aforementioned company policy, the Claimant received conduct reports for a \$2.26 shortage on May 9, 1980, for a \$20 shortage on August 11, 1980, and for a \$9.15 overage on August 23, 1980. The Employer's director of store operations testified that the cash control

policy was in effect even before it was posted (Tr. p. 19).

Neither of the Employer witnesses alleged any knowledge or information which would smack of wilful disregard by the Claimant, of her Employer's interest. Similarly, neither alleged dishonesty by the Claimant. The store manager stated unequivocally that she was discharged solely because of the four cash variances (Tr. p. 42).

For her part, the Claimant acknowledged that she read and was aware of the policy statement since its posting in October, 1980. However, she claimed that she did not understand the policy and was unaware that it provided for discharge after a suspension. She was aware that others had been disciplined in accordance with its pronouncements (Tr. p. 48).

Anent the final incident that culminated in her discharge, the Claimant testified that her assistant manager counted the money from her cash register bank into the till until it contained an even \$100. He then removed the till into the inner office where there were a number of other tills. She alleged that she could not identify which was hers, although she was asked if she wanted to verify the amount. The assistant manager then counted the rest of the cash, checks, and coupons in the drawer and said that it showed \$6 short (Tr. p. 49). She related that earlier that day, a clerk brought her what was purported to be fifty new \$1 bills and, in response to her question, assured her that they were all in numerical sequence. The Claimant had a long line of customers and did not take the time to count the money. She alleges that later she noticed that the bills were not in numerical sequence but acknowledged that

"basically (she) was to blame for not taking the time to count them." (Tr. p. 50). On other occasions when errors occurred she had the opportunity to verify the shortages but questioned the \$49.77 discrepancy because she believed "that was a check which could have been run twice." (Tr. p. 51).

A.R.S. §23-775 of the Employment Security Law, provides in part, that an individual shall be disqualified for benefits if he or she has been discharged for ... negligent misconduct connected with the employment.

Arizona administrative rules and regulations A.C.R.R. R6-3-5105 in defining 'misconduct', states in part:

1. Definition of "Misconduct"

a. Misconduct connected with the work may be defined as an act or omission by the worker which constitutes a material breach of duties and obligations arising out of the contract of employment, or an act or course of conduct, in violation of the employee's duties, which is tantamount to a disregard of the employer's interest. ...

* * *

b.2. A claimant need not have actually acted with intent to wrong his employer to result in a finding of misconduct connected with the work. ...

3. In determining whether the worker would be expected to have avoided the situation which caused the discharge consideration should be given to the worker's knowledge of his responsibilities through past experience, explanations, warnings, etc. The materiality of a duty and the materiality of the breach of such duty should be evaluated in the light of what is customary in the type of business in which the claimant was employed.

Also, the same rules and regulations, A.C.R.R. R6-3-51485 as here applicable reads:

A.1. An employee discharged for violating a company rule, generally is considered discharged for misconduct connected with the work. This principle is based on the theory that when hired, an employee agrees to abide by the rules of his employer. This section covers rules peculiar to a particular employer, and not rules constituting the general code of industrial misconduct. In order for misconduct connected with the work to be found, it must be determined that the claimant knew or should have known of the rule and that the rule is reasonable and uniformly enforced (emphasis added).

Also, the same rule and regulations, A.C.R.R. R6-3-51300 provides, as applicable here:

A.1. A worker has the implied duty of performing his work with ordinary care and diligence and of making reasonable efforts to live up to such standards of performance as are required by his employer. ...

* * *

3. ... In the absence of gross carelessness or negligence or recurrence of ordinary carelessness or negligence, the claimant's failure to perform his work properly is presumed to be attributed to good faith error in judgment, inability, incapacity, inadvertence, etc. (emphasis added).

Clearly, the Employer had every right to establish and enforce a policy it considered to be in the best interest of the company. It cannot be gainsaid that the cash control policy established here was entirely inappropriate to the nature of the business conducted. It is self evident that the care required of personnel entrusted with the handling of cash registers of a food market, as here, must exercise a degree of care, commensurate with the duties involved. And where, as here, a cashier has exhibited repeated occurrences of discrepancies despite repeated warnings, and despite the express

proscriptions of established policy, she must be deemed to have been discharged for misconduct.

The Claimant was an employee of long standing and knew or should have known the importance of the highest degree of accuracy required. She had, and was warned of, at least eight cash discrepancies which occurred over a period of some seven months before and after the posting of the cash control policy. We reject her excuse that she did not understand and was not totally aware of the impact of the policy rule.

DECISION

The decision of the Appeal Tribunal is reversed.

The Claimant was discharged for misconduct in connection with her employment, and is disqualified from January 4, 1981, until March 14, 1981, and her total award reduced to \$760, eight times her weekly benefit amount.

The Employer's experience rating account shall not be charged for benefits paid the Claimant as a result of this employment.

This decision creates an overpayment if the Claimant was paid benefits during all or part of the period of disqualification.

Dated this 2nd day of July, 1981.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Mary A. Bass, Chairman

Eugene R. Murray, Member

Robert D. Sparks, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON May 18, 1982 .

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision

No. PD- 107

Formerly Decision No.
E-1020-81 (AT 4123-81)

In the Matter of:

KOWALSKI,

AND

INTERFACE, INC.,

Claimant.

Employer.

D E C I S I O N

REVERSED

THE CLAIMANT has petitioned for review of the decision of the Appeal Tribunal which held the Claimant was discharged for work-connected misconduct.

The Appeals Board has carefully reviewed the record in this case, including the exhibits and the transcript. The contentions raised in the petition have been considered.

We find no material error in the findings of fact, and adopt them as our own. [The Appeal Tribunal decision contained the following findings of fact].

[The claimant was employed about two years for "X" Incorporated, Scottsdale, Arizona. X Incorporated is a manufacturer of load cells. The claimant had been the second shift supervisor for about one and one-half years until relieved of that position on May 25, 1981. He then became an assembler, with no change in hours or pay. The claimant was discharged on June 7, 1981 effective June 1, 1981 because he took a vacation without permission.

The claimant's immediate supervisor was the production supervisor, who worked the day shift. By memo dated May 15, 1981 the claimant advised his supervisor that he wished to take his two-week vacation period beginning June 1, plus another week of personal leave through June 22, 1981. On or about May 18, the claimant and the supervisor had a discussion wherein the supervisor told the claimant it was company policy to give three weeks advance notice of a desired vacation and refused him permission for the planned dates. The supervisor said she needed the claimant at the plant during the requested time. The claimant had not been aware of company policy requiring three weeks of advance notice for leave requests, nor was he shown such a policy during the discussion with the supervisor.

On May 19, the claimant addressed another memo to his supervisor explaining the reasons for his request and why he felt it was legitimate and requesting her to reconsider. At some time after this memo was written the supervisor verbally informed the claimant that she had not changed her mind. On May 27, the claimant sent the supervisor another memo reminding her that he was going to start his vacation Monday, June 1, and mentioning that since he had been relieved of his supervisory responsibilities his presence should not be necessary.

The claimant had planned a vacation trip by automobile for him and his wife to Chicago, where the claimant's mother lives. He had informed a realtor that he would be available during this period to complete the sale of a condominium he owns in Chicago. The claimant's wife is not employed and it was not urgent that the trip to Chicago be made at this particular time.

The production supervisor addressed a letter to the claimant on June 7, 1981 discharging him effective June 1, for taking vacation without management authorization.]

In the petition, the Claimant contends essentially the same matters covered at the hearing, and asserts that the decision is not based on a correct application of the law to the facts.

Here, it is undisputed that the Claimant took vacation time

and absented himself from the employment, after being denied permission to do so by the Employer. The only question before this Board, just as before the Tribunal, lies within the purview of the applicable administrative rule, A.C.R.R. R6-3-5115:

C. Permission

1. It is reasonable for employer(s) to require that their employees request permission to be absent from work when such absence may be anticipated. A prudent worker will normally request permission and will not take time off when his request is refused.

2. When a claimant is denied permission for an impending absence from work and is absent despite the employer's refusal, the necessity for the absence and his employer's reason for not granting permission must be weighed. The claimant's separation from work under such circumstances would be considered misconduct connected with his work; unless

- a. The employer has denied a legitimate leave request without valid reason; or
- b. The claimant would suffer serious detriment if he did not take time off work; or
- c. The claimant was absent for a compelling personal reason.

The Claimant testified (Tr. pp. 7, 8):

[Hearing Officer]

"Q Okay, tell me just what the points made in this lengthy discussion were?

[Claimant]

A She said I basically couldn't have the vacation because it was not in keeping with company policy. And I pointed out to her we didn't have a company policy. We'd been over this point with other employees. We'd been up this road before and we did not have a written company policy. So in absence of a company policy we'd been operating under that rule for about a year and a half and it's the same rule I applied toward me - a two week notice was sufficient. And she then came back with, well, we cannot afford

to have you leave at that time, and I said, I have a young man, Bob Crane, working with me - he just started a few weeks after I did, and he could do everything I could do. He was a very competent person. I explained to her, with the two weeks I have left I could show him how to lock up the place, how to set the alarm, how to do the minor scheduling of production, whatever, so he can take over the two weeks and handle everything in that part. Plus the other fact - another extenuating circumstance I really didn't mention is that's traditionally our slow period. Almost all vacations are scheduled in this time, June, July, and into August, because that is our slow time. Our production is at a low usually at this time, and it was in this case. We were in one of our low times in employing people and producing sales. We had a large inventory, a large backlog. And for those three reasons, you know, I really couldn't see why they would object.

Q What did she say?

A She just reiterated it was against company policy and -"

Further, the Claimant had been demoted from a supervisory position approximately one week prior to his leaving on vacation. He testified (Tr. p. 13):

"... when you take into account, I wasn't even a supervisor so her reason for not letting me go on (sic) was that she needed my supervisory talent and she didn't because I wasn't a supervisor for the last week."

The Tribunal, in reaching its decision, reasoned "We have evidence from the employer as to the reasons for denial ...". However, the record provides no basis for that conclusion. The Employer made no appearance at the hearing; thus, there is no direct testimony as to the reason for the denial. The only evidence of record from the Employer is Exhibit 3 (Employer protest) which states:

" [Claimant] was terminated from his position

at Interface, Inc. because he took a vacation without management authorization."

and Exhibit 9 (Deputy investigation-phone contact with Employer), containing the following statement:

"ER 6-30-1 ... Mr. Wolward telecom states clmt was Night Supervisor. It is company policy that vacation must be arranged without things hung up while gone, Clmt. did not obtain permission."

Exhibit 3 (supra) clearly states only that which is not disputed; no reason is given for the termination.

Exhibit 9 (supra) contains only information - it elicits no reason - which, according to the Claimant's sworn, un rebutted testimony, is inaccurate.

A.C.R.R. R6-3-51190 provides, in part:

B.2.b. When a discharge has been established, the burden of proof rests on the employer to show that it was for disqualifying reasons. ...

c. ... It is important to keep in mind that mere allegations of misconduct are not sufficient to sustain such a charge.

Proof must be based on evidence, not conjecture. Here, there is virtually no evidence which would support a finding of misconduct, and that evidence, such as it is, carries little probative value.

The Claimant has established that he followed previously accepted procedures in requesting leave. He has established he was not in a supervisory capacity, contrary to the Employer's statement. He had arranged for 'coverage' of his position, if same be required.

Conversely, the Employer has provided no valid reason for the denial. No testimony has been advanced to rebut the

Claimant's position. The necessity of the Claimant's presence during the subject period has not been established. It is not disputed that the period was "traditionally our slow period" and "one of our low times in employing people " (supra).

The Employer has not sustained the burden of proof imposed upon it to show the Claimant's discharge was for disqualifying reasons.

The evidence in this case weighs overwhelmingly in favor of the Claimant.

We find the Claimant's discharge from employment was for other than work-connected misconduct within the meaning of the Arizona Employment Security Law.

DECISION

The decision of the Appeal Tribunal is reversed.

The Claimant was discharged for reasons other than work-connected misconduct. The assessed statutory disqualification is removed.

The Employer's experience rating account shall be charged for benefits paid the Claimant as a result of this employment.

DATED this 20th day of November, 1981.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Reana K Sweeney, Chairman

Eugene R. Murray, Member

Robert D. Sparks, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON May 18, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision
No. PD- 108

Formerly Decision No.
B-1289-80 (AT 7871-80)

In the Matter of:

FIGUEROA,

Claimant.

D E C I S I O N
AFFIRMED

THE CLAIMANT has petitioned for review of the decision of the Appeal Tribunal which held that his appeal from the decision of the Deputy was untimely filed, and further, that the notice of the Deputy's decision, in the English language, denied the Spanish-speaking Claimant due process.

The Appeals Board has carefully reviewed the record in this case, including the exhibits and the transcript. The contentions raised in the petition have been considered.

We find no material error in the findings of fact. The reasons for the decision are founded upon a proper application of the law to the facts. We therefore adopt the [following] Tribunal's findings of fact, conclusions of law and reasons therefor, as our own.

[The claimant, registered for work as a farm laborer,

filed his additional claim for unemployment insurance on July 3, 1980. The employer's protest to the claim was received in the claims office on July 23, 1980. The deputy's determination was mailed to the claimant's correct address of record on September 12, 1980, at a post office box in Gadsden, Arizona.

The claimant cannot remember what date he actually picked up the determination from the post office box, but at his hearing said he thought it was on the following Friday (September 19, 1980). The claimant does not speak or read English. The person preparing the claimant's appeal entered as the explanation for it being untimely, "I just recieved (sic) the determination on 9-29-80."

At his hearing, the claimant said 9-29-80 is the day he found someone who would translate the determination to him in Spanish. He cannot remember which person it was. He gets different people at different times to translate things for him. They do not always give him the correct information.

The claimant's appeal brings up the issue of timeliness. This issue involves the application of Section 23-773 of the Employment Security Law of Arizona and Arizona Administrative Rules and Regulations, Section R6-3-1404.

The deputy's determination was mailed on Friday, September 12, 1980. The 15th calendar date after that mailing fell on Saturday, September 27, 1980. Therefore, the period for a timely appeal was extended until the first working day thereafter, Monday, September 29, 1980. As the claimant did not file his appeal until Tuesday, September 30, 1980, it was not filed within the 15 days provided by the statute for the filing of a timely appeal.

The only basis on which the Tribunal could find an appeal filed beyond the 15-day period to be filed timely (under the Regulation), would be clear evidence the delay was due to either Department error or misinformation, action of the U. S. Postal Service, or a change in the claimant's address. The delay was not due to any of these reasons, but due to the claimant's delay in finding someone who would interpret the meaning [of] the determination to him. Therefore, the Tribunal is prevented from finding the appeal to be timely filed, and has no jurisdiction over the issue of whether the claimant did voluntarily quit the employment with X Company without good cause in connection with the employment.]

In the petition, the Claimant admits that he received the

notice of the Deputy's determination, mailed on September 12, 1980, but was not certain as to the date of receipt thereof. Reflecting his inability to understand the English language, the Claimant found someone unidentified to translate said notice on September 29, 1980, the last day for filing an appeal therefrom, and then filed his appeal on September 30, 1980, or one day late.

The Claimant further contends, through counsel's "Memorandum in Support of Claim for Unemployment Compensation Benefits" that his constitutional rights pursuant to the 14th Amendment of the United States Constitution have been violated by virtue of the State's mailing of a notice in the English language, knowing that the Claimant was familiar only with the Spanish language.

The most careful review of Claimant's Memorandum, well as it is written, fails to identify either fact or law on which a reversal of the Appeal Tribunal's decision could be predicated. Conversely, the findings of fact set forth therein are parallel to those rendered by the Tribunal and, if anything, appear to enlarge their parameters. As to the citations of law urged upon us therein, we must similarly note an absence of support for the propositions submitted, except possibly for some broad and general concepts which the courts of this state and other jurisdictions have interpreted in infinite detail, including Wallis v. Arizona Department of Economic Security, 126 Ariz. 582, 617 P.2d 534 (App. 1980) wherein the Court of Appeals stated, in pertinent part:

"... We must assume that the Legislature meant what it said, and therefore hold that where statutory prerequisites for finality to a deputy's determination are established, that decision becomes 'final' unless a timely appeal is perfected."

We find no merit in counsel's proposition that actions by the

California or Washington legislatures, to include so-called "good cause" exceptions for late filing, would be determinative of an issue arising from the application of Arizona law to an Arizona fact situation. Nor do we subscribe to the contention that regard for the timeliness of an appeal should or can be equated to subversion of a "legislative goal" attendant to what counsel terms a remedial statute. The decision of the Appeal Tribunal reflecting implementation of A.C.R.R. R6-3-1404 in the instant matter is correct and supportable.

The Claimant, through counsel, has propounded a second theory in support of his appeal for reversal of the Appeal Tribunal's decision - the alleged violation of Claimant's constitutional right to due process. Counsel suggests that a violation of such rights is inherent in the Department of Economic Security's mailing of the notice of the Deputy's decision to the Claimant in English. Citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L. Ed. 865 (1950), we are urged to impute inadequacy to the referenced notice solely on the basis of its language and the fact that the Claimant apparently has no familiarity therewith. Our reading of Mullane, supra, leads us to a differing conclusion; i.e., purported inadequacy of notice must be substantively proven, not merely insinuated, and use of the national and official language of these United States of America is in no way tantamount to inadequacy. We look to sister jurisdictions for dispositive decisions in this area, Dalomba v. Director of The Division of Employment Security, 337 N.E.2d 687 (1975) wherein

it stated:

"... a notice in English, clear on its face, was not insufficient merely because, as to persons under language disability, it perhaps did not actually inform Claimant's right of procedural due process was not violated because she was not literate in English and an English-only notice was sent to her. ..."

On the Federal level, we submit the ruling by the United States Court of Appeals, Ninth Circuit, in Carmona v. Sheffield, 475 F.2d 738 (1973), further reinforces our holding:

"... Applicants for California unemployment insurance benefits who spoke, read and wrote only Spanish were not denied equal protection of law because the California Department of Human Resources Development gave all notice in English. ..."

It would appear that the California Supreme Court's Majority decision in Guerrero v. Carlson, 512 P.2d 833 (1973), from which Claimant's memorandum quotes a minority opinion, merely paralleled the Carmona decision, supra.

We note, without elaboration, counsel's reference to Covey v. Town of Somers, 351 U.S. 141, 76 S.Ct. 724, 100 L. Ed. 1021, (1955), and attendant suggestion that standards deemed appropriate to, individuals possessing linguistic disabilities.

For the reasons set forth above, and applying the rationale of Wallis v. Arizona Department of Economic Security, supra, and drawing further support from the Court of Appeals' ruling in Slonim v. Arizona Department of Economic Security, 126 Ariz. 201, 613 P.2d 865 (1980), we find that the Claimant's appeal of the Deputy's determination was not timely filed pursuant to A.C.R.R. R6-3-1404, and further, that the mailing of an English language notice to the Claimant was not violative of any due process rights of the Claimant.

DECISION

The decision of the Appeal Tribunal is affirmed.

DATED this 13th day of March, 1981.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Mary A. Bass, Chairman

E. D. Crowley, Member

Eugene R. Murray, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON June 1, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision

No. PD- 109

Formerly Decision No.
B-640-80 (AT 3549-80)

In the Matter of:

MEITZNER,

Claimant.

D E C I S I O N

REVERSED

THE DEPUTY has petitioned for review of the decision of the Appeal Tribunal which held that the Claimant was eligible for unemployment insurance benefits from April 6, 1980 through June 7, 1980.

The Appeals Board has carefully reviewed the transcript and exhibits in this matter. The contentions raised in the petition have been considered.

We find no material error in the [following Tribunal's] findings of fact:

[The claimant filed a new claim for unemployment insurance benefits effective December 23, 1979. A weekly benefit amount of \$90 was established. On March 1, 1968 the claimant began receiving military retirement based on his service with the United States Air Force. On September 21, 1976 the claimant and his wife entered into a support and property settlement agreement which provided for the irrevocable assignment of the

claimant's military retirement to his wife, with such retirement to be the income of the wife. That support and property settlement agreement was incorporated in a Decree of Dissolution of Marriage issued by the Superior Court of the State of Arizona on September 24, 1976. Since that time, the claimant's military retirement has been mailed directly to his ex-wife by the United States Air Force. During the months of April, May and June 1980 the amount of said retirement was \$463.93.]

and, with the following additions, adopt them as our own:

Term III (e) of the Support and Property Settlement Agreement (Exh. 9) states:

"The entire Airforce retirement and any future increases currently payable in the amount of \$374 per month; in this connection the parties agree that the husband will cause the Airforce retirement to be assigned irrevocably to the wife and in the event this cannot be done the husband will cause the Airforce Accounting and Retirement Center in Denver, Colorado, to mail the check in his name to the address of the wife, further, the husband agrees to execute a limited Power of Attorney to enable the wife to negotiate the Airforce retirement checks; in the event the Airforce retirement check is mailed to the husband, husband agrees to mail it in turn to the wife within five (5) days; the parties agree that all taxes due as a result of the Airforce retirement will be paid by the wife viz., the Airforce retirement will be income to the wife."

The Claimant testified that he has not "received" any of the Military Retirement Benefits since the entry of the decree of dissolution (Tr. p. 4).

The Appeal Tribunal correctly found that this case is controlled by 26 U.S.C. § 3304(a)(15), (sometimes referred to as the Federal Unemployment Tax Act), which states as follows:

The amount of compensation payable to an individual for any week which begins after March 31, 1980, and which begins in a period with respect to which such individual is receiving a governmental or other pension retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of such individuals shall be

reduced (but not below zero) by an amount equal to the amount of such pension retirement or retired pay, annuity or other payment, which is reasonably attributable to such week (emphasis added).

The Appeal Tribunal determined that inasmuch as the Claimant had "assigned" the Air Force retirement payments to his wife, in toto, pursuant to the decree of dissolution, he did not "receive" the retirement payment as contemplated by the preceding statute.

We do not agree. The Claimant's payments to his former wife amount to nothing more than an agreed upon settlement of the latter's claim to, and share, of the community property. That the former assigned his governmental retirement pay to her, as part of such settlement, can work no changes in the law so as to put her in the posture of replacing the Claimant as the individual, "... receiving a governmental ... retirement or retired pay ... which is based on the previous work of such individuals ..."
26 U.S.C. § 3304(a)(15), supra.

The Claimant's ex-wife, not having performed the work upon which the retirement pay is based, cannot receive it within the meaning of the statute. Such payment is based upon the Claimant's previous work; therefore, he is the only individual who can 'receive' it. What he elects to do with it, after he receives it, is entirely up to him. To accept any other interpretation is to suggest that private parties may contract in circumvention of public law. We are not prepared to hold that the irrevocable assignment of retirement pay, for whatever reason, relieves the retiree of its receipt, so as to allow him to apply for other and/or further benefits or payments to which he is not otherwise entitled.

The Senate Finance Committee, in discussing the statutory provision herein considered, had this to say:

"It was brought to the attention of the committee that in a number of the states ... retired people who are receiving public and private pensions ... military pay, etc., and who have actually withdrawn from the labor force are being paid unemployment compensation. ... The committee believes that a uniform rule is required and has added a new provision requiring each state to prohibit the payment of unemployment compensation to any individual who is entitled to any governmental or private retirement pay ... based on previous employment." (emphasis added). The Commerce Clearing House, Inc., Unemployment Insurance Reporter, Volume 1A at page 3267-5.

The thrust of the legislation was to do away with individuals receiving more than one payment for past employment. To hold with the Tribunal's construction would, most certainly, thwart that Congressional will and intent. We, therefore, must conclude that the Claimant is, in fact, receiving retirement payments, pursuant to 26 U.S.C.A. § 3304(a)(15), and that the Support and Property Settlement did nothing more than create a debt and, then, provide him with a convenient method of satisfying it.

Accordingly, we find any award the Claimant would otherwise be entitled to, must be offset by the amount of his military retirement pay attributable to that week. As the Claimant's weekly retirement benefits exceeded his weekly benefit amount, we conclude that the Claimant is ineligible for unemployment insurance benefits.

DECISION

The determination of the Appeal Tribunal is reversed.

The Claimant is ineligible to receive unemployment insurance benefits as long as the Claimant's weekly benefit amount is exceeded by the military pension payment attributable to that week.

This decision may create an overpayment if the Claimant received benefits during all or part of the period of ineligibility.

DATED this 24th day of September, 1980.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Mary A. Bass, Chairman

E. D. Crowley, Member

Eugene R. Murray, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON June 1, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision
No. PD- 110

Formerly Decision No.
B-1075-81 (AT M-707-81)

In the Matter of:

GURULE,

AND

MARATHON STEEL COMPANY,

Claimant.

Employer.

D E C I S I O N

AFFIRMED

THE EMPLOYER has petitioned for review of the decision of the Appeal Tribunal which held the Claimant eligible for the receipt of unemployment insurance benefits and the Employer's experience rating account subject to charges for benefits paid as a result of this employment.

The Appeals Board has carefully reviewed the record in this case, including the exhibits and the transcript. The contentions raised in the petition have been considered.

We find no material error in the findings of fact. The reasons for the decision are founded upon a proper application of the law to the facts. We therefore adopt the [following] Tribunal's findings of fact, conclusions of law, and reasons therefor, as our own.

[The claimant was employed by "X" Employer from August 5, 1978

to July 12, 1981. The claimant was working as a first ladleman on his last day of work. On July 15, 1981, the employer sent the claimant a telegram discharging him for allegedly smoking marijuana on the job on July 12, 1981. The only evidence the employer presented at the hearing to establish this was the signed statements of two supervisors.

The claimant testified under oath that he did not smoke marijuana on the job on July 12, 1981. His testimony was corroborated by the sworn testimony of another employee who was present at the time of the alleged incident.

The claimant has contested a determination his discharge was disqualifying. The issues raised must be decided under Sections 23-775 and 23-727 of the Employment Security Law of Arizona.

Department Benefit Policy Rule R6-3-51190 provides that when a discharge has been established, the burden of proof rests on the employer to show that it was for disqualifying reasons. Mere allegations of misconduct are not sufficient to sustain the employer's burden of proof. In this case, the employer presented only two signed, written statements to support its allegation that the claimant was discharged from his employment for smoking marijuana while on the job. The allegation was denied under oath by the claimant and corroborated by another witness who testified at the hearing. Therefore, the Tribunal concludes the employer failed to meet its burden of proof in establishing misconduct on the part of the claimant. The Tribunal finds the claimant's discharge from employment was for reasons other than work-connected misconduct.]

In the petition, the Employer contends essentially that it did meet its burden of proof by the introduction of two written and signed statements supporting its allegations. The Employer further contends the testimony of the corroborating witness for the Claimant, a co-worker, also terminated at the same time, whose testimony was self-serving, was insufficient to overcome the Employer's testimony and accompanying statements.

The record discloses the Employer received a Notice of Appeal Tribunal Hearing, which provided in part:

REASON FOR THE HEARING: To give all parties an opportunity to present evidence on the cited issues and any other issues which may arise.

ATTENDANCE: You are urged to attend the hearing to present any evidence affecting this claim for unemployment insurance. If you cannot attend the hearing, you may submit a written statement (preferably a sworn statement) explaining your position in the case; however; it is much better for you to appear and testify. You also have the right to send written questions to the hearing officer, who will ensure that the questions are asked of the other party, provided the questions are received prior to the designated hearing date and are germane to the issues to be decided.

POSTPONEMENT: The hearing may be postponed for good cause. Requests for postponement should be made as soon as possible, and may be done by telephoning the number on the heading.

* * *

EVIDENCE: If you have witnesses with personal knowledge of the circumstances involved in the case you should arrange for their appearance at the hearing. If a witness refuses to appear, you may request that a subpoena be issued to compel attendance. You may also request that documents pertinent to the issue be subpoenaed. A request for subpoena must be made in writing in sufficient time prior to the hearing to permit preparation and service of the subpoena. The request must contain the name of the individual or documents desired, the address at which the subpoena may be served, and the facts which the applicant expects to prove by the individual or documents desired. Bring with you to the hearing this notice and any written material you wish to present as evidence. A doctor's certificate may be important in cases involving health. If the appellant fails to appear at the appointed time, a default may be entered (emphasis added).

The Employer presented no testimony of witnesses with personal knowledge of the incident which resulted in the Claimant's discharge, but, rather, introduced two statements, both unsworn, upon which he relied in establishing his position. No request was made for a postponement of the hearing for the purpose of obtaining the personal attendance of these witnesses.

The Tribunal considered the evidence presented at the hearing and accorded such weight to the testimony and documentary evidence as it was entitled, in reaching a decision.

The disposition of cases on the basis of credibility of parties and witnesses is most decisive on appeal or review. The effect and weight of conflicting and contradictory testimony, just as the weight of the testimony on any issue, is on that side of the issue on which the evidence is more credible, and rests within the sound discretion of the Hearing Officer. The Board has consistently held that in matters of credibility, the findings of the trier of fact will not be disturbed except upon a clear showing that such are arbitrary, capricious, and against the weight of evidence. There has been no such showing made in this case. Administrative rule A.C.R.R. R6-3-51190 provides in pertinent part:

B. Burden of proof and presumption

* * *

2. The burden of proof rests upon the individual who makes a statement.

- a. If a statement is denied by another party, and not supported by other evidence, it cannot be presumed to be true.
- b. When a discharge has been established, the burden of proof rests on the employer to show that it was for disqualifying reasons. This burden may be discharged by an admission by the claimant, or his failure or refusal to deny the charge when faced with it.
- c. An employer who discharges a worker and charges misconduct but refuses or fails to bring forth any evidence to dispute a denial by the claimant does not discharge the burden of proof. It is important to keep in mind that mere allegations of misconduct are not sufficient to sustain such a charge.

C. Weight and sufficiency

* * *

2. When sufficient evidence has been obtained, all the facts available must be weighed. Only relevant evidence can be considered.

* * *

c. Credible testimony of an eye witness must be given more weight than hearsay statements.

From our careful review of the entire record, we find ample support for the findings and conclusions reached by the Tribunal.

ACCORDINGLY, the decision of the Appeal Tribunal is affirmed on the basis of the record.

DATED this 13th day of November, 1981.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Reana K Sweeney, Chairman

Eugene R. Murray, Member

Robert D. Sparks, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON June 1, 1982 .

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision
No. PD- 111

Formerly Decision No.
B-552-81 (AT 1789-81)

In the Matter of:

RIOS,

AND

CITIES SERVICE COMPANY,

Claimant.

Employer.

D E C I S I O N

REVERSED

THE EMPLOYER has petitioned for review of the decision of the Appeal Tribunal which held that the Claimant was discharged for reasons other than work-connected misconduct.

The Appeals Board has carefully reviewed the record in this case, including the exhibits and the transcript. The contentions raised in the petition have been considered.

In the petition, the Employer contends that the Tribunal's decision seems to be rooted in the area of evidence; that the drug in question was confiscated by the police and cannot be released by them pending criminal action against the Claimant. It further contends, that "knowingly" introducing illegal drugs on company property is not the real test of what constitutes a violation of its rules, rather it is the mere "introduction" of such drugs which justifies discharge thereunder.

A hearing was held in this matter at which the Claimant, his wife, and five Employer witnesses testified. The facts adduced and as summarized by the Tribunal are incorporated herein by reference and will be repeated for clarity of discussion only, or for amplification.

Boiled down to its essentials, the evidence discloses that on the day in question, the Claimant returned several hours after the end of his term of duty, to his Employer's main gate, and deposited a paper grocery bag on the file cabinet of the guard shack remarking that it contained Pepsi-sodas which a co-worker friend of his had telephoned him to bring to him. He remained for about twenty minutes chatting with the three security guards, and left after assuring them that his friend would call for the bag. One of the guards picked up the grocery bag, felt something at the bottom thereof, and told her captain. They opened the bag, discovered a plastic bag underneath the six-pack container of Pepsi-Colas, and examined the contents. All guards agreed that it was marijuana. The plastic bag and its contents were turned over to the police who had it analyzed by a state agency which determined that the contents were, in fact, marijuana. The Claimant was never confronted with the contents of the plastic bag, nor was the state agency report, or a copy thereof, ever exhibited to the Claimant or made a part of the record.

For his part, the Claimant related that he took his family riding after work and stopped to buy some cigarettes at a convenience store some eleven to sixteen miles from his place of work. As he was getting back into his own car, a stranger in

a truck parked next to him asked whether he knew a certain man, identified as the Claimant's friend and co-worker. Upon receiving an affirmative reply, the stranger asked the Claimant to deliver the bag of sodas to the co-worker at the plant. The Claimant agreed. At the hearing, the Claimant testified that he had never seen the stranger before; he testified he used the expression 'he looked like a narc' (narcotics agent) in describing the person (Tr. p. 45).

The Claimant's wife corroborated his testimony, insisting that the car contained not only herself, but also her four-year old daughter and her niece and nephew, ages 4 and 2, respectively. However, two of the guards testified that the automobile was empty and the Claimant remained at least 20 minutes at the guard shack.

Aside from the foregoing, the Employer's assistant security coordinator testified that at a hearing conducted to determine whether to discharge the Claimant, and at which union representatives were also present, the Claimant denied receiving a telephone call from his co-worker to bring him the sodas. Here he related the story about meeting the stranger outside the convenience store. Anent the latter, when interviewed by the assistant security coordinator, the co-worker denied asking the Claimant to bring him the sodas.

The Employer's Safety and Operating Rules - Pinto Valley Operations - rule #2.1, page 7, under "Discharge Without Further Warning" reads: "Introduction of illegal drugs on the property of the Company will be cause for discharge without further warning." (Exh. 14).

Relative to evidence or the lack of evidence, concerning the issue as to whether the contents of the plastic bag was indeed marijuana, two of the female guards had seen marijuana before and knew what it looked like; one had taken a course in drugs and drug use. The assistant security coordinator testified that he heard the police investigator state to the County Attorney that the chemical analysis of the contents of the plastic bag showed that it was usable marijuana, in excess of 21 grams (Tr. p. 34). He, himself, never saw the written report. The Claimant was subsequently served with a summons and complaint by the Justice Court charging him with the illegal possession of marijuana (Exhs. 11, 12).

Section 23-775 of the Arizona Revised Statutes provides, in part that, "an individual shall be disqualified for benefits after he has been discharged for wilful or negligent misconduct connected with his work." Arizona administrative rules and regulations, in A.C.R.R. R6-3-5105 defining "misconduct" states:

A.1.a. "Misconduct connected with the work" means any act or omission by an employee which constitutes a material or substantial breach of the employee's duties or obligations pursuant to the employment or contract of employment or which adversely effects a material or substantial interest of the employer.

* * *

b.2. A claimant need not have actually acted with intent to wrong his employer to result in a finding of misconduct connected with the work. Misconduct may be established if there is indifference to and neglect of the duties required of the worker by the contract of employment, or a violation of any material

lawful duty required under the employment contract when such duty is expressly or impliedly set forth to the worker and the facts show that the worker should have reasonably been able to avoid the situation which brought about his discharge (underscoring supplied).

Finally, and as here relevant, the said rules and regulations in

A.1. Evidence is that which furnishes any mode of proof or that which is submitted as a means of learning the truth of any alleged matter of fact. This evidence is usually in the form of oral or written statements of a claimant, employer, and/or witnesses. ...

B. Burden of proof and presumption

1. The burden of proof consists of the requirement to submit evidence of such nature that, taking all other circumstances into account, the facts alleged appear to be true. When this burden has been met, the evidence becomes proof. ...

* * *

C. Weight and sufficiency

1. Evidence must be evaluated during the course of adjudication to determine whether it is sufficient to make a decision. ...

2. When sufficient evidence has been obtained, all the facts available must be weighed. ...

* * *

b. Specific detailed facts must be given more credence than general statements.

It is our considered opinion that the Tribunal applied a rule of evidence far afield of that enunciated in administrative law proceedings when it found that the evidence "does not conclusively establish that the Claimant knowingly transported an illegal drug on the Employer's premises." In Woodby v. Immig. & Nat. Serv. 365 U.S. 276 (1966), the United States Supreme Court, in considering the burden of proof requirement in administrative

law proceedings, held that the burden is met when supported by a preponderance of the evidence.

The facts in the instant matter, as outlined above, clearly show, by a preponderance of the credible evidence, that the Claimant did indeed introduce an illegal drug upon the premises of his Employer. The identity of the drug was described in no uncertain terms by the security guards who discovered it and was corroborated by laboratory analysis. While the latter was, without question, hearsay evidence such evidence is generally admissible in administrative proceedings provided that it is relevant, and of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Our careful review of the record leads to no conclusion other than that the plastic bag found at the bottom of the shopping bag contained marijuana.

The Claimant's testimony as to how he came into possession of the shopping bag and its contents, and why he delivered same to his Employer's guard shack, begs speculation.

Here was a situation where the Claimant was accosted by a stranger who 'looked like a narcotics agent', and without further ado, consented to drive some several miles to deliver sodas to a friend at the Employer's premises. It is likewise subject to speculation why the Claimant failed to examine the contents of the bag given him by a complete stranger, and why he lingered so long at the guard's shack after he made the delivery.

The weight of the evidence establishes the Claimant introduced an illegal drug upon the premises of the Employer contrary to its rules which expressly provide for discharge

without further warning.

Misconduct, within the meaning and intent of the Employment Security Law, has clearly been established in this case, and we so find.

DECISION

The decision of the Appeal Tribunal is reversed.

The Claimant is discharged for misconduct in connection with his employment, and is disqualified from February 22, 1981 through May 2, 1981, and his total award reduced by \$760., eight times his weekly benefit amount.

The Employer's experience rating account shall not be charged for benefits paid the Claimant as a result of this employment.

This decision creates an overpayment if the Claimant was paid benefits during all or part of the period of disqualification.

DATED this 10th day of November, 1981.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Reana K Sweeney, Chairman

Eugene R. Murray, Member

Robert D. Sparks, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON June 1, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision

No. PD- 112

Formerly Decision No.
B-1107-81 (AT 4102-81)

In the Matter of:

MILLARD,

AND

FOODMAKER, INC.,

Claimant.

Employer.

D E C I S I O N

AFFIRMED

THE CLAIMANT has petitioned for review of the decision of the Appeal Tribunal which held him ineligible for the receipt of unemployment insurance benefits.

The Appeals Board has carefully reviewed the record in this case, including the exhibits and the transcript. The contentions raised in the petition have been considered.

We find no material error in the findings of fact. The reasons for the decision are founded upon a proper application of the law to the facts. We therefore adopt the [following] Tribunal's findings of fact, conclusions of law, and reasons therefor, as our own.

[The claimant was last employed by the employer, a fast food restaurant, for approximately three months until he was discharged on May 21, 1981 for his failure to perform his duties according to standards set by the employer.

The claimant had primarily four duties to perform during the early morning hours: cleaning and preparing the deep fryers for use, performing outside maintenance, preparing vegetables for use, and mopping and sweeping the interior. The claimant was given four and one-half hours to perform these tasks. The claimant consistently took longer than scheduled. On one occasion the claimant was told that a member of the restaurant's management would be by to inspect the restaurant. The claimant performed the scheduled tasks in four hours. When asked why he was able to perform the tasks on that day, the claimant replied that he tried hard. When asked if he could try hard every day the claimant replied that he could.

After the claimant was discharged, his replacement was consistently able to perform the same and additional duties within three and one-half hours.

The employer has contested a finding the claimant was discharged for reasons other than misconduct in connection with the employment. This issue involves the application of Sections 23-775 and 23-727 of the Employment Security Law of Arizona.

Arizona Administrative Rules and Regulations, in Section R6-3-51300, provide in pertinent part as follows:

1. A worker has the implied duty of performing his work with ordinary care and diligence and of making reasonable efforts to live up to such standards of performance as are required by his employer. Misconduct generally arises when a worker knowingly fails to exercise ordinary care in the performance of his duties.
2. Ordinary care means that degree of care which persons of ordinary prudence are accustomed to exercise under the same or similar circumstances, having due regard to his or others' rights and safety and to the objectives of the employer. This standard is general and application will vary with the circumstances. For example, the ordinary care expected of a precision engineer will vary considerably from the care expected of a ditch digger. The accepted standard of performance establishes what is ordinary care.

3. This does not mean that every claimant discharged because of unsatisfactory work performance is subject to disqualification. In the absence of gross carelessness or negligence, or recurrence of ordinary carelessness or negligence, the claimant's failure to perform his work properly is presumed to be attributed to good faith error in judgment, inability, incapacity, inadvertence, etc. A conscientious employee may be unable to perform his duties to the satisfaction of his employer because of limited mental capacity, inexperience or lack of coordination. If such person is discharged for unsatisfactory work his discharge is not for misconduct.

Arizona Administrative Rules and Regulations, in Section R6-3-51310, provide in pertinent part as follows:

A. Duties not discharged

1. When an employee is given certain tasks to do, an employer may expect that such duties will be performed in accordance with the ability of the worker. Failure to complete assigned work will be considered the same as improper completion of work. The reason(s) for the nonperformance or improper performance will determine whether there was misconduct.
2. A worker discharged for failing to do work which he could reasonably have been able to do or who does work improperly without reasonable excuse, is discharged for misconduct.

Important considerations are:

- a. The worker's knowledge and understanding of his responsibilities; and,
- b. The extent of his opportunity and ability to do his work properly.

In this case, the claimant was discharged for failing to perform his work to standards set by the employer. The claimant established that he could meet the standards when he tried hard and that he should be able to try hard each day. The claimant cannot explain his inability to adequately perform the work and the claimant's replacement was able to perform more work in substantially less time. Accordingly, the Tribunal finds that work connected misconduct has been established.]

In the petition, the Claimant contends that he performed his work to the best of his ability, that the Tribunal was improperly influenced in its finding regarding the ability of the Claimant by the Claimant's successor's ability to do the job within the time required, and that neither gross negligence nor carelessness were established. The test to be applied in determining whether the Claimant's failure to perform his duties constitutes misconduct is found in A.C.R.R. R6-3-51300, which provides:

1. A worker has the implied duty of performing his work with ordinary care and diligence and of making reasonable efforts to live up to such standards of performance as are required by his employer. Misconduct generally arises when a worker knowingly fails to exercise ordinary care in the performance of his duties.

2. "Ordinary care" means that degree of care which persons of ordinary prudence are accustomed to exercise under the same or similar circumstances, having due regard to his or others' rights and safety and to the objectives of the employer. This standard is general and application will vary with the circumstances. For example, the ordinary care expected of a precision engineer will vary considerably from the care expected of a ditch digger. The accepted standard of performance establishes what is ordinary care.

3. This does not mean that every claimant discharged because of unsatisfactory work performance is subject to disqualification. In the absence of gross carelessness or negligence, or recurrence of ordinary carelessness or negligence, the claimant's failure to perform his work properly is presumed to be attributed to good faith error in judgment, inability, incapacity, inadvertence, etc. A conscientious employee may be unable to perform his duties to the satisfaction of his employer because of limited mental capacity, inexperience, or lack of coordination. If such person is discharged for unsatisfactory work his discharge is not for misconduct (emphasis added).

The rule requires that the Employer establish either gross carelessness or negligence or a recurrence of ordinary carelessness or negligence. A review of the record shows the evidence is

uncontroverted that the Claimant repeatedly failed to complete his duties in the allotted time. It is also uncontroverted that on one occasion, when the Claimant was aware of an impending visit of corporate management personnel, he was able to complete his tasks in less than the allotted time. Thus, the Claimant had the ability to meet the Employer's standards. The Tribunal's finding of misconduct is further supported by administrative rule A.C.R.R. R6-3-51310 and the Claimant's testimony.

A.C.R.R. R6-3-51310 provides in part:

A(2) A worker discharged for failing to do work which he could reasonably have been able to do or who does work improperly without reasonable excuse, is discharged for misconduct. Important considerations are:

- a. The worker's knowledge and understanding of his responsibilities, and
- b. The extent of his opportunity and ability to do his work properly.

The record reveals the following testimony (Tr. pp. 21, 22):

[Hearing Officer]

"Q Okay, now do you recall the day that you got the job done very quickly because some supervisor was coming this day?

[Claimant]

A Yeah, I remember that.

Q Okay, why were you able to get things done so quickly on that day as opposed to the others?

A Well, I guess I wanted to help Steve to show the boss that we could get it done, I guess.

Q What did you do differently that day than -

A I don't remember, but I know - you know -

Q Why would you be able to meet it that day, meet the requirements that day and not the other days?

A I honestly don't know.

Q No ideas?

A Maybe it was because - you know, I really tried real hard.

Q Any reason why you couldn't try real hard the other days or -

A Not that I know of."

Thus, the Claimant understood his responsibilities and could carry them out in the time required when he "tried real hard". The Claimant's repeated failure to meet the reasonable standards of the Employer having been established, coupled with the Claimant's having neither advanced nor established any reasonable excuse thereof at the hearing, amply support a finding of misconduct. Evidence of the ability of others to perform the duties in question, while not dispositive of the Claimant's ability to perform same, has probative value as to the degree of difficulty of those duties.

The weight of the evidence supports the Tribunal's findings. We find nothing in the record which would lead us to change the decision.

ACCORDINGLY, the decision of the Appeal Tribunal is affirmed on the basis of the record.

DATED this 25th day of November, 1981.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Reana K Sweeney, Chairman

Eugene R. Murray, Member

Robert D. Sparks, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON June 1, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision
No. PD- 113

Formerly Decision No.
B-1314-81 (AT T-2243-81)

In the Matter of:

EVANS,

AND

K-MART CORPORATION,

Claimant.

Employer.

D E C I S I O N

AFFIRMED

THE EMPLOYER petitions for review of the decision of the Appeal Tribunal which reversed the determination of the Deputy and held that the Claimant was discharged for reasons other than misconduct connected with the work, and the Employer's experience rating account shall be charged.

The petition has been timely filed, and the Appeals Board has jurisdiction pursuant to A.R.S. §§ 23-671(C) and 23-672(C). We have carefully reviewed the record in this case, including the transcript of the hearing, and the exhibits. The contentions in the petition have been considered.

THE APPEALS BOARD FINDS no material error in the Tribunal's findings of fact. The reasons for the decision are founded upon a proper application of the law to the facts. We, therefore, adopt the Appeal Tribunal's findings of fact, reasoning, and conclusions

of law as our own [as follows].

[The claimant was employed as a cashier for "X" Retail Corporation, Sierra Vista, Arizona, for four months until she was discharged on September 15, 1981.

The claimant was discharged for violating a company rule against ringing up orders for friends or relatives. The claimant received and signed a copy of the rules. They prohibit this without defining "friends" or "relatives". On the day of discharge she left her register and spoke to a lady from her church. The claimant later rang up the church member's order. The claimant admitted to her supervisors that she rang up her "sister" and previously rang up orders for friends. The claimant had never been warned about this conduct.

The claimant alleged that her church members were a special kind of an acquaintance who were more than friends. However, she did not consider them to fall within the prohibition against ringing relatives and friends. When she said she rang up friends she meant repeat customers.

The assistant manager had discharged other employees for ringing up friends. The company rule requires immediate discharge and no warnings are necessary.

The claimant has contested a determination which held her discharge warranted disqualification. The issue involves the application of Section 23-775 and Section 23-727 of the Employment Security Law of Arizona.

Arizona Administrative Rules and Regulations, in Section R6-3-51485, provide in pertinent part as follows:

- A. 1. An employee, discharged for violating a company rule, generally is considered discharged for misconduct connected with the work. This principle is based on the theory that when hired, an employee agrees to abide by the rules of his employer. This section covers rules peculiar to a particular employer, and not rules constituting the general code of industrial misconduct. In order for misconduct connected with the work

to be found, it must be determined that the claimant knew or should have known of the rule and that the rule is reasonable and uniformly enforced.

2. Recognition must be accorded to the type of business in which the employer is engaged and other surrounding circumstances. The rule must be reasonable in light of public policy and should not constitute an infringement upon the recognized rights and privileges of workers as individuals. Rules to affect the employee's conduct outside the employer's premises and which could not reasonably affect the employer's interests are generally considered unreasonable.

The claimant was discharged for violating a known company rule by ringing up a customer she described as her "sister". The individual was not a blood sister but a member of the claimant's church. When confronted, the claimant admitted to ringing up the "sister" and to ringing up "friends". The company rule does not define "friends" or "relatives".

The claimant did not understand her "sisters" from her church to fall within the company rule against ringing up relatives and friends. The friends she had previously rung up were only repeat customers.

In view of the claimant's credible good faith belief that her church "sister" did not fall within the prohibition and the lack of prior warning, the Tribunal finds that her discharge for this inadvertent violation of the rule renders the enforcement of the rule unreasonable. The Tribunal finds that the claimant was discharged for reasons other than misconduct.]

In its petition, the Employer contends that the Claimant was terminated for violating a company rule, namely, selling to friends or relatives. Therefore, the Employer claims, under the company's policy, all friends and relatives of the Claimant must make their purchases from someone other than the Claimant. The record establishes that the Claimant, as a company cashier, rang up sales for members of a church to which the Claimant was also a member. The Claimant referred to fellow church members as "sisters", meaning "sisters" of a spiritual family rather than blood relatives. The Employer took the position that it made no difference that a

"friend" from the Claimant's church was not a blood sister. The company policy stated "friends and relatives", and therefore, a church acquaintance was a "friend" (Tr. p. 9).

The issue before the Board is whether the company rule is a reasonable rule as it pertains to the category of "friends". The company rule provides (Tr. p. 6):

"Friends and relatives, when shopping, should make purchases from someone other than yourself (cashiers)."

A prohibition of allowing cashiers to wait upon relatives is a sound company policy. However, to prohibit cashiers from waiting upon "friends" is so fraught with so many meanings that a reasonable and workable definition of "friends" is impossible.

Black's Law Dictionary, Fifth Edition (1979), p. 600, defines the word "friend" as follows:

"Friend. One favorably disposed. (cite). Varying in degree from greatest intimacy to acquaintance more or less casual. (cite)."

Black's Law Dictionary, supra, p. 22, defines "acquainted" as:

"Acquainted. Having personal, familiar, knowledge of a person, event or thing. 'Acquaintance' expresses less than familiarity; familiarity less than intimacy. Acquaintance springs from occasional intercourse, familiarity from daily intercourse, intimacy from unreserved intercourse. (cite). To be 'personally acquainted with,' and to 'know personally', are equivalent terms; (cite)."

Administrative rule A.C.R.R. R6-3-51485 provides, in pertinent part:

A. General

1. An employee, discharged for violating a company rule, generally is considered discharged for misconduct connected with the work. This principle is based on the theory that when hired, an employee agrees to abide by the rules of his employer. This section covers rules peculiar to a particular

employer, and not rules constituting the general code of industrial misconduct. In order for misconduct connected with the work to be found, it must be determined that the claimant knew or should have known of the rule and that the rule is reasonable and uniformly enforced (emphasis added).

Here, based upon the evidence in view of the company rule, it is obvious that the rule is not reasonable as it pertains to cashiers being prohibited from making sales to "friends". By definition, a first-time customer could, over a period of time, become a "friend" to a cashier. Must the cashier monitor the relationship to determine the point in time when the "customer" becomes a "friend", and then tell the "customer-friend" that the cashier can no longer wait upon her/him because the cashier would then be violating the company rule and subject to discharge? How can the company monitor the company rule to determine the point in time that a "customer" becomes a "friend" of the cashier?

The Claimant admitted that she was given a copy of rules and that she signed those rules. The Hearing Officer intensely questioned the Claimant as to what a "friend" meant to the Claimant. She responded (Tr. pp. 12, 13):

[Hearing Officer]

"Q Well, what did you understand friends to mean?

[Claimant]

A Someone that you knew that wasn't an immediate member of your family. The one you -- maybe you associated with, that you went out with, that you was close to -- something like that.

Q Would you consider the individuals that you saw on the day of your separation to be friends?

A No, I would consider them to be sisters, members of my church.

* * *

Q ... You told me that friends were someone you knew who weren't relatives. Did you not know these members of your church?

A Yes, and I would consider them acquaintances, because I don't live with them. I see them at church, I speak to them, and I go about my business and they go about theirs. I don't live with them.

Q But aren't they the equivalent -- aren't they -- if anything, aren't they more than friends?

A Sure. They're acquaintances and are sisters.

Q But they're more than friends, aren't they?

A Sure. (Tr. p. 13)

* * *

Q Why -- okay, you were aware of the rule about ringing up friends. You saw these sisters in the store and asked them for a ride. When they came up to your register, why didn't you tell them -- you know -- hey, I can't ring you. The policy requires that I not ring relatives and friends. Why don't you go to another register. Why didn't you do that?

A I don't consider members of my church as friends or as relatives, in that nature. (Tr. pp. 13, 14)

* * *

Q Didn't you understand that the same policy that would apply to friends and relatives would apply to these sisters from your church?

A No. I've never heard of anything of such.

Q You didn't think that they were like friends?

A No." (Tr. p. 15)

The Appeals Board has consistently enunciated its adherence to the principle that businesses may require the regulation of their employees through company rules. However, we neither approve nor disapprove any rule which may be adopted and utilized by an employer even though the breach thereof may result in an employee's

discharge. Such decisions are not within the purview of the Board. However, the eligibility of a Claimant for unemployment insurance benefits is governed by the provisions of the Employment Security Law and not by the employer or employee.

The record clearly establishes that the Claimant was discharged for violation of a company rule prohibiting cashiers from ringing up sales to "friends". A.C.R.R. R6-3-51485, supra, provides that in order for misconduct connected with the work to be found, the rule must be reasonable. The Board concurs with the Tribunal that the company rule does not define "friends", so as to put the Claimant sufficiently on guard to prevent violation of the company rule.

Upon careful review of the evidence, together with a thorough examination of the entire record, and in light of the administrative rule pertinent thereto, the Board is constrained to the view that the Employer's rule is not reasonable, and we conclude that the facts support the findings and conclusions of the Tribunal and need not be disturbed. Accordingly,

THE APPEALS BOARD AFFIRMS the decision of the Appeal Tribunal on the record.

DATED: February 2, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Reana K Sweeney, Chairman

Eugene R. Murray, Member

Robert D. Sparks, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON June 1. 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision

No. PD- 114

Formerly Decision No.
B-113-81 (AT 9470-80)

In the Matter of:

KENNEDY,

Claimant.

D E C I S I O N

AFFIRMED

THE CLAIMANT has petitioned for review of the decision of the Appeal Tribunal which held him unavailable for work and ineligible for unemployment insurance benefits from November 30, 1980 to December 6, 1980.

The Appeals Board has carefully reviewed the record in this case, including the exhibits and the transcript. The contentions raised in the petition have been considered.

We find no material error in the findings of fact. The reasons for the decision are founded upon a proper application of the law to the facts. We therefore adopt the [following] Tribunal's findings of fact, conclusions of law, and reasons therefor, as our own.

[The claimant has 15 - 20 years' experience as a truck driver. He did not personally contact any prospective employers or actively seek

work during the week ending December 6, 1980 because he had no funds with which to utilize public transportation or put gasoline in his personal vehicle. The Department of Economic Security mailed the claimant's unemployment benefits for the weeks ending November 15 and 22, 1980 to an incorrect address. Therefore, rather than receiving them on or about November 28, 1980, the claimant did not receive them until December 5, 1980.

The claimant has contested a deputy's determination holding him unavailable for work and ineligible for unemployment insurance benefits from November 30, 1980 to December 6, 1980.

Section 23-771 of the Arizona Revised Statutes provides in part:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that the individual:

* * *

3. Is ... available for work.

Benefit Policy Rule R6-3-5205 provides that in order to be considered available for work a claimant's personal circumstances must leave him free to accept and undertake some form of full-time work. Moreover, he must be actively seeking work or following a course of action reasonably designed to result in his prompt reemployment in full-time work. The objective of availability is to determine whether a claimant is genuinely and regularly attached to the labor market.

The claimant did not personally contact any prospective employers or actively seek work during the week ending December 6, 1980. Although it was Department error which caused the claimant to be without funds during that week, the Tribunal must find the claimant was unavailable for work pursuant to Benefit Policy Rule R6-3-5205.]

In his petition, the Claimant contends that he was precluded

from actively seeking reemployment as a result of non-receipt of his unemployment insurance checks. The record indicates that the Claimant did, in fact, advise the Department of Economic Security of a change of address, and the incorrect mailing of his checks occasioned a delay of one week in the Claimant's receipt thereof. This delay, according to the Claimant, denied him the financial capability to look for work (Tr. pp. 2, 3, 4):

"I did not have funds to do so, either for transit or riding the bus, or for my personal vehicle."

* * *

"... I feel that if I don't receive my checks when I should and its not due to my fault, I shouldn't be penalized for it."

We cannot subscribe to the Claimant's proposition. Our concept of unemployment insurance benefits does not include a belief that payments thereunder were designed by the various legislatures to produce a status quo for the recipient thereof. On the premise that, in most instances, unemployment is a temporary condition, albeit unfortunate, the relief afforded by benefit checks never was intended to place the recipient into the same financial status experienced while employed. At best, such benefits are available only as a temporary and partial mitigation of the severity of the burdens, financial and psychological, which unemployment inevitably produces. Applying this understanding to the instant case, we conclude that the non-receipt of unemployment benefit checks on the day of usual delivery thereof does not dictate relevancy to the question of seeking reemployment.

Section 23-771 of the Arizona Revised Statutes provides in pertinent part:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that the individual:

* * *

3. Is ... available for work.

Administrative rule A.C.R.R. R6-3-5205 provides that, in order to be considered available for work a claimant must be accessible to a labor market and he must be actively seeking work or following a course of action reasonably designed to result in his prompt reemployment in full-time work. The willingness or unwillingness of employers to hire is not relevant to the issue.

The evidence of record indicates that the Claimant is unmarried and has no dependents, that he possesses both an automobile and a motorcycle, and that he had been earning \$50.00 per day prior to his current unemployment. We further note that the Claimant apparently had access to a telephone (Tr. p. 4):

"... because I called to find out about those checks and they read off my correct address."

Under the fact situation thus demonstrated, we can conceive of no logical or reasonable basis for the Claimant's failure to actively seek reemployment, regardless of the late arrival of unemployment insurance benefit checks. This Board has consistently given credence to even minimal efforts at work searches designed to establish an individual in the full-time work force; however, we are unable to extend that concept, and resultant benefits, to a total absence of self-help.

ACCORDINGLY, the decision of the Appeal Tribunal is affirmed on the basis of the record.

DATED this 19th day of March, 1981.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Mary A. Bass, Chairman

E. D. Crowley, Member

Eugene R. Murray, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON June 1, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision

No. PD- 115

Formerly Decision No.
B-250-79 (AT 5953-79)

In the Matter of:

INGALLS,

Claimant.

D E C I S I O N

REVERSED

THE CLAIMANT has petitioned for review of the Appeal Tribunal decision which held:

The determination of the deputy is affirmed. The claimant is unavailable for work and ineligible for benefits from August 5, through September 8, 1979.

The Appeals Board has carefully reviewed the entire record in this matter including the transcript and exhibits. The contentions raised in the petition for review have been examined and considered.

THE APPEALS BOARD FINDS:

The Claimant was employed for two and one-half years, prior to being laid off on June 29, 1979, as a biochemistry research assistant at a local university in Tucson, Arizona, his place of residence.

The Claimant has a Ph.D. in biochemistry which he obtained

from Arizona State University in 1973. The Claimant was laid off because the funding for his program had ended. Prior to being laid off, the Claimant had contacted many individuals at the university regarding other available positions, and had written numerous proposals in an attempt to receive additional funding.

The Claimant testified that employment in the field of biochemistry, particularly in cancer research, his specialty, is best obtained by mailing resumes to educational institutions, pharmaceutical houses, and research companies that advertise in scientific journals. The Claimant regularly receives this scientific journal, and consults it for advertisements of positions which are suitable for one possessing his skills. When such a position is advertised, the Claimant sends a resume to the potential employer. He testified he sent two to four resumes a week for positions which are so advertised. The Claimant also testified that he had obtained his last employment by sending a resume in response to an advertisement placed in this professional journal.

The Claimant further testified that another method of finding employment in his field is to contact friends and professional associates who are employed by educational institutions or research facilities, inquiring as to possible employment available within their knowledge. The Claimant follows up on leads thus developed. The Claimant testified there is little opportunity for employment in his field in the Tucson area. He stated, however, that he is willing to relocate to find suitable employment.

A.R.S. § 23-771 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the Department finds that the individual:

* * *

3. ... is available for work.

Administrative rule A.C.R.R. R6-3-5205 provides in pertinent part:

2.a. He must be accessible to a labor market

b. He must be ready to work on a full-time basis

c. His personal circumstances must leave him free to accept and undertake some form of full-time work

d. He must be actively seeking work or following a course of action reasonably designed to result in his prompt reemployment in full-time work.

* * *

5. Availability for work is a relative term. The objective of availability is to determine if a claimant is genuinely and regularly attached to the labor market. Availability for work also is the relationship between the restrictions imposed upon a claimant and the job requirements of the work which he is qualified to perform. It implies that restrictions do not unduly lessen the possibilities of his accepting suitable work. Unreasonable restrictions which substantially limit employment opportunities result in unavailability.

This Claimant has a Ph.D. in biochemistry and is experienced in cancer research. Consideration must be accorded to the qualifications and skills possessed by the Claimant as they relate to the kind and type of work he is seeking. It must be borne in mind that he is a highly skilled professional. The Claimant has sought employment within the context of his peculiar and

specialized skill. It should also be noted that it is the availability for work, rather than the availability of work which is the criterion; the willingness or unwillingness of employers to hire is not relevant to the issue. The Board finds that the Claimant is making a reasonable attempt to obtain a position. He is not restricting himself as far as geographical location is concerned. He is sending resumes in response to advertisements, a normal and generally accepted method of contacting potential employers in his field. Further, the Claimant has contacted individuals who are acquainted with his field of work, also a generally accepted method of receiving information of openings in his field. The Board concludes he was available for work for the period from August 5, through September 8, 1979.

The decision of the Tribunal is reversed. The Claimant is available for work and eligible for benefits for the period from August 5, through September 8, 1979.

DATED this 28th day of December, 1979.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Mary A. Bass, Chairman

E. D. Crowley, Member

Eugene R. Murray, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON June 1, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision

No. PD- 116

Formerly Decision No.
B-805-80 (AT T-5340-80)

In the Matter of:

KEENAN,

Claimant.

D E C I S I O N

REVERSED

THE CLAIMANT has petitioned for review of the Appeal Tribunal's decision which held that he was unavailable for work and ineligible for benefits for the period of June 8, 1980, through July 12, 1980.

The Appeals Board has carefully reviewed the record in this case, including the transcript and exhibits. The contentions raised in the petition have been considered.

In his petition, the Claimant presents additional facts not presented at the time of the hearing. There is no showing that this information, if pertinent, was not available for presentation at the time of hearing. Therefore, it may not now be considered by this Board.

We find no material error in the [Tribunal's] findings of fact [as follows].

[This twenty-two year old claimant was last employed as a surveyor's helper for eleven weeks ending October 24, 1979. He has five years' experience as a surveyor's assistant.

During the academic semester January to June 1980 the claimant attended the University of Arizona on a full-time basis, taking graduate courses in philosophy. He swears he does not intend to go back in the fall and has not pre-registered for fall classes. He is not enrolled in any degree program. His courses met from noon to 3:00 p.m. on Tuesdays and Thursdays, and from 3:30 p.m. to 6:30 p.m. on Thursdays. The claimant has no concurrent history of full-time work and full-time schooling.

The claimant is a member of good standing in the operating engineers' union. He registered on that union's out-of-work list on June 11, 1980, and continues to meet the reporting requirements of that referral hall.

and, therefore, adopt them as our own with the following additions:

The Claimant contacted his former Employer concerning work on June 9, 1980, and registered with his union in Phoenix on June 10, 1980.

He quit his employment on October 24, 1979 as a result of an industrial injury. He was released to return to work on January 7, 1980. Prior to his medical release he signed up and paid his tuition fees for graduate level course work at the University of Arizona for the academic year commencing in mid-January. Having already paid the tuition fees for that semester, the Claimant chose to complete the semester after obtaining the medical release for work. He did not pre-register for the next regular academic year.]

The Tribunal, in determining that the Claimant was unavailable for work, applied the following portion of A.C.R.R. R6-3-5240:

... An individual shall be presumed to be unavailable for work any week of unemployment if such individual is a student.

* * *

4. A claimant considered a student by virtue of having attended school during the most recent regular term may remove the student status by a substantial showing that he will not return to school ... A substantial showing is more than just a statement that the claimant does not intend to return to school.]

The Appeal Tribunal found that the Claimant's evidence was not substantial within the meaning of the above rule to overcome the presumption he was unavailable for work.

In determining whether the Claimant has presented substantial evidence within the meaning of A.C.R.R. R6-3-5240:

... [t]he adjudicator shall examine the claimant's search for work, personal circumstances, and such other factors that might indicate his true intentions ... (emphasis added).

In addition to the Claimant's sworn statement that he did not intend to return to school in the fall, we find, upon a thorough review of the record, evidence supportive thereof. The Claimant, a union member, was actively seeking employment in a field in which he had 5 years' prior experience by registering and checking with his union. The circumstances surrounding his attendance at school the previous semester indicate his attendance was not the result of an intent to remove himself from the labor market in order to pursue a scholastic degree. His testimony supports a finding he was motivated to return to school for the semester because an unanticipated event, an industrial injury, forced him to be involuntarily unemployed for an uncertain period of time. That he does not intend to return to school in the fall is further supported by his testimony that, at the time he registered for school, he did not enroll in a degree program, and, upon completion of the semester, he did not preregister for

the following semester.

We conclude that the Claimant presented ample evidence to overcome the presumption that he is unavailable within the meaning of the above-cited rule.

The evidence is uncontroverted that the Claimant contacted his former employer on June 9, 1980, registered with his union in Tucson on June 11, 1980.

Accordingly, the decision of the Appeal Tribunal is reversed. The Claimant was available for work commencing on June 8, 1980, through July 12, 1980, and eligible for benefits for that period, if otherwise qualified.

DATED this 8th day of October, 1980.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Mary A. Bass, Chairman

E. D. Crowley, Member

Eugene R. Murray, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON June 1, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision

No. PD- 117

Formerly Decision No.
B-104-79 (AT 4559-79)

In the Matter of:

BUCHMAN,

Claimant.

D E C I S I O N

AFFIRMED

THE CLAIMANT has petitioned for review of the decision issued by the Appeal Tribunal on August 1, 1979, which held:

The determination of the deputy is affirmed. The claimant is unavailable for work and ineligible for benefits from June 10, 1979, through July 21, 1979.

The Appeals Board has carefully examined the correspondence, information, and evidence contained in the record and has reviewed the transcript of the Tribunal hearing held on July 25, 1979. The contentions raised in the petition for review have been examined and considered.

The Claimant, age 19, was last employed as a food checker and cashier from June 28, 1978, until May 30, 1979. She had attended a local university as a full-time student until May 17, 1979, when the regular term ended. The Claimant plans

to attend the same university during the next regular semester as a full-time student.

When completing a Department eligibility review questionnaire, the Claimant stated she was willing to work from 5 p.m. to 11 p.m., Monday through Friday, and that her means of transportation at that time consisted of walking. The Claimant's last employment was located within walking distance of her home.

The Claimant attended school during the day and worked part time for her last Employer during the period September 1, 1978, through May 31, 1979. The Claimant's hours of work averaged 29 per week. She contended there were certain weeks she worked 40 or more hours. The Claimant obtained this job through a friend of hers who was the head cashier. When she began this employment in June, 1978 she was working five times a week on day and evening shift. When classes resumed, the Claimant requested that her hours be reduced if possible. The Employer indicated her schedule could be reduced to a minimum of 4 shifts per week. Generally, the Claimant worked a six-hour shift.

The Claimant identified approximately 40 employers she contacted during the period in question. Initially she contacted prospective employers within walking distance of her home. As of approximately June 29, 1979, she had the use of the family automobile to conduct her work search. It is the Claimant's contention that she was employed on a full-time basis with her last Employer. She alleges that her last Employer considered 30 hours a week to be full-time employment.

Administrative rule A.C.R.R. R6-3-5240 provides:

A.1. Full-time attendance at an institution for academic learning creates a presumption that a claimant is unavailable for work. A claimant who is attending, or during the most recent regular term has attended, an institution of academic learning on a full-time basis, is considered a student and presumed unavailable for work. This presumption may be rebutted if the claimant has not, in order to attend school, left suitable full-time work, refused suitable full-time work, or reduced his hours to part-time work and has established a sufficient pattern of concurrent, full-time work and full-time school attendance during the nine months preceding his new or additional claim to show that school attendance will not in itself interrupt full-time employment.

2. A full-time student can remove the presumption that he is not available for work only by having established a definite pattern of regular, full-time work during regular school terms and vacation periods, showing that school attendance will not in itself interrupt full-time employment. This does not apply to individuals who only attend night school. Their availability should be tested by the same criteria applied to an individual who is attending school on a part-time basis.

The Claimant attended the most recent regular term as a full-time student at an institution for academic learning and plans full-time attendance during the next regular session. During the nine-month period preceding the Claimant's application for benefits her employment time averaged 29 hours weekly. The evidence also establishes that the Claimant requested of her Employer that her hours be reduced to accommodate her resumption of school.

There exists no absolutely definitive rule by which an accurate measurement of 'full-time' work can be made. Concededly, there may be variations within a particular trade or industry,

established by practice, whereby something less than 40 hours may be considered a workweek; a union contract may also establish a workweek by its terms. 'Full-time' employment, however, as used in the above-cited rule, clearly contemplates the usual, customary and generally accepted norm of 40 hours weekly.

Despite the Claimant's allegation that her last Employer considered 30 hours a week to be full-time employment, there is no support to lend credence to such a position within the contemplation of the Employment Security Law of Arizona.

The distinction to be drawn between that which is 'full-time' and that 'part-time' is self-evident. The Board does not consider an average workweek of 29 hours to be a pattern of full-time employment.

We are impressed with the Claimant's sincerity in her effort to obtain employment while carrying a full academic schedule, and consider that she is making a diligent attempt to find a job; however, we find the presumption of unavailability, within the meaning and intent of the applicable rule, has not been overcome.

The decision of the Appeal Tribunal is affirmed. The Claimant was not available for work and was ineligible for benefits from June 10, 1979, through July 21, 1979.

DATED this 27th day of November, 1979.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Mary A. Bass, Chairman

E. D. Crowley, Member

Eugene R. Murray, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON June 1, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision

No. PD- 118

Formerly Decision No.
B-851-80 (AT T-5454-80)

In the Matter of:

BOLLMAN,

Claimant.

D E C I S I O N

REVERSED

THE CLAIMANT has petitioned for review of the decision of the Appeal Tribunal which held the Claimant ineligible for unemployment insurance benefits.

After its initial review herein, the Appeals Board, by Order dated October 21, 1980, remanded this matter to the Appeal Tribunal inasmuch as the testimony of the Claimant at the initial Tribunal hearing was not taken under oath or affirmation, as required by A.C.R.R. R6-3-1503(B)(1). Pursuant to said Order, a hearing was held November 24, 1980 in Tucson, Arizona, at which time the Claimant, under oath, affirmed his prior testimony, and, for reasons not known to this Board, was permitted to present further evidentiary testimony concerning the issue presented herein.

This matter is again before the Board. The entire record has been carefully reviewed, including the exhibits and transcripts, both of which are properly the subject of consideration.

The contentions raised in the petition have been considered.

The [following] findings of fact as determined by the Appeal Tribunal, being substantially correct, are adopted by the Board, as its own.

[This claimant was last employed as an electronics technician by "X" Employer, Tucson, Arizona for nine months ending May 30, 1980. During the fall semester 1979, the claimant attended the University of Arizona on a full-time basis and worked for X Employer five hours a day, Monday through Friday, plus all day Saturdays. During the spring 1980 semester, the claimant attended the University of Arizona on a full-time basis, and worked nine hours a day for X Employer on Mondays, Wednesdays, Fridays and Saturdays. He thus worked 34 hours a week for X Employer during the fall semester of 1979 and 36 hours a week for X Employer during the spring semester of 1980.

The claimant attended the 1980 summer session at the University of Arizona, taking four units, which in a summer session is considered a full-time load. He attended classes five days a week from 9:00 a.m. to 3:00 p.m. Those courses ended on July 3, 1980. The claimant is pursuing a Bachelor of Arts degree at the University of Arizona.

Since June 15, 1980, the claimant has been looking for work as an electronic technician. He has contacted numerous Tucson employers seeking work on either the swing or graveyard shifts. In addition to his nine months' experience with X Employer, the claimant has six years' experience as a military radar technician.

A.C.R.R. R6-3-5240 provides, in relevant part, as follows:

A. Department regulation No. R6-3-1805 provides in part:

An individual shall be presumed to be unavailable for work for any week of unemployment if such individual is a student; provided, however, that such presumption may be rebutted upon a showing to the satisfaction of the Department that such individual was, in fact, available for work. ...

1. Full-time attendance at an educational

institution creates a presumption that a claimant is unavailable for work. A claimant who is attending or during the most recent regular term has attended, an educational institution on a full-time basis is considered a student and presumed unavailable for work. This presumption may be rebutted if the claimant has not, in order to attend school, left suitable full-time work, refused suitable full-time work, or reduced his hours to part-time work and has established a sufficient pattern of concurrent, full-time work and full-time school attendance during the nine months preceding his new or additional claim to show that school attendance will not in itself interrupt full-time employment.

2. A full-time student can remove the presumption that he is not available for work only by having established a definite pattern of regular, full-time work during regular school terms and vacation periods, showing that school attendance will not in itself interrupt full-time employment. This does not apply to individuals who only attend night school, or to individuals who have a history of full-time employment during hours other than the hours they are attending, or during the most recent regular term have attended, classes at an educational institution. Their availability should be tested by the same criteria applied to an individual who is attending school on a part-time basis.]

The Tribunal, in this case, found that the Claimant was attending school full time, while working 36 hours per week. The Tribunal held the Claimant to be unavailable for work because the Claimant had not, in the Tribunal's view, established a sufficient pattern of concurrent, full-time work and full-time school attendance so as to overcome the presumption of unavailability. That decision states, in part, as follows:

"This Tribunal does not consider 36 hours per week to be working on a 'full-time' basis."

The Employment Security Law does not, in any statute or regulation, define "full time". Nor do we believe that an all encompassing definition is possible or even desirable. Each situation is different and must be evaluated on its own merits, considering the hours of employment, the scheduling of classes in relationship to working hours, the number of classes taken, and how each claimant regards the employment, to name but a few relevant factors.

The Claimant testified at the initial hearing that his class schedule was arranged around his work. The Claimant also testified that while he would not give up his schooling to accept a full-time job, he explained that he did not perceive such to be necessary inasmuch as he was engaged in what he considered to be full-time employment. He testified that during some weeks he worked more than 36 hours, and that those episodes of lesser hours were, upon occasion, dictated because of final exams.

The Claimant stated he was willing to work evening or morning shifts to enable himself to continue taking classes, or to rearrange his class schedule so that he could resolve an otherwise conflicting work schedule (Tr. p. 5).

While a 40-hour week may connote "full-time" work in many instances, we do not find, under these facts, that decreasing the total by an average of four, reduces the Claimant's status to "part time".

To impose, in this case, an arbitrary number of 'customary, normal or ordinary' hours as establishing with certainty the concept of full-time work, would be to ignore the fact that many businesses operate on a full-time workweek comprising less than

40 hours; it would follow, then, that a claimant who had earned credits in a history of full-time employment of less than 40 hours weekly, would be restricted in his eligibility for benefits. We cannot subscribe to such reasoning, nor do we construe the Employment Security Law to import such intent.

Here, the Claimant was employed in what was ostensibly, and for all practical and actual purpose, full-time work during the period herein considered.

The presumption of unavailability has, in this case, been rebutted. The Claimant has established a pattern of concurrent, full-time work and full-time school attendance.

The decision of the Appeal Tribunal is reversed.

The Claimant was available for work and is eligible to receive unemployment insurance benefits, if otherwise qualified, from June 15, 1980 through August 2, 1980.

DATED this 30th day of January, 1981.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Mary A. Bass, Chairman

E. D. Crowley, Member

Eugene R. Murray, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON June 1. 1982 .

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision
No. PD- 119

Formerly Decision No.
B-202-81 (AT T-88-81)

In the Matter of:

DEGRAND,

Claimant.

D E C I S I O N

AFFIRMED

THE CLAIMANT has petitioned for review of the decision of the Appeal Tribunal which held that she was unavailable for work and ineligible for unemployment insurance benefits from December 14, 1980 through January 10, 1981.

The Appeals Board has carefully reviewed the transcript and exhibits in this matter. The contentions raised in the petition have been considered.

The Board finds no error based upon its review of the entire record.

There is no material error in the findings of fact. The reasons for the decision are founded upon a proper application of the law to the facts.

Accordingly, the Appeals Board adopts the [following] Appeal Tribunal's findings of fact, conclusions of law, and reasons

therefor, as its own.

[The claimant was last employed for two weeks as a dry cleaner worker until she was laid off on November 22, 1980.

On the afternoon of December 16, the claimant left Tucson, by car with friends for West Allis, Wisconsin. She arrived about 10:00 a.m. on December 19th. The claimant stayed with her son while in Wisconsin, and maintains the purpose of the trip was to look for work. The claimant left Wisconsin on the morning of January 4, and arrived in Tucson on the afternoon of January 7th.

During the week ending December 20, the claimant telephoned two cleaning establishments in Wisconsin. During the week ending December 27, the claimant personally applied with three employers seeking work. During the week ending January 3, the claimant made numerous telephone calls to employers. She did not make personal contacts because she did not have a car and was not familiar with the bus schedule. The claimant returned to work on January 12, 1981.

The claimant has contested a determination which held she was unavailable for work from December 14, 1980 through January 10, 1981.

Section 23-771 of the Arizona Revised Statutes provides in part:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that the individual:

3. Is ... available for work.

Arizona Administrative Rules and Regulations, in Section R6-3-52150, provide in pertinent part as follows:

B. In Transit

1. When an individual moves from locality to locality, it is important to determine whether the individual's activities are directed toward efforts to obtain work or are directed to personal efforts inconsistent with his attachment to the labor market.

2. A claimant who is absent from his home or the community in which he most recently performed work, without additional evidence as to the reason for his absence, is presumed unavailable for work.
3. When the circumstances show that the claimant's purpose in traveling was to obtain employment and it was reasonable for him to believe that his opportunities for employment would be improved by the travel, he may be considered available for work during the period in which he was in transit.

Benefit Policy Rule R6-3-5205 provides in pertinent part:

6. A claimant's eligibility is not impaired when he is physically unable to work, or engaged in activities which would prevent his working, provided:
 - a. The period involved is not more than one full calendar day, and
 - b. The inability or activities do not reduce or jeopardize his opportunities for employment.

The claimant was in transit more than two days in each of the weeks ending December 21, and January 10. The claimant stayed with her son over Christmas and New Year's holidays. The claimant personally contacted only three employers in Wisconsin, although personal contact is the usual method of obtaining work in her occupation. The Tribunal is not convinced the primary purpose of the trip was to find employment and finds the claimant was unavailable for work.]

In the petition, the Claimant contends the decision of the Tribunal is unjust and unfair and she has made an honest effort to find a job.

The Claimant informed the Deputy that she left Tucson December 16, 1980, and traveled to West Allis, Wisconsin, for the purpose of seeking work. She rode with friends who were returning to the area for a holiday visit. Claimant mentions that her

son, who resides there, told her there were a lot of jobs open.

When a claimant travels to another area, particularly during a holiday period, for the stated purpose of seeking employment, such action must be thoroughly examined. To justify the trip to Wisconsin, based solely on job market information presumably furnished by her son, is subject to close scrutiny. If a claimant is seeking employment, and wishes to obtain labor market information on a particular area, such data is readily available by a call or letter to the local job service office. Such action could well avert the expenditure of time and monies for a trip to an area with a tight labor market, e.g., West Allis, Wisconsin. This fact is further substantiated by the Claimant's testimony (Tr. p. 9):

"Q You're talking about the job service?

A That's right.

Q Is that correct?

A In fact, three deputies told me down there -- they said, why did you come here for? It's worse here than it's probably back in Tucson. That's what he told me."

The Board finds that the Appeal Tribunal decision is supported by the weight of the evidence and, as such, will not be disturbed.

ACCORDINGLY, the decision of the Appeal Tribunal is affirmed on the basis of the record.

DATED this 27th day of March, 1981.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Mary A. Bass, Chairman

E. D. Crowley, Member

Eugene R. Murray, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON June 1, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision

No. PD- 120

Formerly Decision No.
B-173-81 (AT 8215-80)

In the Matter of:

MARLATT,

Claimant.

D E C I S I O N

AFFIRMED

THE CLAIMANT has petitioned for review of the decision of the Appeal Tribunal which held that the Claimant was unavailable for work from August 3, through August 24, 1980, and therefore not entitled to unemployment insurance benefits.

The Appeals Board has carefully reviewed the record in this case, including the exhibits and the transcript. The contentions raised in the petition have been considered.

We find no material error in the findings of fact and, after correcting them in paragraph two, line 5, by changing April to August 24, 1980, adopt them as our own. The reasons for the decision are founded upon a proper application of the law to the facts. We therefore adopt the [following] Tribunal's findings of fact [as corrected], conclusions of law, and the reasons therefor, as our own.

[The claimant's work experience is as a typist/receptionist and finance clerk. She worked for her last employer in Phoenix, Arizona, and was earning \$5.45 an hour after a six-year period of employment ending July 31, 1980.

When she filed her claim in Alamogordo, New Mexico, on August 5, 1980, she certified that the minimum wage she would accept was \$5.45 an hour. Most jobs in the claimant's type of work pay from \$3.10 to \$4.75 an hour. On August 27, 1980, the claimant lowered her wage demand to \$4.00 an hour and her claim was reinstated effective August 24, 1980. The claimant contends that during the period in question she sought work in her usual field and was offered no work at any salary. Her subsequent work search reveals a top wage of \$4.75 an hour. As of January 7, 1981, she was still unemployed.

The claimant has contested a finding she was ineligible for unemployment insurance because she was unavailable for work.

Section 23-771 of the Arizona Revised Statutes provides in part:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that the individual:

* * *

3. Is ... available for work.

Arizona Administrative Rules and Regulations, in Section R6-3-52500, provide in pertinent part as follows:

A. A claimant should understand the import of any statement he makes regarding acceptable wages, and be aware of the prevailing rate. When it has been determined that a claimant has restricted the wages acceptable to him, an evaluation of the claimant's wage requirement is necessary to determine whether he is employable at the specified wage. The claimant's work history showing higher earnings and his possession of unusual abilities might result in employment at wages in excess of the prevailing rate. A claimant should be given a reasonable time in which to seek employment yielding comparable earnings, especially when the higher earnings appear due to superior

ability. However, in time, when his continued unemployment clearly demonstrates that he must accept the prevailing rate if he is to obtain work in the particular locality, his refusal to accept the prevailing rate would render him unavailable for work.

- B. In the absence of special circumstances, work at wages prevailing for his occupation in the community may be considered suitable for the claimant. Whether refusal of such work would render him unavailable depends upon whether such refusal results in his being inaccessible to a substantial number of work opportunities which the community affords. The fact that his restriction excludes some opportunities for suitable work is not conclusive that he is unavailable for work. If work in the particular locality in a particular occupation is quite standardized as to terms of employment, and the vast majority of the local establishments provide rather uniform rates of pay for work in the claimant's occupation, a claimant's insistence upon higher wages for such work may result in his having only the slightest chance of becoming employed. Such a claimant would not be available for work.
- C. In restricting acceptable wages to his former rate of pay, the claimant's availability is not impaired if there are reasonable prospects of re-employment at that figure in the near future.

In this case, for the three-week period in question, the claimant's wage demand was in excess of the top of the range for the type of work she sought. This effectively priced her out of the labor market regardless of whether she was offered work at any wage. Under these circumstances the Tribunal finds she was unavailable for work from August 3, 1980, until her claim was reinstated.]

In the petition, the Claimant contends that she was actively seeking work in Alamogordo, New Mexico. She further contends that in completing her claim form, she inserted a pay rate which she expected to earn rather than the wage rate she would accept as a minimum wage.

Although Claimant may have actually been actively seeking work during the period in which she was disqualified for benefits,

the form which she completed in connection with her benefit claim is plain and unambiguous on its face. The question on the form reads: "What is the minimum wage you are willing to accept?" Claimant inserted \$5.45 per hour.

It was established that this hourly figure is considerably higher than the prevailing wage rates in Alamogordo, New Mexico, for Claimant's type of work. It was only after Claimant learned that she had been disqualified for benefits that she reduced her wage expectations. Here, the Claimant's wage demand and expectancy thereof, served only to effectively 'price her out of the market' in the geographical area of her work search.

The decision of the Tribunal correctly sets forth the applicable rules regarding acceptable wage requirements. The salient portion of such rules, A.C.R.R. R6-3-52500(B), states in part:

If work in the particular locality in a particular occupation is quite standardized as to terms of employment and the vast majority of the local establishments provide rather uniform rates of pay for work in the claimant's occupation, a claimant's insistence upon higher wages for such work may result in his having only the slightest chance of becoming employed. Such a claimant would not be available for work.

For the three-week period in question, Claimant had only the slightest chance of becoming employed due to her wage expectations. It is immaterial to our consideration that Claimant has not been able to find work even after she reduced her wage expectations. It is sufficient that during the three-week period in question, she expected that if a job opportunity came along, that job would pay \$5.45 per hour. Since this wage rate was excessive for the area (a fact which Claimant could have easily determined by reference

to the local classified section of her newspaper, or in consultation with the local Job Service Office) Claimant was properly determined to be unavailable for work and therefore not entitled to unemployment insurance benefits.

ACCORDINGLY, the decision of the Appeal Tribunal is affirmed on the basis of the record.

DATED this 8th day of May, 1981.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Mary A. Bass, Chairman

E. D. Crowley, Member

Eugene R. Murray, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON June 1, 1982 .

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision
No. PD-121

Formerly Decision No.
B-731-81 (AT REM-21-82)

In the Matter of:

PARKS,

Claimant.

D E C I S I O N

AFFIRMED

THE CLAIMANT petitions for review of the decision of the Appeal Tribunal which affirmed the determination of the Deputy and held that the Claimant was not available for work and ineligible for the receipt of unemployment insurance benefits from April 5, 1981, through May 30, 1981.

The petition has been timely filed, and the Appeals Board has jurisdiction pursuant to A.R.S. §§ 23-671(C) and 23-672(C). The original interstate hearing was held in Decatur, Alabama, for the benefit of the liable state, Arizona, on May 27, 1981. Subsequently, an Appeal Tribunal hearing was held in Phoenix, Arizona, on June 2, 1981, and a decision issued on June 3, 1981. A corrected Appeal Tribunal Decision was issued on June 8, 1981, from which the Claimant filed a timely appeal on June 10, 1981. From

a careful review of the petition for review and the entire record, the Board was unable to properly decide the issue presented, and, on December 23, 1981, the Board ordered the matter remanded for the taking of additional evidence. On January 28, 1982, a Remand Hearing was held. The matter is again before the Board. We have carefully reviewed the entire record in this case, including the transcripts of the hearings and the exhibits. The contentions raised in the Claimant's petition have been considered.

THE APPEALS BOARD FINDS no material error in the [following] Appeal Tribunal's findings of fact:

[This worker reopened her claim for unemployment insurance effective April 5, 1981 in Decatur, Alabama, and has continued to file from that area. She is classified as a secretary by the job service.

The claimant resides in Athens, Alabama, population 14,000 and files her claims weekly in Decatur, 13 miles from her home, which is a larger city. The claimant is seeking clerical or secretarial work and states this type of employment is very slow in Athens, the only city she has sought employment.

Between April 5, 1981 and May 2, 1981 the claimant inquired for work solely by telephone inquiry. She was counseled on April 22, 1981 by the department that she should seek work by making personal contacts with prospective employers. Between May 3 and May 30 she listed three personal contacts per week, but only in the Athens area.

The claimant's husband is retired on 100% disability and has been in ill health. He was hospitalized for gall-bladder surgery from April 19, 1981 through May 11, 1981. She left her employment in Arizona to move him to Alabama because of his ill health. The claimant testified that she moved to that area because she has relatives and friends there who can help her take care of her husband.

The claimant said that her sister-in-law lives next door and can help but she has not had to ask for help yet. The claimant added that she obtained a letter from her husband's doctor on May 26, 1981 stating that her

spouse's condition had improved so she can be free to work.]

but supplements them with the following finding:

The Claimant has made no effort to look for work in Decatur because she believes it is an unreasonable commuting distance from Athens, her residence.

We, therefore, adopt the Tribunal's findings of fact, as supplemented, as our own, and present our own reasoning. A.R.S. § 23-771 provides in part:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that the individual:

* * *

3. Is ... available for work.

The record establishes that the Claimant was advised by her husband's Arizona doctor to quit her employment to care for her ill husband (Exh. 13). The Claimant left her Arizona job and, with her husband, returned to Athens, Alabama, where her immediate family lived. Although the Claimant stated she was available and looking for work (Tr. p. 9) from April 5, 1981 (Exh. 1), her husband's Alabama doctor did not release her to return to work until May 26, 1981, after the improvement of her husband's health (Exh. 23).

Administrative rule A.C.R.R. R6-3-52155 provides in part:

A. A claimant is considered available for work only when he is prepared to accept at once (or within a reasonable time) any offer of suitable full time employment. When the claimant's domestic circumstances are such that no work can be accepted for a temporary or permanent period, the claimant is unavailable for work. If, however, the claimant's circumstances do not unduly restrict his chances of employment, he may be available.

Further, administrative rule A.C.R.R. R6-3-52150 provides in part:

C. Removal from locality

1. Generally, a claimant must be in a position to accept work of a type for which he is qualified at a place where that type (or types) of work is done. The mere fact that a claimant goes or moves from one locality to another is not of itself a basis for holding him unavailable for work. The main factors to consider in such a case are:

* * *

c. Does his reason for leaving the old locality or leaving employment in the former locality still exist and, if so, does this unduly restrict his availability for work?

2. A claimant who goes to a new locality generally will be presumed available for work if:

* * *

d. There are no undue restrictions on his employability.

Here, the evidence establishes the Claimant's husband's illness required the Claimant's care, and, therefore, restricted her employability from April 5, 1981, until May 26, 1981.

In addition to the foregoing, the evidence establishes that the Claimant's search for work was of a minimal nature. She made three telephone contacts for each of the weeks ending April 11, 1981, April 18, 1981, April 25, 1981, and May 2, 1981. She made three personal contacts for each of the weeks ending May 9, 1981, May 16, 1981, and May 30, 1981. She made four personal contacts for the week ending May 23, 1981. Athens, Alabama, is a community of approximately 14,000 population (Tr. p. 16) and lies fifteen miles from Decatur (Tr. p. 17) which has a population of approximately 38,000 (Tr. p. 17). The Claimant testified that she didn't feel that she should have to look for a job in Decatur because she believed it was an unreasonable commuting distance

(Tr. p. 18).

A.C.R.R. R6-3-52150 provides in part:

A. General

1. There is a presumption of unavailability if an individual resides in a community in which there is no type work existent for which he is qualified, and he is unable to seek and accept work in other communities in which such work does exist. This presumption can be overcome by a showing that the individual has an attachment to the community in which he is residing and that other suitable work exists. In arriving at a determination of this nature it is necessary to identify the type or types of work which the individual might reasonably be able to do and establish that such work does exist ...

* * *

C. Removal from locality

* * *

6. Various other factors may have a bearing as to whether a claimant is available for work in a new locality. Among these are:

* * *

e. His reasons for refusing work in other localities;

The Claimant testified that there were people from Athens who worked in Decatur (Tr. p. 19). A.C.R.R. R6-3-52150 also provides in part:

D. Transportation and travel

* * *

6. When a claimant substantially reduced his opportunities for employment by refusing to travel in the same manner as is customary in the locality, he is not available for work unless there is a reasonable expectancy of his obtaining work in the restricted locality.

As to what constitutes a reasonable distance and a reasonable period of travel time, A.C.R.R. R6-3-53150 provides in part:

B. Transportation and travel

* * *

2. Travel over twenty miles from the claimant's residence or more than two hours elapsed time for a round trip may be unsuitable work unless such travel in excess is customary for the claimant or for workers in the same locality as the claimant.

Therefore, the Board finds that the Claimant's refusal to expand her work search from Athens to Decatur has substantially reduced her opportunities for employment, and she was not available for work, under the provisions of the Employment Security Law. Accordingly,

THE APPEALS BOARD AFFIRMS the decision of the Appeal Tribunal on the record. The Claimant was not available for work and is ineligible for the receipt of unemployment insurance benefits from April 5, 1981, through May 30, 1981.

DATED: March 30, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Reana K Sweeney, Chairman

Eugene R. Murray, Member

Robert D. Sparks, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON June 15, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision

No. PD-122

Formerly Decision No.
B-51-82 (AT 7702-81)

In the Matter of:

DAVIES,

AND

FRY'S FOOD STORES,

Claimant.

Employer.

D E C I S I O N

AFFIRMED

THE EMPLOYER petitions for review of the decision of the Appeal Tribunal which affirmed the determination of the Deputy and held that the Claimant was discharged from employment for a reason other than misconduct connected with the work, and that the Employer's experience rating account shall be charged.

The petition has been timely filed, and the Appeals Board has jurisdiction pursuant to A.R.S. §§ 23-671(C) and 23-672(C). We have carefully reviewed the entire record in this case, including the transcript of the hearing, and the exhibits. The contentions raised in the Employer's petition have been considered. No response was filed by the Claimant.

THE APPEALS BOARD FINDS no material error in the Tribunal's findings of fact. The reasons for the decision are founded upon a proper application of the law to the facts. We, therefore,

adopt the [following] Appeal Tribunal's findings of fact, reasoning, and conclusions of law as our own.

[The claimant was hired by "X" Inc., in October of 1980. Her job classification was sanitation coordinator and she was paid \$16,000 per year. Her hours of work were flexible.

On or about September 21, 1981, the claimant was given a report on certain matters which Mr. "A", the director of construction, had concluded that the claimant had failed to comply with requirements. The claimant and Mr. A discussed and set certain goals for the claimant with respect to her job performance. The claimant continued to fail to fully satisfy Mr. A's expectations.

On October 30, 1981, the claimant was scheduled to handle the sealing of a floor in a new store. She made arrangements for personnel to be available at 4:30 p.m. The persons scheduled to do the work did not arrive at the appointed time and the entire project was not completed as scheduled. This was reported to Mr. A.

After discussing the matter with the claimant, Mr. A wrote in his notes of conclusion:

"I contend (claimant) is not competent, thorough, complete and professional in the way she handles people and her duties.

Because of the above mentioned occurrences, and previous occurrences which resulted in other "write-ups", I have decided to terminate (claimant). . . ."

Prior to October 30, 1981, the claimant had made arrangements for the crew. She had reminded the individuals with respect to their commitment to work. When all of the scheduled individuals did not report, the claimant arranged for one additional individual as an emergency measure and proceeded to try to accomplish all the work.

The employer has contested a determination holding the claimant was discharged from employment for a reason other than misconduct connected with the work. The issues raised must be decided under Sections 23-775 and 23-727 of the Employment Security Law of Arizona.

Arizona Administrative Rules and Regulations, in Section R6-3-51310, provide in pertinent part as follows:

A. Duties not discharged

1. When an employee is given certain tasks to do, an employer may expect that such duties will be performed in accordance with the ability of the worker. Failure to complete assigned work will be considered the same as improper completion of work. The reason(s) for the nonperformance or improper performance will determine whether there was misconduct.
2. A worker discharged for failing to do work which he could reasonably have been able to do or who does work improperly without reasonable excuse, is discharged for misconduct. Important considerations are:
 - a. The worker's knowledge and understanding of his responsibilities; and,
 - b. The extent of his opportunity and ability to do his work properly.

The employer contends that the claimant's failure to accomplish set goals and completely fulfill the duties outlined in her job description amounted to misconduct connected with the work.

After reviewing the evidence in this case, the Tribunal concludes that the claimant had knowledge and understanding of her responsibilities and duties. However, she was given limited control over the personnel needed for accomplishing her goal. On October 30, 1981, the claimant was faced with circumstances over which she had little control. There is no evidence of a lack of effort on her part. Her failure to satisfy the employer's requirements did not arise out of a lack of exercise of ordinary care and the Tribunal finds her discharge from employment was for a reason other than misconduct connected with the work.]

In its petition, the Employer contends that A.C.R.R. R6-3-51300 is applicable to the facts in this case. Also, the Employer contends that the Claimant avoided the problem which led to her discharge by going to lunch.

Administrative rule A.C.R.R. R6-3-51300 provides in part:

A. General

1. A worker has the implied duty of performing his

work with ordinary care and diligence and of making reasonable efforts to live up to such standards of performance as are required by his employer. Misconduct generally arises when a worker knowingly fails to exercise ordinary care in the performance of his duties.

2. "Ordinary care" means that degree of care which persons of ordinary prudence are accustomed to exercise under the same or similar circumstances, having due regard of his or others' rights and safety and to the objectives of the employer. This standard is general and application will vary with the circumstances. For example, the ordinary care expected of a precision engineer will vary considerably from the care expected of a ditch digger. The accepted standard of performance establishes what is ordinary care.

3. This does not mean that every claimant discharged because of unsatisfactory work performance is subject to disqualification. In the absence of gross carelessness or negligence, or recurrence of ordinary carelessness or negligence, the claimant's failure to perform his work properly is presumed to be attributed to good faith error in judgment, inability, incapacity, inadvertence, etc. A conscientious employee may be unable to perform his duties to the satisfaction of his employer because of limited mental capacity, inexperience, or lack of coordination. If such person is discharged for unsatisfactory work his discharge is not for misconduct (emphasis added).

The Claimant's title was "Sanitation Coordinator" (Tr. p. 5).

A thorough examination of the record does not disclose any evidence to establish an "accepted standard of performance" in regard to a "Sanitation Coordinator". As a point of reference, the Employer witness described the job duties of the Claimant to be (Tr. p. 5):

[Hearing Officer]

"Q And what were her duties? ...

[Employer Witness]

A Okay. In general, there is a lot of specifics which I described on the job description, but in general Jean's job was to monitor the sanitation at each facility, and to analyze and make recommendations for any improvements, to come up with a standardized method of sanitation at each store. In general, those are the major topics, okay?"

The Claimant testified (Tr. p. 31):

"Q And what was your understanding of your responsibilities as Sanitation Coordinator?

A To inspect the stores at daytime to see if they conformed to health regulations; also, to inspect and train night crews in nightly sanitation; to be on a consultant basis."

The Claimant was terminated because her superior was dissatisfied in the way she supervised the sealing of some floors at a new store (Tr. p. 6), and because she had left the store for one and one-half hours during that time to eat (Tr. p. 13).

The Claimant testified that she arrived at the new store at 2:45 p.m. Four employees were scheduled to arrive at 4:30 p.m. to do the work. No one showed up until 6:00 p.m., when two employees arrived. The Claimant set them to work sweeping, and left instructions for them to hose down the area and use the buffing machine while she went to eat. She was gone approximately one and a half hours, and upon her return she discovered that only the sweeping had been done (Tr. p. 33). The Claimant testified (Tr. p. 40):

[Hearing Officer]

"Q Could you explain why it was necessary for you to be away one and a half hours?

[Claimant]

A Yes, because I had worked from eight o'clock in the morning, and it was now six o'clock in the evening, and I hadn't even had a lunch break, and I then worked through until one o'clock in the morning, Saturday morning.

Q You were on the job at Fry's during those hours?

A Correct, so between the hours of eight o'clock Friday morning and one o'clock Saturday morning I had one and a half hours for lunch break."

The Claimant also testified (Tr. pp. 43-45):

[Employer Representative]

"Q Did you make an attempt at 4:30 to get anyone to come in?

* * *

[Employer Representative]

Q And what was their answer?

[Claimant]

A They were unable to get the employee for me because it was in the early hours of the evening, and that employee was not expected until approximately eleven o'clock, ...

* * *

[Claimant]

A That was not part of my duties to be calling these employees in. Every time I wanted employees I used to work through the District Manager.

[Employer Representative]

Q Was it your job to get the job done?

A It is my job to get the job done.

Q If people don't show up, what do you do?

A All the employees are under the direction of the District Manager and Managers of the stores. I was not able to call employees in from one location to another other than Dick who was from the corporate offices."

The Board concurs with the Tribunal decision that the Claimant was given limited control over the personnel needed for accomplishing her goal and that she was faced with circumstances over which she had little control. The Board also concurs with the Tribunal decision that the Claimant's failure to satisfy the Employer's requirements did not arise out of a lack of exercise of ordinary care.

The Tribunal applied the appropriate statute A.R.S. § 23-775 and administrative rule A.C.R.R. R6-3-51310, to the facts in this case. The application of A.C.R.R. R6-3-51300 does not alter the Claimant's eligibility for the receipt of unemployment insurance benefits, and the Tribunal's failure to discuss same in the decision is not reversible error. The Board will affirm a Tribunal's decision unless it is arbitrary, capricious, or an abuse of discretion [See, e.g., Thompson v. Arizona Department of Economic Security, 127 Ariz. 293, 619 P.2d 1070 (1980)]. A decision is not arbitrary, capricious, or an abuse of discretion if the weight of the evidence supports it. Here, the findings of the Tribunal are supported by the greater weight of the evidence. Accordingly,

THE APPEALS BOARD AFFIRMS the decision of the Appeal Tribunal on the record.

DATED: March 12, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Reana K Sweeney, Chairman

Eugene R. Murray, Member

Robert D. Sparks, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON June 15, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision

No. PD-123

Formerly Decision No.
B-203-81 (AT 200-81)

In the Matter of:

CHAPMAN,

AND

D.H.I.A.,

Claimant.

Employer.

D E C I S I O N

REVERSED

THE EMPLOYER petitions for review of the decision of the Appeal Tribunal which affirmed the determination of the Deputy and held that the Claimant had been discharged for reasons other than misconduct connected with the work and the Employer's experience rating account was to be charged.

The Appeals Board has carefully reviewed the entire record in this case, including the exhibits and the transcript. The contentions raised in the petition have been considered.

THE APPEALS BOARD FINDS the following facts, included within the record herein, to be the significant facts upon which our decision is based.

The Claimant was employed for approximately four months with a Tempe, Arizona-based dairy herd improvement association. Part of the function of the association was to make herd testings and

milk sample analysis at various dairies in, and around, the greater Phoenix area. The testing procedures are very specific in nature, and involve a 24-hour test period. The association uses two teams of testers to make the samplings, a morning team and an evening team. Each team consists of a tester and a lead person known as a "senior tester." The morning team makes the initial animal identification for the sampling and testing immediately upon the start of the milking operations. At times, these initial recording operations can become hectic. Testers record the initial data on note pads and, as opportunity provides, these initial entries are transferred to "barn sheets." These sheets then become the permanent record of the test. These barn sheets, however, are not taken to the testing site by the testing teams; they must be obtained from the dairy personnel prior to the start of morning milking.

Under ideal conditions, the testing and samplings are made by the first shift team. The data entered on the barn sheets, and the completed sheets, are left at the dairies to be used by the second team to record their testing results.

Under less than ideal conditions, the morning team may not be able to obtain the barn sheets from the dairy personnel prior to the start of the required testing operations. In such cases, they are to proceed with the testing, record the data on the note pads and, at some later point, obtain the barn sheets and complete the entries prior to the start of the second shift testing. If, for any reason, barn sheets are not completed by the first shift testers, animal identification and milk sampling cross-match becomes an impossible task for the second shift, and, therefore,

the second shift is unable to function in conducting the required second half of the operation. During the earlier part of her employment with this organization, the Claimant was a tester assigned to work on the second shift. While on that shift there was one occasion where she found that first shift personnel recorded test data on notebook pads, but had not transferred that data to the barn sheets. On that occasion, the Claimant made the data transfer herself because "I thought I was required to do this. I just didn't want anybody getting in any trouble" (Tr. p. 44). In November of 1980, the Claimant overheard a conversation wherein it was reported that another morning crew had collected data but had not recorded it on the barn sheets. She was told that others had transferred the information to the sheets later. The Claimant was not personally involved in this latter situation.

Somewhat prior to her termination from this job, the Claimant was promoted to senior tester. During the early part of December, 1980, the Association Manager found a number of the Claimant's milk weights and milk sample bottles had not been recorded on the barn sheets, as required. Although this, in itself, was of no major significance, it precipitated a meeting with the Claimant and the Manager. During that meeting, the Manager specifically told the Claimant it was her responsibility to see that all information was recorded on the barn sheets before she left the tested dairy. It was also pointed out, as senior tester, she was paid a higher rate, and that record completeness was part of the responsibility of the position. That meeting was held on December 8, 1980. The circumstances that led directly to the Claimant's discharge occurred on December 11, 1980. The Claimant and another tester were scheduled

to make first shift testings at a local dairy; the Claimant arrived at the dairy substantially prior to the start of milking operations, but, despite her efforts, could not obtain the required barn sheets from the dairy personnel. Nevertheless, the team went ahead with the testing-sampling operations, and recorded their findings. Sometime prior to mid-morning, the dairy's herdsman brought the barn sheets to the Claimant. The Claimant continued with the testing and recorded the data on her note pad, but made no entries on the barn sheets. The Claimant described the activities at the dairy that day to be "... a little bit faster than usual" (Tr. p. 37). During that shift, however, there were slow periods when the Claimant and the tester could have transferred data from scratch pads to barn sheets, had they chosen to do so. There was testimony at the hearing on this point as follows (Tr. pp. 39, 40):

[Hearing Officer]

"Q ... could you have recorded some of it (the data) in the slack times when there was only one milker?

[Claimant]

A Possibly, yes.

* * *

Q Okay. Why didn't you, then, if that's the question?

A I don't have a reason why I didn't.

Q How much of the data do you think you could have reasonably, in your opinion, transferred to the big sheet during the slow period?

A Maybe about an hours worth of recording, which is not to (sic) much.

Q And you say have no reason as to why you did not?

A Except that I was just keeping my mind on what I was doing, and normally that is part of my job, I understand that fully.

Q What?

A That I was to record on these barn sheets. I understand that fully ..."

When the second shift testing team reported to the dairy on the evening of December 11, 1980, they found the barn sheets for the morning testing had not been completed, and, therefore, could make no further progress in the day's testing.

It is the Employer's position that he can understand and accept the non-completion of the barn sheets, by the Claimant, during the earlier part of the testing operations that day, simply because the sheets were not available; however, it was the lack of data entry on the barn sheets delivered during mid-morning that he found inexcusable, and resulted in the Claimant's discharge from her job.

The law and administrative rules and regulations applicable in this case provide as follows:

A.R.S. § 23-775 (Disqualification from benefits):

An individual shall be disqualified for benefits:

* * *

2. For the ten consecutive weeks immediately subsequent to first filing a valid claim after he has been discharged for wilful or negligent misconduct connected with the employment, and in addition his maximum benefit amount shall be reduced by an amount equivalent to eight times his weekly benefit amount.

A.R.S. § 23-619.01(A) provides as follows:

"Misconduct connected with the work" means any act or omission by an employee which constitutes a material or substantial breach of the employee's duties or obligations pursuant to the employment or contract of employment or which adversely affects a material or substantial interest of the employer.

A.C.R.R. R6-3-5105(A) states in pertinent part:

* * *

2. A claimant need not have actually acted with intent to wrong his employer to result in a finding of misconduct connected with the work ...

3. In determining whether the worker would be expected to have avoided the situation which caused the discharge, consideration should be given to the worker's knowledge of his responsibilities through past experience, explanations, warnings, etc. The materiality of such duty should be evaluated in the light of what is customary in the type of business in which the claimant was employed.

In the instant case, A.C.R.R. R6-3-51300(A) must be considered in determining whether the Claimant's discharge was for work-connected misconduct. It provides in pertinent part:

1. A worker has the implied duty of performing his work with ordinary care and diligence and of making reasonable efforts to live up to such standards of performance as are required by his employer. Misconduct generally arises when a worker knowingly fails to exercise ordinary care in the performance of his duties (emphasis added).

2. "Ordinary care" means that degree of care which persons of ordinary prudence are accustomed to exercise under the same or similar circumstances, having due regard to his or others' rights and safety and to the objectives of the employer ...

3. This does not mean that every claimant discharged because of unsatisfactory work performance is subject to disqualification. In the absence of gross carelessness or negligence, or recurrence of ordinary carelessness or negligence, the claimant's failure to perform his work properly is presumed to be attributed to good faith error in judgment, inability, incapacity, inadvertance, etc. A conscientious employee may be unable to perform his duties to the satisfaction of his employer because of limited mental capacity, inexperience, or lack of coordination. If such person is discharged for unsatisfactory work his discharge is not for misconduct.

Further, A.C.R.R. R6-3-51310 provides:

1. When an employee is given certain tasks to do, an employer may expect that such duties will be performed in accordance with the ability of the worker. Failure to complete assigned work will be considered the same as improper completion of work. The

reason(s) for the nonperformance or improper performance will determine whether there was misconduct.

2. A worker discharged for failing to do work which he could reasonably have been able to do or who does work improperly without reasonable excuse, is discharged for misconduct. Important considerations are;
 - a. The worker's knowledge and understanding of his responsibilities, and;
 - b. The extent of his opportunity and ability to do his work properly.

THE APPEALS BOARD DECIDES the record establishes the Claimant was fully aware of the testing-sampling procedures and the need to record that data on the barn sheets. She did not do so on December 11, 1980, despite the availability of time during the shift to make the required recordings. The Claimant's actions, in light of the warning she had received, reflect a deliberate disregard of the Employer's interest. Her discharge was for misconduct connected with the work.

The decision of the Appeal Tribunal is reversed. The Claimant was discharged for misconduct connected with the employment. She is disqualified from December 14, 1980 through February 21, 1981. In addition, her total award is to be reduced by \$216, eight times her weekly benefit amount.

The Employer's experience rating account is not to be charged for unemployment insurance benefits paid the Claimant as a result of this employment.

This decision creates an overpayment if the Claimant was paid benefits during all or part of the period of disqualification.

DATED: December 11, 1981.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Reana K Sweeney, Chairman

Eugene R. Murray, Member

Robert D. Sparks, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON June 15, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision
No. PD-124

Formerly Decision No.
B-587-81 (AT 1950-81)

In the Matter of:

NICKELL,

Claimant.

AND

SALT RIVER PROJECT AGRI.
IMPROVEMENT & POWER DISTRICT,

Employer.

D E C I S I O N

AFFIRMED

THE EMPLOYER, through counsel, petitions for review of the decision of the Appeal Tribunal which affirmed the determination of the Deputy and held that the Claimant was not discharged for misconduct connected with the employment.

The petition has been timely filed, and the Appeals Board has jurisdiction pursuant to A.R.S. §§ 23-671(C) and 23-672(C). We have carefully reviewed the entire record in this case, including the transcript of the hearing, and the exhibits. The contentions raised in the Employer's petition have been considered. No response was filed by the Claimant.

THE APPEALS BOARD FINDS no material error in the Tribunal's findings of fact. The reasons for the decision are founded upon a proper application of the law to the facts. We, therefore, adopt

the [following] Appeal Tribunal's findings of fact, reasoning, and conclusions of law as our own.

[The claimant was employed as an instrument mechanic for "X" District, Page, Arizona, from November, 1975, until his discharge effective February 20, 1981. The claimant was suspended by the employer on October 10, 1980. Both he and the employer witness agreed that an attachment remained between the company and the claimant until his official discharge in February, 1981. The claimant continued to receive certain company benefits after he had been placed on suspension.

While on suspension, the claimant was employed during November and December, 1980, for a company in Page, Arizona. He was employed for several days and earned wages in excess of his weekly unemployment amount. The claimant did not file his unemployment insurance claim until after the effective date of the discharge action from X District.

The claimant's suspension and subsequent discharge resulted from an unsanctioned or wildcat strike that took place beginning April 20, 1980. This action involved 250 to 300 employees of X District. The claimant was off work by his own action for four days during this wildcat strike. He was aware that he was in violation of the no strike clause contained in the collective bargaining agreement in force at the time. The strike ended in May, 1980.

In May, 1980, grievances were filed by a local union regarding the discharge of 18 employees who had been involved in the strike. These grievances were returned to the union by the employer as the employer contended no issue of fact existed. At this point, June, 1980, management of the company issued an edict that no other employees would be terminated as a result of the work stoppage, stating that the 18 discharged employees would serve as a proper example. Management stated that bygones were to be considered bygones and the issue was to be dropped in the spirit of cooperation. The company's position was that no further investigation was to be conducted regarding any of the other employees participating in the action by not reporting to work.

In July, 1980, the union filed a civil suit in Superior court regarding the company's handling of the grievances relating to the discharged employees. Shortly after, in August, 1980, the company filed a countersuit for damages against the union and instituted a complete investigation of the wildcat strike.

This investigation, according to the testimony of Mr. "A", labor relations Administrator, was "motivated by the union's original claim". At this point no specific employees were being investigated.

During the course of the investigation, the claimant's name was raised by two other employees in depositions submitted to the employer in October, 1980. As a result, the claimant was suspended on October 10, 1980, "pending further investigation of union activities during illegal work stoppage". Upon completion of the investigation, the claimant was terminated effective February 20, 1981, for violation of the no strike clause in the bargaining agreement. Had the investigation cleared the claimant, he would have been restored to the job with back pay, etc.

The claimant testified he was aware his job was in jeopardy when he remained away from work during the four days when the work stoppage was going on and that he was aware of the no strike clause in the contract, although he contended, at one point in the hearing, that his intent was not to violate this clause. Mr. A stated that in addition, the claimant, as a member of the executive committee of the union, had a duty to actively denounce the strike and to actively encourage employees to return to work, which he alleged the claimant did not do.

The employer has contested a finding that the claimant was discharged for reasons other than misconduct connected with the employment. The issues raised must be decided under Section 23-775 of the Employment Security Law of Arizona.

The first issue before the Tribunal is the result of the claimant's employment with another entity while he was on suspension from X District.

Arizona Administrative Rules and Regulations, in Section R6-3-50440, provide in pertinent part as follows:

A. General

A temporary separation from work or cessation of work does not necessarily sever the employer-employee relationship, even if the employee obtains work with another employer during the temporary separation.

1. The employer-employee relationship continues when there is a definite agreement between

the employer and worker that the worker will resume his employment at a definite time or on the occurrence of a definitely foreseeable event.

2. In such cases, issues may arise from the initial or intervening employment that require adjudication. Other issues will arise later if the worker does not return to work for the employer with whom he had the continuing employer-employee relationship.

* * *

D. Disciplinary suspension of definite duration

1. When a worker is placed on disciplinary suspension of definite duration there is a presumption that the employer-employee relationship continues during the suspension period. Notice by the claimant that he does not intend to return to work or notification by the employer to the claimant that the job will not be available at the conclusion of the suspension would terminate the employer-employee relationship.

In this case, the claimant, after being suspended, obtained work with another employer during a temporary cessation of work from X District. Both the claimant and the employer agree that the employer-employee relationship continued and that the claimant could have resumed his employment on the occurrence of a definitely foreseeable event, the completion of the investigation. Therefore, the Tribunal finds that the claimant's cessation of work and his obtaining work with another company did not sever the employer-employee relationship and that the separation from X District requires adjudication. In reaching this conclusion, the Tribunal has evaluated the testimony of the parties and notes the claimant did not file his claim for unemployment insurance until officially discharged in February, 1981.

The next issue is the claimant's discharge from employment.

Arizona Administrative Rules and Regulations, in Section R6-3-56445, provide in pertinent part as follows:

4. a. Participation in a strike in violation of a no-strike clause of a collective bargaining agreement is usually misconduct connected with the work.

The Tribunal finds the evidence establishes that the claimant, in remaining away from work for four days was participating

in the strike in violation of the no-strike clause contained in the collective bargaining agreement in effect at the time. The claimant testified he was aware of this clause and also was aware that his job was in jeopardy when he did not report to work.

Next, the Tribunal must turn to the sequence of events in this case. The Rules further provide in pertinent part of R6-3-51385, as follows:

- A. Before a disqualification for a discharge for misconduct may be applied, the worker must have committed an act(s) of misconduct connected with his work and he must have been discharged for such act(s).
- B. Generally, only the employer can state authoritatively the reasons for the worker's dismissal. If the discharge does not follow the commission of misconduct in a prompt and reasonable sequence of events, the burden falls on the employer to establish the causal relationship. When an unreasonable length of time has elapsed between the commission of the act and the discharge, the employer has in effect condoned the act, and the subsequent discharge is not for work-connected misconduct.

The claimant was discharged effective February 20, 1981, after being suspended in October, 1980, for an incident that took place in April, 1980. The Tribunal finds that the above cited rule is applicable in this situation as to the length of time that elapsed between the act and the discharge. Therefore, the burden falls on the employer to establish the causal relationship.

The employer witness testified that in June, 1980, the issue of discharging employees was dropped. There was no further pursuit of this matter until a separate issue generated an investigation of the stoppage. This investigation subsequently established the claimant's misconduct relative to violation of the no-strike clause.

The employer discovered the issue of the claimant's actions in an effort to contest a separate action, the civil suit by the union, not in an effort to establish the claimant's misconduct. The evidence establishes the disclosure of the claimant's misconduct was only incidental to the purpose of the employer's effort.

The testimony establishes management had dropped the issue and stated that no other terminations would take place as a result of any acts that had occurred during the work stoppage in April and May, 1980. The evidence, therefore, establishes that the employer condoned the

claimant's activities during this incident. The employer's decision to resurrect the matter in another context, several months later, fails to show a prompt and reasonable sequence of events as cited in the appropriate rule. The employer has not met the burden of proof to establish the causal relationship between the claimant's acts in April, 1980, and the decision to suspend in October, 1980, and subsequently discharge in February, 1981. The claimant was not discharged for misconduct connected with the employment.]

In its petition, the Employer contends that due to the Claimant's employment under a union contract, Federal law, rather than Arizona law, must control to determine the cause of the Claimant's discharge where he was charged with participation in a strike in violation of a no-strike clause contained in the union contract. This contention may well be true; however, that is not the issue before us. The issue before this Board is whether the Employer has effectively condoned the Claimant's conduct where the act took place ten months prior to the discharge.

The Board does not question the Employer's right to terminate the Claimant for his violation of agreement under a union contract. We have consistently enunciated our adherence to the principle that employers may regulate the actions of their employees through company rules or otherwise, and we neither approve nor disapprove any rule or procedure which may be adopted or utilized by an employer, though the breach thereof may result in an employee's discharge. Such decisions are not within the purview of the Board. The eligibility of a claimant for unemployment insurance benefits is governed by the provisions of the Employment Security Law and not by the employer or employee.

The record establishes that the Claimant participated in certain acts during a wildcat strike in April of 1980; i.e., the

Claimant intentionally missed four consecutive days of work which the Employer categorized as 'absent without leave'. Because of these actions, the Claimant was subsequently discharged on February 20, 1981.

In June of 1980, although the Employer was not aware of the extent of the Claimant's participation in the illegal strike, it was fully aware of the four-day AWOL period subsequently charged and made a part of the reason for the Claimant's discharge. (Tr. p. 32; Employer's Brief, p. 7). The Employer became aware, on October 2, 1980, of the Claimant's participation in the illegal strike, which violated provisions of the union contract.

The record establishes that as a result of the illegal strike in April of 1980, in which 250 to 300 employees participated, twelve employees were terminated on May 6, 1980, and six more employees were terminated on May 20, 1980 (Tr. pp. 6, 7). The Employer witness testified (Tr. pp. 7, 8):

[Employer witness]

"... At this time, which was June of '80, management's position was that the punishment to the 18 overt participants would set a proper example. They would not attempt -- they would attempt, rather, to let bygones be bygones and not terminate any others or press for damages which were very considerable. The issue was to be dropped in the spirit of cooperation, which was needed from our top management; there was to be no further investigation because we had an upcoming negotiation and we wanted to start off on the right foot. ..."

The Employer witness also testified (Tr. p. 28):

[Hearing Officer]

"... Now, there was one point in there where you said you were just going to forget everything -- like you fired --"

[Employer witness]

A That's correct.

Q -- you fired 18 people, right? You terminated 12 employees somewhere around May 6th, or some where in there, and then you terminated --

A On June 12th of '80 --

Q Uh-huh.

A --- when we returned the cases --

Q Yeah, because of no issue of fact.

A -- because of no issue of fact. It was the manager (sic) and philosophy at that time to let bygones be bygones and go ahead."

The Employer witness further testified (Tr. p. 39):

[Hearing Officer]

"Q On 7-7-80, you said I.B.E.W. filed a suit [against the Employer].

[Employer witness]

A Uh-huh. They filed a civil suit.

Q Okay. My question is, because of that civil suit, is that what actually caused the investigation of Mr. Mickell's activities?

A That's correct.

Q All right. Had the union not filed that civil suit, would this investigation have taken place?

A No."

The testimony of the Employer's witness establishes that in May-June of 1980, the Employer condoned the acts of all participants, excluding the eighteen who were terminated, as a result of the wildcat strike held in April of 1980. Had the Union not sued the Employer in July of 1980, no investigation would have been instituted, and the Claimant would have remained employed.

Here, the Tribunal, as adjudicator of the evidence, found that the Employer did not sustain its burden of proof in establishing the causal relationship between the acts of misconduct and the discharge approximately ten months later. The Tribunal applied the appropriate statute, A.R.S. § 23-775, and administrative rules, A.C.R.R. R6-3-51385 and R6-3-56445 ^{1/}, to the facts in this case. The Board will affirm a Tribunal's decision unless it is arbitrary, capricious, or an abuse of discretion [See, e.g., Thompson v. Arizona Department of Economic Security, 127 Ariz. 293, 619 P.2d 1070 (1980)]. A decision is not arbitrary, capricious, or an abuse of discretion if the greater weight of the evidence supports it. Here, the findings of the Tribunal are supported by the greater weight of the evidence. Accordingly,

THE APPEALS BOARD AFFIRMS the decision of the Appeal Tribunal on the record.

DATED: March 11, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Reana K Sweeney, Chairman

Eugene R. Murray, Member

Robert D. Sparks, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON June 15, 1982.

^{1/} A.C.R.R. R6-3-56445 was subsequently amended, effective March 17, 1981.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision

No. PD-125

Formerly Decision No.
B-807-81 (AT 3091-81)

In the Matter of:

LEVI,

AND

ARIZONA PUBLIC SERVICE CO.,

Claimant.

Employer.

D E C I S I O N

AFFIRMED

THE CLAIMANT, through counsel, petitions for review of the decision of the Appeal Tribunal which affirmed the determination of the Deputy and held that the Claimant is disqualified from May 3 through July 11, 1981, and the sum of \$760, eight times her weekly benefit amount, is to be deducted from her total award, and that the Employer's experience rating account is not to be subject to charges.

The petition has been timely filed, and the Appeals Board has jurisdiction pursuant to A.R.S. §§ 23-671(C) and 23-672(C). We have carefully reviewed the entire record in this case, including the transcript of the hearing, the exhibits, and the memorandum of law submitted on behalf of the Claimant. The contentions raised in the Claimant's petition have been considered. No response has

been filed by the Employer.

THE APPEALS BOARD FINDS no material error in the Tribunal's findings of fact. The reasons for the decision are founded upon a proper application of the law to the facts. We, therefore, adopt the [following] Appeal Tribunal's findings of fact, reasoning, and conclusions of law as our own.

[The claimant worked as an engineering designer for "X" Utility, Phoenix, Arizona, for approximately three years until she was discharged on May 1, 1981. The employer contends that it discharged her for excessive tardiness. The claimant disputes the employer's records relating to her alleged tardiness and further contends that her discharge was a result of the employer's discrimination against her because she is a woman.

The section in which the claimant worked consisted of a number of engineers and engineering designers. Each of the latter was paired with one of the former in order to assist the engineer by doing design work. A designer both worked with that engineer and worked alone completing assignments, from the engineer. Mr. "H" provided overall management and guidance.

The section was on "flex-time". Employees could select a starting time as early as 7:00 a.m. or as late as 8:00 a.m. to begin an eight hour day. Mr. H allowed employees who were tardy occasionally to complete eight hours by staying past their scheduled departure time.

In March of 1981 Mr. H, paired the claimant with Mr. "W", an engineer. Mr. W was scheduled to arrive at 7:00 a.m., each work day. The claimant testified that Mr. H asked her to match her arrival times to Mr. W's. Mr. H testified that the claimant requested the early starting time herself. The claimant did not request that she be allowed a later arrival time.

On March 16, 1981, Mr. H took her off the probation status on which she had been placed due to poor attendance. Unbeknownst to the claimant, Mr. H had her daily arrival times monitored by other members of her work section.

On April 22, 1981, he issued the claimant a "letter of instruction," which stated that she had been late to work 17 times in the previous 26 working days. At the

hearing, the claimant testified that she was late without excuse no more than four times during that period.

Beginning April 23, Mr. H began arriving at work before the claimant's scheduled starting time. Every few minutes, he would get up from his own desk and check the claimant's work station. Once he saw that it was prepared for the day's work, he concluded the claimant was at work. He then recorded the time using the clock on the work area wall. He kept records on the arrival times of the other employees as well.

Based on those records, he testified that the claimant was late each of the six work days from April 23, through April 30, 1981, much more than any other employee during that period. The claimant testified that she arrived at work on or before 7:00 a.m. on four of those days. Her car was inoperable and she was late a couple of days because the people with whom she rode did not get to the job site by 7:00 a.m.

The employer issued a discharge letter to the claimant on May 1, 1981, stating that it was terminating her for being late for six consecutive days since April 22, the date of the letter of instruction. Mr. H signed the discharge letter.

At the hearing, the claimant ascribed her discharge to a continuing pattern of discrimination against her as a woman. To support this, she introduced the complaints against X which she has filed with the EEOC. Both parties stipulated into evidence a number of memoranda which has been placed into her file by the employer during her tenure with X.

She also contended that the timekeeping which resulted in her discharge was begun to retaliate against her for her EEOC complaint of March 9, 1981. She argued that this conclusion should be drawn from the circumstances surrounding her discharge.

The employer denied both contentions. Mr. H testified that he began keeping track of the arrival times of all employees in his section in order to monitor compliance with a March 17th memo on time off which he discussed with each staff member.

The claimant did not attempt to bring her discrimination charges to higher management or personnel office.

The claimant has contested a deputy's determination that

the employer discharged her for a disqualifying reason. This appeal must be decided in accordance with Sections 23-775, paragraph 2, and 23-727 of the Employment Security Law of Arizona.

Arizona Administrative Rules and Regulations, in Section R6-3-51435, provide in pertinent part as follows:

- A. The duty to report to work on time is similar to the duty to be present for work. The responsibility for punctuality is expressed or implied in the contract of employment.
- B. The degree of responsibility may vary in proportion to the potential harm to the employer and to the degree of control the worker had over his tardiness. Late arrival due to unavoidable delay in transportation, emergency situations, or causes not within the claimant's control is not misconduct. Unnecessary delay in arrival beyond the time that the worker should have been able to get to work after considering his reason for delay may constitute misconduct.
- C. An isolated instance of tardiness usually is not misconduct. However, when an employee has special responsibilities such as opening an establishment, furnishing power and heat for others and the like, his failure to exercise a high degree of concern for punctuality may amount to misconduct. In the absence of pressing responsibilities, misconduct may be found in repetition of tardiness caused by the worker's failure to exercise due care for punctuality.

Here, the claimant was taken off probation for attendance problems on March 16. She admitted to being late without excuse four times in the next six weeks. On April 22, she received another written warning about her attendance. By her own admission, she arrived late for work two of the next six days. This repetition of tardiness constituted misconduct.

The available evidence does not establish that the claimant's discharge was the result of discrimination against her. The claimant was not the only one required to arrive at work on time. Mr. H kept track of each employee's arrival time during the period immediately prior to the claimant's discharge. Only the claimant was so consistently late.]

In the petition, the Claimant raises four issues, as follows:

1. Claimant's discharge was based solely on sex discrimination against her by the Employer.
2. Claimant was discharged for reasons other than work-connected misconduct within the meaning of A.R.S. § 23-775.
3. Claimant's discharge was arbitrary, discriminatory and unreasonable, and not based on work-related misconduct.
4. The Tribunal's decision is not supported by substantial evidence.

In support of the petition, Claimant's counsel has submitted a "Statement of Facts" upon which her petition is based. The Claimant alleges the following facts are supported by the evidence:

- A. Arizona Public Service followed a policy of "flex time."
- B. The flex time policy meant that the times for arrival and departure were not strictly or rigidly observed.
- C. Three-fourths of the employees used the flex time procedure for time off.
- D. The flex time policy worked in the following way: If an employee was going to be late, he or she would call in and state that they were going to be late. An alternative to calling in would be having a "Request for Time Off" filled out in advance.
- E. The flex time policy was that "as a rule" it was all right for an employee to start later than 7:00 a.m. if the employee called in; the important thing was that the Employer be notified in advance.
- F. The philosophy of the flex time procedure was that employees could come in late, so long as they notified the Employer in advance, and made up the time at the end of the day.
- G. The Employer followed the flex time policy but that it was only to be employed on an "occasional" basis.
- H. The Claimant's discharge is really based upon her utilizing the flex time procedure.
- I. The filing of the E.E.O.C. charge is the only plausible explanation for the Employer's discriminatory treatment of the Claimant in comparison to other workers in the same section who followed the same flex time

procedures.

The Claimant has misconstrued the meaning of "flex time" as used by the Employer, and its purpose. The Claimant's supervisor testified (Tr. p. 45):

[Employer Representative]

"Q What are the normal hours which flex time deviated?

[Supervisor]

A The flex time blended with both construction and engineering and that was the time to -- between construction and engineering we blended other groups to have different starting times. And we fit the total group. (emphasis added)

* * *

[Employer Representative]

Q Yes. I do. What was the intention of going to flex time?

[Supervisor]

A We went to flex time so we could coordinate with construction crews as well as to the engineering crew and other people.

Q Were people assigned flex time or did they volunteer for it?

A Both.

Q People that chose to start earlier than 8:00 o'clock, were they expected to come in when they agreed upon, by that I mean if they chose to come in at 7:00 or 7:30, were they expected to be there by that time?

A Yes.

Q Was this ever articulated to them?

A Yes." (emphasis added) (Tr. p. 63).

Therefore, the record establishes that "flex time", as used by the Employer, was a procedure whereby employees could begin their working hours on a staggered basis to coordinate with

other departments.

The Claimant, however, conceived "flex time" to indicate "flexibility" in being allowed, by the Employer, to work after the normal quitting time to make up for work-time lost when an employee was late for work (Tr. pp. 80, 81).

In the Claimant's "Statement of Facts"--she cites certain portions of the transcript, and Exhibit 12, in an effort to establish that her statements be deemed as "facts". The Board has carefully examined Exhibit 12, and the transcript, and we are unable to find any reference to "flex time" in Exhibit 12 or the testimony cited to establish that "flex time" means what the Claimant perceives it to mean. All references cited by the Claimant in her "Statement of Facts" actually refer to an informal Employer procedure whereby if an employee was going to be late in coming to work, the employee could call in and notify the Employer, and then make up the lost time at the end of the employee's regular shift (Tr. p. 125). However, the Employer's informal procedure was to be used for emergencies (Exh. 17, p. 1) on an "occasional" basis (Tr. pp. 121-126).

Under the Employer's policy of "flex time", which provided for different starting times for employees, some began work at 7:00 a.m. (Tr. pp. 38, 40), some began work at 7:30 a.m. (Tr. p. 41), and others began work at 8:00 a.m. (Tr. p. 39). The Claimant's starting time, beginning the last week in March of 1981 was 7:00 a.m. (Tr. p. 87) which was the starting time she requested (Tr. p. 119). If an employee began work at 7:00 a.m., he was expected to come in to work at 7:00 a.m. (Tr. pp. 63, 124). The Employer's personnel manual, a copy of which the Claimant received when employed

(Tr. p. 34), and which she read (Tr. p. 113), covered the Employer's policy on the subject of time off (Tr. p. 34). Exhibit 12 articulated this policy (Tr. pp. 34, 37).

Based upon Employer documents and testimony, the record establishes that the Claimant's history of absences and tardiness required the Employer to issue a letter of reprimand dated November 26, 1980 (Exh. 15), whereby the Claimant was placed on probation for ninety days with a warning that she would be subject to termination if she failed to significantly improve her absenteeism to an acceptable level.

On March 16, 1981, the Claimant was given another letter (Exh. 20), whereby she was notified that her probationary status had ended, but she was again cautioned to keep her absenteeism at, or near, the company average. On March 17, 1981, all employees were notified (Exh. 12) to inform the Employer of any time to be taken off from work.

On April 22, 1981, the Employer issued a letter of reprimand (Exh. 9) to the Claimant, noting that in the previous twenty-six working days, she had been off work for three days due to personal illness, had taken part of one day off work for personal business, had been late to work on seventeen occasions, and had taken two days of work off for vacation. She was informed that her sporadic attendance was disruptive and non-productive and that failure to comply with the instructions in the letter would result in immediate disciplinary action, possibly including termination.

The next day, April 23, 1981, the Claimant's first and secondary supervisors held a meeting with the Claimant (Exh. 17) at which her previous absences and tardiness were discussed, and

the Claimant was put on notice that her working hours were from 7:00 a.m. to 3:30 p.m. and that she was expected to be at work during those working hours.

On May 1, 1981, the Claimant was given a letter of termination (Exh. 14) because in the eight working days following the April 23rd meeting, the Claimant was late to work on six of those days. Based on Employer records, as testified to by her supervisor, the Claimant's recent work history is as follows (Exh. 10):

WILDA LEVI 3/16/81 - 4/22/81

(7:00 a.m. starting time as of 3/2/81)

<u>DATE</u>	<u>ITEM</u>
3/18/81	Late - 12:30 p.m.
3/20/81	Late - 8:20 a.m.
3/23/81	Late - 8:00 a.m.
3/24/81	Late - 7:45 a.m.
3/25/81	Late - 8:35 a.m.
3/26/81	Late - 8:00 a.m.
3/27/81	Late - 8:35 a.m.
3/30/81	Vacation - (called on 3/30/81)
3/31/81	Vacation
4/1/81	Late - 8:00 a.m.
4/2/81	Late - 8:20 a.m.
4/3/81	Late - 11:20 a.m.
4/6/81	Late - 7:15 a.m.
4/7/81	Late - 7:35 a.m.
4/8/81	Late - 8:15 a.m.
4/9/81	Late - 7:35 a.m.
4/10/81	Late - 7:40 a.m.
4/13/81	Off - Personal Illness
4/14/81	Off - Personal Illness
4/16/81	Off - Personal Illness
4/21/81	Late - 7:35 a.m.
4/22/81	Late - 8:55 a.m.
4/23/81	Late - 8:00 a.m.
4/24/81	Late - 7:10 a.m.
4/27/81	Late - 7:08 a.m.
4/28/81	Late - 7:25 a.m.
4/29/81	Late - 7:12 a.m.
4/30/81	Late - 7:21 a.m.
5/1/81	Late - 9:30 a.m.

The Claimant testified that she had received many letters of reprimand in regard to being off work, or being late to work, or not being in her area of work, and that the letters contained the warning of immediate disciplinary action, possibly including termination (Tr. p. 85). However, contrary to the Employer's records, the Claimant testified that she was not late seventeen times between March 18 and April 22, 1981, but was only late four times (Tr. p. 89) and instead of being late seven times between April 23 and May 1, 1981, she was only late on three occasions (Tr. pp. 94, 95).

The Claimant's supervisor testified that he kept records on all personnel under his supervision in regard to absences and tardiness (Tr. pp. 38 - 44; 59, 60), and issued letters of reprimand to employees other than the Claimant (Tr. p. 60). The supervisor testified (Tr. pp. 61, 62):

[Hearing Officer]

"Q Did you monitor his [male employee] attendance subsequently?

[Supervisor]

A Yeah, I monitor everyone's attendance.

* * *

[Claimant's Counsel]

Q Mr. Hosso, when did you begin, if you can recall, to keep your record of peoples' lateness or tardiness in your section?

[Supervisor]

A I don't understand the question. I always kept these slips.

Q The past eight years?

A Probably six, uh-huh."

Here, the Claimant and an Employer witness, her supervisor, in testifying as to the number of times the Claimant was late for work, presented conflicting testimony. Where the testimony is in conflict, the Tribunal must make a factual determination as to the credibility of each witness. The Board adheres to the principle that where credibility is an issue, the findings of fact of the Tribunal will generally not be disturbed. It is the Tribunal who, by observing the witness' demeanor and the manner in which the testimony is given, is best able to judge credibility. Although the Claimant denied being late the number of times testified to by the Employer's witness, she did admit that she was late for work four times between March 18 and April 22, 1981, and that she was late for work three times between April 23 and May 1, 1981.

It was the Claimant's position during the Tribunal hearing (Tr. p. 71), and further raised on review in her petition, that she was discharged solely due to sex discrimination by her Employer. Subsequent to the letter of March 16, 1981 (Exh. 20), the Claimant filed a complaint with the Arizona Civil Rights Division for the Equal Employment Opportunity Commission on March 19, 1981 (Exh. 13), alleging sex and age discrimination by her Employer. On May 1, 1981, the date of her termination, the Claimant filed a second complaint (Exh. 16) alleging she was terminated as retaliation for filing the first complaint. The issue was thoroughly explored at the Tribunal hearing, and in regard to the first complaint, the record shows (Tr. pp. 65, 66) that the Claimant made little inquiry into the grievance procedure of her Employer to resolve her alleged sexual discrimination problem. She also did not attempt to resolve the problem at any higher management level than her supervisor.

The Claimant perceived her termination was retaliation for filing her complaint of sex discrimination, rather than her disregard or neglect to report to work on time (Tr. pp. 99, 101). The record, however, does not support her contention.

The record establishes that the Claimant made no effort to adjust her grievance on the alleged retaliation. We concur with the Tribunal that the evidence contained in the record does not establish that the Claimant's discharge was the result of discrimination.

In her petition, the Claimant also contends that she was discharged for reasons other than misconduct within the meaning of A.R.S. § 23-775, urging that the heart of this statute is the concept of "fault", citing Boynton Cab Company v. Newbeck, 237 Wis. 249, 296 N.W. 636, 640 (1941) as cited with approval in Arizona Department of Economic Security v. Magma Copper Company, 125 Ariz. 389, 609 P.2d 1089 (1980).

The Claimant overemphasizes the importance of Arizona Department of Economic Security v. Magma Copper Company, supra, which was based upon statutes and rules no longer in effect. The Court of Appeals noted in its decision at 125 Ariz. 389, 393, 609 P.2d 1089, 1093:

Since the phrase "misconduct connected with his work" is nowhere defined in the Employment Security Act, we must determine the meaning the legislature intended to attach to those words.

The Court then arrived at its decision by adopting language from Boynton Cab Co., supra. However, Boynton is no longer dispositive of the issue of eligibility to receive unemployment insurance benefits. An examination of the statutes and

administrative rules and regulations cited by the Court of Appeals in Arizona Department of Economic Security v. Magma Copper Co., supra, establishes the following: 1) With the exception of A.C.R.R. R6-3-51190, which was adopted after Mr. Martinez was discharged [1-24-77], all rules have subsequently been amended. 2) With the exception of A.R.S. § 23-601 which remains unchanged, all statutes have subsequently been amended. 3) A.R.S. § 23-619.01 was adopted [§1, Ch. 179, L'79] to provide, within the Employment Security Act, a definition of "Misconduct connected with his work". A.R.S. § 23-619.01 provides in part:

A. "Misconduct connected with the employment" means any act or omission by an employee which constitutes a material or substantial breach of the employee's duties or obligations pursuant to the employment or contract of employment or which adversely affects a material or substantial interest of the employer.

B. "Wilful or negligent misconduct connected with the employment" includes, but under no circumstances is limited to, the following:

1. Absence from work without either notice to the employer or good cause for failing to give notice, repeated absence from work without good cause where warnings regarding repeated absence have been received from the employer, frequent absences from work without good cause, failure to return to work following an authorized leave, vacation, sick leave or other leave of absence when such failure is without permission from the employer, or repeated failure without good cause to exercise due care for punctuality or attendance in regard to the scheduled hours of work set by the employer (emphasis added).

Therefore, the concept of "fault" is no longer controlling. Misconduct, wilful or negligent, is now the standard in determining whether a claimant is entitled to unemployment insurance benefits. Thus, the current law specifically includes repeated absences and lack of due care for punctuality as misconduct.

In her petition, the Claimant further contends that her discharge was arbitrary, discriminatory and unreasonable, and not based on work-related misconduct. A.R.S. § 23-619.01, supra, sets forth the acts and omissions which constitute misconduct. Here, the evidence establishes a persistent pattern of the Claimant's repeated failure, without good cause, to exercise due care for punctuality in regard to the scheduled hours of work set by her Employer.

Here, the weight of the evidence does not support the contention that the Employer had "tolerated" or "condoned" the Claimant's absences and tardiness. Rather, the greater weight of the evidence establishes that the Employer had consistently reprimanded and counselled the Claimant for her disregard of punctuality.

The decision of the Court of Appeals in Gardiner v. Arizona Department of Economic Security, 127 Ariz. 603, 623 P.2d 33 (1981) is dispositive of this case. The Court held therein that repeated acts of misconduct, after warnings, constituted misconduct in connection with the employment, and the employee's prior work history could be taken into consideration in evaluating the Claimant's conduct. The Court went on to say in Gardiner, supra:

The undisputed evidence showed that the employer had consistently reprimanded and disciplined the employee for his disregard of his work requirements, hoping that the employee's punctuality, attendance, and productivity would improve, until at last his patience was exhausted. These facts show that the employer acted persistently in attempting to change the employee's behavior, rather than passively tolerating the employee's acts.

* * *

An employer may, and normally should take a reasonable time to determine the proper course of action to take when an employee fails to perform ... work with

ordinary care and diligence and fails to live up to such standards of performance as are required by the employer.

The final acts of tardiness by the Claimant, in this case, are not the criteria upon which the findings of misconduct must rest, but, rather, the totality of the circumstances surrounding the ultimate decision of the Employer to discharge the Claimant.

Here, it was the burden of the Employer to show that the Claimant was discharged for excessive tardiness constituting misconduct. The record establishes that the Employer has amply met its burden of proof. The Claimant has not presented sufficient evidence to overcome the Employer's proof. We will affirm a Tribunal's decision unless it is arbitrary, capricious, or an abuse of discretion [See e.g., Thompson v. Arizona Department of Economic Security, 127 Ariz. 293, 619, P.2d 1070 (1980)]. A decision is not arbitrary, capricious or the result of an abuse of discretion if the greater weight of the evidence supports it. Here, the greater weight of the evidence supports the Tribunal decision. From our thorough review of the entire record, we find no basis upon which to disturb the decision of the Tribunal. Accordingly,

THE APPEALS BOARD AFFIRMS the decision of the Appeal Tribunal on the record.

DATED: March 19, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Reana K Sweeney, Chairman

Eugene R. Murray, Member

Robert D. Sparks, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON June 15, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision

No. PD-126

Formerly Decision No.
B-1232-81 (AT 4723-81)

In the Matter of:

RAWLINS,

AND

KENNECOTT COPPER COMPANY,

Claimant.

Employer.

D E C I S I O N

AFFIRMED

THE EMPLOYER, through counsel, petitions for review of the decision of the Appeal Tribunal which affirmed the determination of the Deputy and held that the Claimant is eligible for benefits, if otherwise qualified, from July 12 through August 1, 1981.

The petition having been timely filed, and the Board having jurisdiction pursuant to A.R.S. §§ 23-671(C) and 23-672(C), we have carefully reviewed the record in this case, including the transcript of the hearing and the exhibits, and have considered the contentions raised in the petition, as well as counsel's memorandum in support thereof.

THE APPEALS BOARD FINDS no material error in the findings of fact. The reasons for the decision are founded upon a proper application of the law to the facts. We, therefore, adopt the [following] Appeal Tribunal's findings of fact, reasoning, and

conclusions of law as our own.

[The claimant was an accounting clerk working for "X" Copper Company, Hayden Arizona, when she was laid off on February 27, 1981. The claimant was part of the salaried work force which worked normal business hours. Her layoff was part of a reduction in force instituted by the employer.

As part of its benefit policy for such workers, the employer placed the claimant on a "terminal leave" period from March 2 through July 28, 1981. That terminal leave was calculated by totaling the claimant's vacation pay, separation pay, and payment in lieu of separation notice. The total thus reached was divided by the claimant's daily salary to give the terminal leave period. While on terminal leave, the claimant was covered by the life insurance and medical and dental plans provided by the employer.

According to evidence presented by the employer, the claimant's terminal leave period included six days' deferred vacation, 14 days' current vacation and three days' pro rata vacation, for a total of 23 vacation days. The remainder of the terminal leave period was for separation pay and separation notice.

Even though the claimant was receiving the equivalent of her normal salary while on terminate leave, she was not expected to perform any services for the employer and was free to seek and accept other employment without jeopardizing her rights to receive payments.

The employer has contested a deputy's determination that the claimant was eligible for unemployment insurance from July 12, 1981, the effective date of her claim through August 1, 1981, the last day of the week during which she received any payments for termination leave.

Section 23-621 of the Employment Security Law of Arizona provides:

"Unemployed

An individual shall be deemed 'unemployed' with respect to any week during which he performs no services and with respect to which no wages are payable to him, or with respect to any week of less than full-time work if the wages payable to him with respect to such week are less than his weekly benefit amount."

Arizona Administrative Rules and Regulations provide in pertinent part of Section R6-3-55460:

A. Dismissal or separation pay

1. Dismissal payments include, but are not limited to, wages in lieu of notice, dismissal payments, and severance payments, and may be in accordance with the contract of employment or an unilateral policy of the employer.
2. Payments may be made as a lump sum at the time of termination of services. In other instances, the employer may continue to include the worker on his payroll for one or more pay periods following the termination of the worker's services.
3. Section 23-621 of the Employment Security Law of Arizona provides that an employee is unemployed with respect to any week in which he performs no services and with respect to which no wages are payable to him. Therefore, dismissal or separation payments, as shown above, are considered to be payments for past services and shall not be allocated to any period after the separation from work.

B. Vacation, holiday or sick pay

1. For the purpose of Unemployment Insurance, payments received for vacation, sick or holiday leave are considered earnings and shall result in denial of benefits if allocated to periods during which claims are filed.
2. The appropriate period to which vacation, sick or holiday pay is allocable will be determined in one of the following ways:
 - a. If there was a written or verbal contract between the employer and the claimant in effect at the time of separation, allocate to the appropriate period in accordance with the contract, continuing for the number of work days which the pay would cover at the regular wage rate.
 - b. If no written or verbal contract was in effect, allocate to the appropriate period following the last day of performance of services, continuing for the number of work days which would cover at the regular wage rate.

The claimant was paid 23 days' vacation pay at a rate equivalent to her normal daily salary. That vacation pay must be allocated to the period following her last day of work, February 27, 1981, and be treated as wages for that period. The vacation pay is allocated to the period beginning March 2, 1981, and ending April 4, 1981, the day of the week in which she received vacation pay greater than her weekly benefit amount. The remainder of the sums paid to the claimant in accordance with the employer's terminal leave plan were dismissal payments, and shall not be allocated to any period after the separation from work.

As part of his argument, the employer's attorney submitted to this Tribunal a letter which he had requested from the Chief of the Contributions Section of this Department. In that letter, Mr. Charles Vance stated that the Contribution Sections considered severance pay, dismissal pay, payment in lieu of and such other similar payments to be wages which should be reported by employers and which would be subject to contributions.

Based on this, the employer's attorney argued that all of the payments made by the employer to the claimant during the terminal leave period must be considered wages. He also argued that it would be unjust for this Department to consider such payments/wages for the purpose of requiring contributions from the employer, but not consider them wages for the purpose of determining whether the claimant was employed and charge the employer's experience rating account for benefits paid the claimant during the time she was receiving such payments.

The employer's argument is not persuasive with respect to separation pay. In the instant case, eligibility for benefits turns on when the separation pay was earned, but liability for contributions turns on when it was paid.

R6-3-55460 provides that dismissal or separation payments are to be considered payments for past services i.e.: wages earned before separation. Therefore, those payments are not allocated to weeks after separation even if they are actually paid after separation.

Accordingly, the claimant was unemployed under A.R.S. Section 23-621 beginning April 5, 1981, because she performed no services and no wages were payable to her. The wages she was paid thereafter as separation pay were earned before separation.

The Employment Security Law of Arizona defines wages as

remuneration for services and provides that contributions shall be paid in accordance with prescribed regulations, A.R.S. Sections 23-622 and 23-626 (sic).

The regulations require that employers file quarterly reports of wages paid in the quarter, Arizona Administrative Regulation R6-3-1703(B). They provide further that contributions on taxable wages are due and payable on the due date for the calendar quarter in which the wages were paid, Arizona Administrative Regulation R6-3-1704

Accordingly, the determination of the deputy is affirmed.]

The sole question presented to the Board is whether the Claimant is unemployed, and, thus, eligible for unemployment insurance benefits, during a period in which she is receiving terminal leave pay.

The facts in this case are undisputed: The Claimant, a casualty of a reduction in force implemented by the Employer, received, inter alia, terminal leave pay in accordance with the Employer's written policy. The terminal leave payments, in this case, became payable for the period beginning April 5, 1981, and continued through July 28, 1981, at which time the allocation was exhausted as to the Claimant. The Claimant filed her new claim for benefits effective July 12, 1981. The period then remaining, during which the Claimant continued to receive terminal leave pay, for purposes of our consideration, extended from July 12, 1981, through the week ending August 1, 1981.

The Employer takes the position that, inasmuch as terminal leave pay is considered wages for tax contribution purposes, such payment must necessarily be considered wages for unemployment insurance benefit purposes as well. To hold otherwise, the Employer argues, is inconsistent and arbitrary. The Employer

alleges, further, that administrative rule A.C.R.R. R6-3-55460 is invalid because it contradicts state and federal law (which treat such payments as wages).

A.C.R.R. R6-3-55460 provides:

A. Dismissal or separation pay.

1. Dismissal payments include, but are not limited to, wages in lieu of notice, dismissal payments, and severance payments, and may be in accordance with the contract of employment or an unilateral policy of the employer.

2. Payments may be made as a lump sum at the time of termination of services. In other instances, the employer may continue to include the worker on his payroll for one or more pay periods following the termination of the worker's services.

3. Section 23-621 of the Employment Security Law of Arizona provides that an employee is unemployed with respect to any week in which he performs no services and with respect to which no wages are payable to him. Therefore, dismissal or separation payments, as shown above, are considered to be payments for past services and shall not be allocated to any period after the separation from work.

A.R.S. § 23-621 provides:

An individual shall be deemed "unemployed" with respect to any week during which he performs no services and with respect to which no wages are payable to him, or with respect to any week of less than full-time work if the wages payable to him with respect to such week are less than his weekly benefit amount (emphasis added).

During the period with which we are here concerned, the Claimant performed no services, so the only question before us is the extent to which wages were payable to her "with respect to" each of the weeks in that period. In a week with respect to which no wages were payable, or wages payable less than the weekly benefit amount, the Claimant would satisfy the requirement in A.R.S.

§ 23-621.

A.R.S. § 23-622 defines wages, in part, as:

A. "Wages" means all remuneration for services from whatever source, including commissions and bonuses and the cash value of all remuneration in any medium other than cash ... (emphasis added).

In this, and all similar cases, the employer-employee relationship ends upon separation, and there can be no weeks of employment after that. Dismissal pay, terminal leave pay, severance pay, by whatever designation, whether or not determined to be taxable wages, does not cause a reduction in the Claimant's benefits since it is considered to be a payment for services prior to the worker's separation from employment, and, thus, may not be allocated to a period after she last performed services.

The Tribunal found, in the application of the law and the regulations to the facts of this case, the Claimant is eligible for benefits. The evidence amply supports, and we concur in, that finding.

We are not persuaded by Employer's argument that the administrative rule applied in this case (A.C.R.R. R6-3-55460) is invalid on the grounds that it lacks statutory basis.

A.R.S. § 23-601 - Declaration of Policy - provides:

As a guide to the interpretation and application of this chapter, the public policy of this state is declared to be as follows:

Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds

during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own (emphasis added).

A cardinal principle of statutory interpretation is to follow the plain and natural meaning of language to discover what the legislature intended to say [See Dearing v. Arizona Department of Economic Security, 121 Ariz. 203, 589 P.2d 446 (1978).].

The authority of a public administrative body or agency ordinarily includes the power to make or adopt rules and regulations with respect to matters within the province of such body, provided such rules and regulations are not inconsistent with law, but serve to effectuate the statute it is administering.

The rules and regulations of a public administrative body usually comprise those actions of such body in which the legislative element predominates in that they establish a pattern of conduct to be followed. They are the duly made general rules relative to the subject on which the administrative agency acts, subordinate to the terms of the statute under which they are promulgated, and in aid of the enforcement of its provisions [See 73 C.J.S. Public Administrative Bodies and Procedure § 92.].

In order that a rule or regulation adopted or made by a public administrative body may be valid, it must be within the authority delegated to such body [See State Board of Barber Examiners v. Walker, 67 Ariz. 156, 192 P.2d 723.].

The rule or regulation should be consistent with the

provisions of the statute it seeks to effectuate. Thus, it should not violate or defeat the spirit and purpose of the statute it is intended to carry into effect, but, rather, it should be in furtherance of such statute [See 73 C.J.S. pg. 423, supra - cases cited].

A.R.S. § 23-601, supra, contains clear and unambiguous language. Its thrust is to provide benefits for those persons "unemployed through no fault of their own." The Claimant, it is undisputed, falls within the purview of the statute.

The test of the validity of the regulation herein considered is not, as the Employer contends, the fact that such terminal leave pay is treated as wages for tax contributions (and other) purposes, and, therefore, must necessarily be similarly treated for benefit purposes.

The statutes and regulations governing tax contributions are separate enactments and serve to accomplish a purpose substantially different from A.R.S. § 23-601, supra, and A.C.R.R. R6-3-55460, supra.

Arizona has long recognized the necessity of an administrative body to formulate and adopt rules and regulations for effecting its purposes and conducting its business [See Manhattan - Dickman Construction Company v. Showler, 113 Ariz. 549, 558 P.2d 894 (1976); Long v. Dick, 87 Ariz. 25, 347 P.2d 581 (1959)]. The Court stated in Manhattan - Dickman, citing Memorial Gardens Association, Inc. v. Smith, 16 Ill.2d 116, 131, 156 N.E.2d 587, 596 (1959):

There is a distinction between the delegation of true legislative power and the delegation of subordinate authority to exercise the law. [Citations] While the legislature may not divest itself of its proper function of determining what the law shall be, it may authorize others to do those things which it might properly but cannot understandingly or advantageously

do itself. [Citations].

A.C.R.R. R6-3-55460, supra, is designed and intended to effectuate the provisions of A.R.S. § 23-601, supra, which, by its terms, is designed and intended to provide benefits for persons "unemployed through no fault of their own", as the Claimant in this case,

The fundamental principle of statutory construction is to ascertain and give effect to the intention of the legislature [Mardian Construction Co. v. Superior Court, 113 Ariz. 489, 557 P.2d 526 (1976).].

We find administrative regulation A.C.R.R. R6-3-55460 to be consistent with the policy underlying unemployment insurance benefits and a wholly reasonable interpretation and application of the law. Accordingly,

THE APPEALS BOARD AFFIRMS the decision of the Appeal Tribunal on the record.

The Claimant is eligible for benefits, if otherwise qualified, from July 12, 1981, through August 1, 1981.

DATED: March 12, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Reana K Sweeney, Chairman

Eugene R. Murray, Member

Robert D. Sparks, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON June 15, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision

No. PD- 127

Formerly Decision No.
B-764-80 (AT 4426-80)

In the Matter of:

RINDY,

AND

TELEPHONICS, INC.,

Claimant.

Employer.

D E C I S I O N

REVERSED

THE DEPUTY, and the EMPLOYER, have petitioned for review of the decision of the Appeal Tribunal which held that the Claimant left work voluntarily with good cause in connection with the employment.

The Appeals Board has carefully reviewed the entire record in this matter, including the transcript and exhibits. The contentions raised in the petition have been considered.

The Board, for its purposes, finds the following facts:

The Claimant was employed as an office manager for her last Employer for approximately 9-1/2 years. At the time of her separation, her salary was \$250 per week. She worked approximately 5 to 6 hours per day, five days a week. Her hours of work were generally from 9:00 a.m. to 2:00-2:30 p.m. (Tr. p. 3).

At the time the Claimant accepted this employment, the Employer's premises was located in Scottsdale, Arizona. The Claimant's residence was approximately one mile from her work situs, and her commuting time thereto,

one way was approximately ten minutes. . Nine months prior to the Claimant's quitting, the Employer relocated to Fountain Hills, Arizona. At this time, the Employer began paying the Claimant an additional \$10 weekly for travel allowance. The Claimant's commuting time to the new location was approximately thirty minutes, one way, from her home to the job.

At the hearing, the Claimant testified she was not sure of the distance from her home to the new location because she had "never clocked it". When filing her initial claim, the Claimant stated she was driving forty miles daily to and from work. When completing an eligibility questionnaire, the Claimant stated the commuting distance was twenty-five miles, one way. An Arizona Highway map indicates the mileage distance at approximately twenty miles.

The Claimant had no information as to the cost of commuting involved, stating that she "never kept track" of that item. She testified that the primary factor that caused her to quit was "the aggravation of the drive." She contended her health began to be affected as a result of the commuting, although she did not require nor seek medical assistance in this regard.

Although the Claimant had a prospect of possible other employment, which had not yet materialized, her testimony attests to the fact that the reason for her leaving was the commuting problem, as she recited it.

This is the only employment the Claimant has had since coming to Arizona.

The evidence clearly establishes that the Claimant left her last employment because of her distaste of commuting to Fountain Hills. It is significant that the Claimant tolerated the move for approximately nine months, with the attendant travel.

First, we must examine the departmental rules and regulations as they apply to the issue herein A.C.R.R. R6-3-50150, Distance to work, provides:

A. Removal from locality

* * *

2. If a worker quits because the employer moves the work premises beyond a reasonable commuting distance, he leaves with good cause in connection with the work.

* * *

B. Transportation and travel

1. When a worker quits because of transportation difficulties it must be determined if he left without good cause in connection with his work, or whether he separated for compelling personal reasons not attributable to his employer and not warranting disqualification. Factors to be considered are:

- a. Availability of transportation, both public and private.
- b. Time, distance, and cost of travel in relation to wages paid.
- c. Customary practice of workers in claimant's locality.
- d. Customary practice in worker's trade.
- e. Worker's past pattern of transportation.
- f. Relocation of work site.
- g. Adverse effect of travel on claimant's health.
- h. Prospects of obtaining other work without serious transportation problems.

2. Generally, travel of more than 20 miles from the claimant's residence or more than 2 hours elapsed time for a round trip, or commuting expense equal to 10 per cent or more of a claimant's gross wage is considered excessive unless such time or expense is customary for the claimant or for workers in the same locality as the claimant ... A claimant should not be disqualified if:

- a. His travel time or expense was excessive and he has reasonable prospects of more suitable work; or
- b. His travel time or expense was excessive beyond all reason, even though he lacked assurance of other work.

These rules and regulations are, as stated by the Tribunal, guides to be used in determining the subject issue presented.

However, they are not to be substantially abandoned, for that would defeat the purpose for which they were promulgated.

The record herein clearly fails to establish even a semblance of 'unreasonableness' in the commuting distance engendered by the Employer's relocation; the time involved encompassed, at best, 30 minutes; the distance, about 20 miles on an unobstructed roadway; compensation was paid as a differential. There is no showing that such travel is not customary for workers similarly situated. The "adverse effect" upon the Claimant is unsupported; dislike for, or distaste of, driving to work is proclaimed, but that, in and of itself, furnishes no valid basis upon which to establish good cause for abandoning otherwise satisfactory employment.

Upon our careful review of the evidence, together with a thorough examination of the entire record, and in consideration of the rules and regulations as they are applicable thereto, we are convincingly directed to conclude, and we so find, that the Claimant left her employment without good cause in connection with the work, within the meaning and intent of the Employment Security Law of Arizona.

The decision of the Appeal Tribunal is reversed.

The Claimant left work voluntarily without good cause in connection with the employment and is disqualified from May 25, 1979, until she is reemployed and earns \$450, five times her

weekly benefit amount.

The Employer's experience rating account shall not be charged for benefits paid the Claimant as a result of this employment.

This decision may create an overpayment if the Claimant received benefits during all or part of the period of disqualification.

DATED this 16th day of September, 1980.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Mary A. Bass, Chairman

E. D. Crowley, Member

Eugene R. Murray, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON June 15, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision
No. PD-128

Formerly Decision No.
B-108-80 (AT 9190-79)

In the Matter of:

TERRELL,

AND

J. C. PENNEY CO.,

Claimant.

Employer.

D E C I S I O N

SET ASIDE

THE DEPUTY petitioned for review of the decision issued by the Appeal Tribunal which held that the Claimant left work for a compelling personal reason not attributable to the Employer and not warranting disqualification for unemployment insurance benefits.

The Appeals Board, upon initial review of this case, ordered the taking of additional evidence. This was accomplished on April 17, 1980, when the Claimant appeared and testified in Alabama.

This matter is again before the Board. The entire record has been carefully reviewed, including the transcripts and exhibits. The contentions raised in the petition have been considered.

The Board, for its purposes, finds the following facts:

The Claimant was employed for approximately two years as a cashier for a department store in Tucson, Arizona, until she quit on February 23, 1979. The Claimant's husband is a member of the armed forces and at that

time was stationed at an air force base near Tucson. He received orders assigning him to duty in Germany. Although it appears the Claimant was aware, prior to March, of the transfer, the husband's official orders were dated March 21, 1979, and provided he was to report to his new assignment in Germany on May 30, 1979; his projected departure date was May 15, 1979. Another document verifies that concurrent travel of the Claimant and her child, with her husband, was not approved, and that the anticipated delay for movement of the dependents would be less than twenty weeks.

The Claimant and her husband left Tucson, Arizona sometime in April, then traveled to Montgomery, Alabama, arriving approximately April 30, 1979; the Claimant and her husband had relatives in that state. Her husband was given a thirty-day leave before leaving for Germany. The Claimant became ill in June 1979, and was hospitalized. When travel became available to Germany, she was unable to make the trip due to her illness, and her husband thereupon received a humanitarian re-assignment to Alabama to be with his wife.

The Claimant explained that she quit her job on February 23, 1979, so that she could attend to personal affairs such as preparing and packing for the move; she was pregnant, and had to obtain her medical records, and obtain medical permission to travel.

No medical evidence was presented to establish the necessity of the Claimant's leaving work.

The Claimant stated that she could not have remained in base housing in Tucson pending her travel to Germany, nor did she desire to remain there while pregnant.

The issue before the Board is whether the Claimant left work voluntarily without good cause or left for compelling personal reasons not attributable to the Employer. A.C.R.R. R6-3-50155 provides in pertinent part:

A spouse or unemancipated minor who leaves to accompany a spouse or parent who is a member of the armed services and who is transferred to another locality as a result of official orders is considered to have left for a compelling personal reason not attributable to the employer and not warranting disqualification for benefits.

The Claimant left her employment on February 23, 1979, in

anticipation of her husband's transfer to another country. She did not leave Tucson, however, until late April 1979, and arrived in Alabama, where she and her husband planned to spend his leave, on April 30. Concurrent travel for the Claimant was not approved, but it was anticipated that the Claimant would join her husband at a later date. The Claimant contended she left work February 23, because she had to prepare for the move. The Board does not accept the proposition that approximately two months was required for the Claimant's preparation to travel. The Claimant has not established that she could not have continued working until a time closer to the departure from Arizona. The evidence does not establish that the Claimant, at the time of the quit, left to accompany her spouse within the meaning and intent of the applicable rule. The Claimant, under the circumstances evident herein, left work voluntarily without good cause in connection with the employment.

The decision of the Appeal Tribunal is set aside.

The Claimant left work voluntarily without good cause in connection with the employment and is disqualified from February 18, 1979, until she is re-employed and earns \$345, five times her weekly benefit amount.

The Employer's experience rating account shall not be subject to charges for benefits paid the Claimant as a result of this employment.

This decision may create an overpayment if the Claimant received benefits during all or part of the period of disqualification.

DATED this 13th day of June, 1980.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Mary A. Bass, Chairman

E. D. Crowley, Member

Eugene R. Murray, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON June 15, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision
No. PD-129

Formerly Decision No.
B-59-82 (AT 7688-81)

In the Matter of:

BENSEN,

Claimant.

D E C I S I O N

AFFIRMED

THE CLAIMANT petitions for review of the decision of the Appeal Tribunal which affirmed the determination of the Deputy and held that the Claimant was unavailable for work and ineligible for the receipt of benefits from November 15, 1981, through January 2, 1982.

Having carefully reviewed the entire record in this case transmitted by the Appeal Tribunal upon the filing of the petition, including any exhibits and transcripts, having considered the issue timely and properly raised, and taking jurisdiction pursuant to A.R.S. §§ 23-671(C) and 23-672(C),

THE APPEALS BOARD FINDS no material error in the Appeal Tribunal's findings of fact, and the reasons for its conclusion are founded upon a proper application of the law to the facts.

We, therefore, adopt the [following Tribunal's] findings of fact, reasoning, and conclusions of law as our own.

[The claimant was an employee of long standing with a local mortgage firm in Scottsdale, Arizona. During mid-November, 1981, she left that job to return to North Dakota to assist in caring for her mother. Although her mother requires assistance, this, in itself, does not keep the claimant from full-time employment.

The claimant applied for unemployment insurance benefits effective November 15, 1981, and thereafter filed various continued claims through the week ending January 2, 1982, (the week prior to the date on which the hearing was held). During those weeks, her search for employment consisted of making application with the Fargo, N.D., facility of the firm for which she had worked in Arizona, contacting a local hospital and reviewing newspaper advertisements for work. The claimant says her search for employment was not more extensive because of the high rate of unemployment in the area of her residence.

The claimant has approximately nine or ten years experience in the mortgage loan business. At the time she applied for benefits, she said she also had experience in secretarial work.

The claimant has contested a determination she was unavailable for work and ineligible for unemployment insurance benefits for an indefinite period beginning November 15, 1981.

Section 23-771 of the Arizona Revised Statutes provides in part:

"An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that the individual:

* * *

3. Is ... available for work."

Arizona Administrative Rules and Regulations, in Section R6-3-5205, provide in pertinent part as follows:

2. Availability for work is defined as the readiness of a claimant to accept suitable work when

offered. To fulfill this requirement all the following criteria must be met:

- a. He must be accessible to a labor market
- b. He must be ready to work on a full-time basis
- c. His personal circumstances must leave him free to accept and undertake some form of full-time work
- d. He must be actively seeking work or following a course of action reasonably designed to result in his prompt re-employment in full-time work.

Arizona Administrative Rules and Regulations, in Section R6-3-52160, provide in pertinent part as follows:

- A. 1. In order to maintain continuing eligibility for unemployment insurance a claimant shall be required to show that, in addition to registering for work, he has followed a course of action which is reasonably designed to result in his prompt re-employment in suitable work. Consideration shall be given to the customary methods of obtaining work in his usual occupation or for which he is reasonably suited, and the current condition of the labor market. ...

In this case, the claimant's search for employment in the period ending January 2, 1982 cannot be considered a search for work best designed to result in her prompt reemployment. We therefore find she was unavailable for work.]

In her petition, the Claimant contends the Tribunal's findings inaccurately reflect her job search, in that she had additionally contacted other potential employers. The Claimant also submits names of other employers with whom she has sought work subsequent to the hearing of January 6, 1982.

The Board, in its review is confined to the record, and note therefrom that the Claimant testified that since arriving in North Dakota in early November, 1981, she contacted the Metropolitan home office (Tr. p. 5) for a job, watched ads in the paper

(Tr. p. 5), contacted a hospital (Tr. p. 6), phoned a realty company (Tr. p. 6), and made a call to Gate City Savings and Loan (Tr. p. 6). The Claimant further testified she contacted job service who phoned two local banks on her behalf (Tr. p. 8). Thus, the record shows only two actual in-person job contacts during the approximately 6-7 week period herein considered. Phone calls are merely inquiries, and newspaper ads are no more than preliminary exploration.

The Tribunal, in applying the applicable administrative rules (A.C.R.R. R6-3-5205 and A.C.R.R. R6-3-52160) to the facts of this case, found that the Claimant did not establish she was following a course of action reasonably designed to result in her prompt re-employment in full-time work. We concur in that finding.

The Board is not unmindful of the present condition of the labor market in many areas; however, this condition does not exempt the requirement that there be a reasonable design to obtain employment within the meaning and intent of the Arizona Employment Security Law.

Inasmuch as the Claimant's job search efforts since the date of the hearing are not a part of the record before us, we are unable to consider that information. Accordingly,

THE APPEALS BOARD AFFIRMS the decision of the Appeal Tribunal
on the record.

DATED: February 26, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Reana K Sweeney, Chairman

Eugene R. Murray, Member

Robert D. Sparks, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON July 13, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision
No. PD- 130

Formerly Decision No.
B-1341-81 (AT T-3130-81)

In the Matter of:

MEEK,

AND

NOGALES U.S. EMPLOYEES
FEDERAL CREDIT UNION,

Claimant.

Employer.

D E C I S I O N

AFFIRMED AND MODIFIED

THE CLAIMANT petitions for review of the decision of the Appeal Tribunal which reversed the determination of the Deputy and held that the Claimant was discharged for misconduct in connection with the employment, assessed the statutory disqualification, and non-charged the Employer's experience rating account.

This matter was initially scheduled for hearing, and convened, on October 29, 1981. However, because of the Claimant's failure to receive timely notice of that hearing, the Tribunal re-scheduled the hearing to November 10, 1981, upon waiver of notice. Our review encompasses the re-scheduled evidentiary hearing.

Having carefully reviewed the entire record in this case, transmitted by the Appeal Tribunal upon the filing of the petition, including any exhibits and the transcript, having considered the issue timely and properly raised, and taking jurisdiction pursuant

to A.R.S. §§ 23-671(C) and 23-672(C),

THE APPEALS BOARD FINDS no material error in the Appeal Tribunal's findings of fact, and the reasons for its conclusions are founded upon a proper application of the law to the facts. We, therefore, adopt the [following Tribunal's] findings of fact, reasoning, and conclusions of law as our own.

[The claimant was employed as general manager and assistant treasurer of "X" Credit Union, Nogales, Arizona, for three and one-half years until she was discharged on August 28, 1981.

The claimant was discharged because an Arizona credit union league auditor and federal examiner both recommended her discharge for mismanagement. The audits disclosed missing checks, bank statements, and other records; non-current records; statement errors; and a general ledger not in proper use. The auditors were unable to make full reports because of the missing checks and records. The claimant as manager had control of these records.

The claimant declined to testify at the hearing.

The employer has contested a determination which held the claimant's discharge did not warrant disqualification. The issue involves the application of Section 23-775 and Section 23-727 of the Employment Security Law of Arizona

Arizona Administrative Rules and Regulations, in Section R6-3-51190, provide in pertinent part as follows:

B. Burden of proof and presumption

1. The burden of proof consists of the requirement to submit evidence of such nature that, taking all other circumstances into account, the facts alleged appear to be true. When this burden has been met, the evidence becomes proof.
2. The burden of proof rests upon the individual who makes a statement.

- a. If a statement is denied, by another party, and not supported by other evidence, it cannot be presumed to be true.
- b. When a discharge has been established, the burden of proof rests on the employer to show that it was for disqualifying reasons. This burden may be discharged by an admission by the claimant, or his failure or refusal to deny the charge when faced with it.
- c. An employer who discharges a worker and charges misconduct but refuses or fails to bring forth any evidence to dispute a denial by the claimant does not discharge the burden of proof. It is important to keep in mind that mere allegations of misconduct are not sufficient to sustain such a charge.

The claimant was discharged for failure to maintain documents and records. The claimant failed to deny the charge. The employer has established a prima facie case of misconduct. The Tribunal finds the claimant's discharge was for misconduct.]

In her petition, the Claimant contends the following:

1. The Decision is contrary to the facts and the law;
2. I was denied my right to counsel, due process of law and the right to confront witnesses during the purported hearing held herein;
3. I have been denied my rights under the Constitution of the State of Arizona and the United States of America by the proceedings and the decision herein.

The Claimant was represented at both the initial and re-scheduled hearing by competent counsel who, the record reflects, ably represented the Claimant in these proceedings.

At the inception of the re-scheduled hearing, the Hearing Officer was advised that the Claimant would not testify

(Tr. p. 14):

[Hearing Officer]

"Q ... Mr. Larson, I believe you indicated to me prior

to the hearing that although the claimant is present to exercise her right of presence at this hearing, she is not planning to give testimony. Is that correct?

[Claimant's Counsel]

A That's correct, Mr. Pollard.

[Hearing Officer]

Q So you have no witnesses that will be sworn?

[Claimant's Counsel]

A We have no witnesses."

Claimant's counsel cross-examined the witnesses who testified on behalf of the Employer, successfully objected to the admission of certain documentary evidence, preserved his objections for the record, and made a closing argument.

We find no basis in the record to support the Claimant's contention that she was denied due process of law. The essential elements of due process were accorded the Claimant. She was given the opportunity to be heard, which she declined. She was given the opportunity to defend herself of any allegations of misconduct, rebut any unfavorable testimony, cross-examine witnesses, and object to any of the proceedings. The hearing was conducted so as to accord all parties such fundamental rights as are consistent with the standard of fairness and justice.

The Claimant has presented no definitive basis for her contention that she was denied her constitutional rights. We have examined the record for support of that contention, and find none.

A.R.S. § 23-619.01 provides in relevant part:

A. "Misconduct connected with the employment" means any act or omission by an employee which constitutes a material or substantial breach of the employee's duties and obligations pursuant to the employment or

contract of employment or which adversely affects a material or substantial interest of the employer.

Administrative rule A.C.R.R. R6-3-51190 provides in pertinent part:

B. Burden of proof and presumption

1. The burden of proof consists of the requirement to submit evidence of such nature that, taking all other circumstances into account, the facts alleged appear to be true. When this burden has been met, the evidence becomes proof.
2. The burden of proof rests upon the individual who makes a statement.
 - a. If a statement is denied by another party, and not supported by other evidence, it cannot be presumed to be true.
 - b. When a discharge has been established, the burden of proof rests on the employer to show that it was for disqualifying reasons. This burden may be discharged by an admission by the claimant, or his failure or refusal to deny the charge when faced with it.
 - c. An employer who discharges a worker and charges misconduct but refuses or fails to bring forth any evidence to dispute a denial by the claimant does not discharge the burden of proof. It is important to keep in mind that mere allegations of misconduct are not sufficient to sustain such a charge.

The evidence presented in this case establishes that the Claimant occupied a position of responsibility with the Employer, was accountable for the orderly conduct of critical areas of the business, and the Employer placed great reliance upon the Claimant's knowledge, expertise and integrity.

The evidence establishes that the Claimant, although capable of doing so (Tr. p. 36), failed to perform her reasonable and proper duties (Tr. p. 91), that an audit by state and federal examiners disclosed missing records, records not maintained, computer entries not properly entered, statements in error, checks

missing (Tr. p. 20), and numerous other discrepancies, all of which were within the control and management of the Claimant. The Claimant denied none of the charges made against her.

The evidence further establishes that the Employer was adversely affected by the conduct of the Claimant.

The Tribunal found that the Employer, in this case, met the burden of proof required to establish the Claimant's discharge was for disqualifying reasons. The evidence supports that finding. We perceive no basis to disturb it. Accordingly,

THE APPEALS BOARD AFFIRMS the decision of the Appeal Tribunal on the record, but modified the monetary disqualification found by the Tribunal.

The Claimant was discharged for misconduct connected with her employment.

The Claimant is disqualified from August 23, 1981, until she is re-employed and earns wages of \$475, five times her weekly benefit amount.

The Employer's experience rating account shall not be subject to charges for benefits paid the Claimant as a result of this employment.

DATED: April 1, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Reana K Sweeney, Chairman

Eugene R. Murray, Member

Robert D. Sparks, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON July 13, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision

No. PD-131

Formerly Decision No.
B-1134-81 (AT 5316-81)

In the Matter of:

PHILLIPS,

AND

VALLEY NATIONAL BANK,

Claimant.

Employer.

D E C I S I O N

AFFIRMED

THE EMPLOYER, through its authorized representative, has petitioned for review of the decision of the Appeal Tribunal which affirmed the determination of the Deputy, and held the Claimant discharged for other than misconduct, and eligible for the receipt of unemployment [benefits], and the Employer's experience rating account subject to charges for benefits paid the Claimant as a result of this employment.

Having carefully reviewed the entire record in this case, including the exhibits, transcript, the Employer's written argument appealing Tribunal Decision and the Claimant's response thereto, having considered the issue timely and properly raised, and taking jurisdiction pursuant to A.R.S. §§ 23-671(C) and 23-672(C),

THE APPEALS BOARD FINDS no material error in the Appeal

Tribunal's findings of fact, and the reasons for its conclusions are founded upon a proper application of the law to the facts. We, therefore, adopt the [Tribunal's] findings of fact, reasoning, and conclusions of law as our own [as follows]:

[The claimant was last employed as a teller for the employer, a national banking association, from September 5, 1978 until she was discharged on August 26, 1981 due to what the employer considered to be excessive absenteeism.

Throughout the claimant's employment she has suffered from severe abdominal pain resulting from an appendectomy performed approximately 11 years prior to her discharge. This condition caused the claimant to be absent from all or portions of 24 working days during 1981. The employer's medical insurance enabled the claimant to obtain medical treatment at a health maintenance facility. On June 30, 1981, the claimant and her manager discussed her absenteeism and the reasons therefor and concluded that it might be in the claimant's best interests to seek other medical care, although this would be at her expense. The employer's health insurance would not cover such treatment nor did the employer offer to reimburse the claimant for any expenses suffered by her. At the same time, the claimant was placed on a 90-day probation providing that the claimant would not be allowed to have more than two absences during the 90-day period due to illness. After being placed on probation, the claimant was absent three days due to her abdominal condition. On the final occasion, the claimant was undergoing tests requested by the outside physician. After the third absence, the claimant was discharged for failing to meet the conditions of her probationary period.

As a teller, the claimant had responsibility for servicing the walk-in clients of the bank as well as working in the vault and certificate of deposit transactions. There were other employees who could and did cover for the claimant during her periods of absence. No employee was required to work overtime as a result of the claimant's absences.

Prior to discharging the claimant, the employer did not attempt to ascertain either from her or from her physician whether she would recover from her afflictions in the foreseeable future. The claimant assured the employer that the absenteeism would be taken care

of. The employer made no attempt to ascertain whether the claimant had sought medical treatment, pursuant to their recommendations, apart from the health care facility, or, if she had, what that physician prognosis was.

The employer has contested a finding that the claimant was discharged for reasons other than misconduct in connection with the employment. This issue involves the application of Sections 23-775 and 23-727 of the Employment Security Law of Arizona.

Arizona Administrative Rules and Regulations, in Section R6-3-5105, provide in pertinent part as follows:

- B. 1. A separation from work for compelling personal reasons is usually restricted to circumstances which have no direct relation to a worker's employment and usually occurs when a claimant quits his employment for a cause beyond his control. However, under the circumstances set forth in B(2) below, a compelling personal reason determination may be made where the employer acted to discharge the claimant.
2. A determination that the claimant was discharged for a compelling personal reason must establish that:
- a. the employer had no reasonable alternative but to discharge the claimant; and
 - b. one or more of the following circumstances is present:
 - i. the claimant is discharged because of an absence due to incarceration which is determined not to be misconduct under Rule R6-3-5115(E)(1);
 - ii. the claimant is discharged because of a physical or mental condition which might have endangered his own safety on the job or the safety of others, for example: epilepsy, active tuberculosis, etc.; or
 - iii. the claimant is discharged because he was unable to properly perform his work due to a physical or mental condition; or
 - iv. the claimant is discharged because his employer has entered into an agreement with another party, other than the claimant, which would result in a violation

by the employer of a Federal or State law if the claimant is retained in employment.

In appealing the deputy's determination, the employer concedes that the claimant's absences were due to her physical condition and did not represent a disregard of the employer's interests. However, the employer contends that the claimant's discharge should be treated as a discharge for compelling personal reasons, not attributable to the employer and not warranting disqualification from receipt of unemployment insurance benefits.

The Arizona Court of Appeals, in Employment Security Commission v. Valley National Bank of Arizona, 20 Ariz. App. 460, 513 P.2d 1343 (1973) found a discharge for a compelling personal reason where the following conditions were present: (1) The claimant had been ill over an extended period of time; (2) the claimant returned to work but was physically unable to adequately perform her duties at the present or in the immediate future; (3) the employee and the employer's doctor could not establish when the employee would be restored to health, and (4) the employee's position was such that temporary replacement would not be a reasonable alternative. Under these circumstances, the Court found that the employer had no reasonable alternative but to terminate the employment.

The Tribunal finds the factual situation in Valley National Bank of Arizona, supra, to be distinguishable from the instant case. In this case, the claimant was working when able and was not required to take extended periods of time off from work. The employer did not attempt to ascertain if or when the claimant's condition would be alleviated. There has been no showing that temporary replacement during the days of absence, while somewhat inconvenient, was not a reasonable alternative. The claimant was attempting to undergo treatment by a physician independent from her health-care facility, as the employer recommended, and was in the process of undergoing tests for an adequate diagnosis when discharged. The Tribunal finds that the evidence does not establish that the employer had no reasonable alternative but to terminate the employment. Therefore, the discharge was not for a compelling personal reason.]

In its petition for review, the Employer contends essentially that the Appeal Tribunal misapplied the law by failing to follow Employment Security Commission v. Valley National Bank of Arizona, 20 Ariz. App. 460, 513 P.2d 1343 (1973), and A.C.R.R. R6-3-5105(B).

The Employer further contends the Appeal Tribunal's finding that "temporary replacement during the days of absence, while somewhat inconvenient, was a reasonable alternative" is erroneous and that the proper application of the law requires a finding that the Employer is not subject to charges. We do not agree.

The Appeal Tribunal recognized the Court's ruling in Employment Security Commission v. Valley National Bank of Arizona, supra, and correctly found that decision is inapplicable to the instant case. The Court of Appeals, in discussing A.R.S. § 23-727 and the administrative rules applicable thereto which have remained substantially unchanged as they relate to the Employer's contentions, states:

In this case, in our opinion, the Bank has sustained its burden of showing that there was "no reasonable alternative but to terminate the employment." What this showing of no reasonable alternatives must be, must, of necessity, depend upon the particular facts of the case. However, where the evidence before the Commission shows that the illness which caused the inadequate performance had not ceased at the time she returned to her employment and it appears from the actions of the employee herself that she was physically unable to adequately perform her duties in the immediate future, and the illness was not attributable to her employer and did not disqualify her from benefits, we are compelled to conclude that the Bank had "no reasonable alternatives" other than termination and therefore "compelling personal reasons" existed. [20 Ariz. App. 460, 513 P.2d 1343 (1973).]

The evidence of record in the case sub judice does not establish there was "no reasonable alternative but to terminate the employment". In response to the inquiry of the Hearing Officer, the Employer's Operations Officer and the only Employer witness testified:

[Hearing Officer]

"Q Were the nature of her duties such that she had

ongoing duties from day to day, or were most of them a daily occurrence?

A They were daily.

Q In other words, she wouldn't have work assignments that would extend over a period of days?

A I don't quite understand.

Q Okay. Were her duties something that she was required to do -- in other words, would they normally be accomplished within a day, her individual tasks?

A Yes.

Q So she wouldn't normally have a job that carried over to the next day or something?

A Well, on occasions when the customer traffic, you know, did not allow her to leave the line to do the C.D.s, on occasion those -- it's not the critical point that they be done every day. They, you know, could be held over to the next day, and in that case, yes, there would be maybe some work from today that would still be there for her tomorrow to get done.

Q Was there anything about either the duties themselves, or the claimant's particular skills and ability, that prevented her duties being covered by someone else in her absence?

A Her duties were covered, you know, by other employees ... (Tr. pp. 13, 14).

* * *

Q Was there anything peculiar about the claimant's duties or her job that would prevent it from being performed in her absence by temporary employees?

A No. If you are referring maybe to a relief staff or something of this nature, a branch of our size normally does not receive relief for employees who are out of work. Some of the smaller branches do, but we have to operate with the staff that we have whether they're there or not.

Q So you normally filled the claimant's position with employees who normally did not work on that day, or moved them around internally?

A Yes (Tr. p. 18).

* * *

[Mr. Birchett]

Q Okay. Mr. Serin, just to pursue these two questions a little further. Could you give me some indication of say the percentage of tellers that are trained to be vault tellers?

[Mr. Serin]

A At our branch I would say about 50 per cent.

Q How many tellers do you have?

A We have nine.

Q And how many of your tellers would you say are trained in, or are able to perform the Certificates of Deposit work?

A At that time we had about three of the tellers plus our utility clerk and myself." (Tr. pp. 20, 21)

Thus, the record shows an alternative existed to the termination and such alternative had been used by the Employer previously. We find nothing in the record which establishes that this alternative was no longer available.

Additionally, the Claimant herein, unlike the claimant in Employment Security Commission v. Valley National Bank of Arizona, supra, was not shown to have an illness which caused any inadequate performance, other than the absence, nor did the Employer establish the Claimant would be physically unable to adequately perform her duties in the immediate future. On the latter issue we note the Employer instructed the Claimant to seek additional medical attention and the Employer believed the Claimant complied with such instructions (Tr. p. 17). We further note the following un rebutted testimony of the Claimant (Tr. pp. 23, 24):

[Hearing Officer]

"Q Okay. You have seen another physician?

A Yes.

Q That's a yes?

A Yes.

Q Did you see one prior to your discharge?

A Before my discharge?

Q Yes.

A Yes, I was taking tests. That's why I was sick those few days, you know, I was taking tests at Arizona Health --

Q You were taking tests those three days?

A Well, no. The 4th I was, and the week before that I was, but I went to work after I took the test.

Q Prior to your discharge did the employer ever ask you to bring in a statement from your physician as to the likehood (sic) of your returning to -- or overcoming these afflictions?

A Now, what you're trying to say is the doctor made out a statement?

Q No, I am asking you if the employer asked you to provide one?

A I can't think -- no, he just told me to bring a note from the doctor for being excused for those days.

Q Excusing your absence?

A Yes.

Q Okay, Ms. (Claimant) I have a number of questions I could ask you, but they've been covered by Mr. (Employer witness') testimony and that portion of the case does not seem to be in dispute. Therefore, I have no further questions to ask you at this time. Do you have anything you wish to add? Oh, let me ask one question which is somewhat remotely relevant because foresight is always -- or hindsight is always 20-20. Has the situation been resolved, your health situation.

A Has it been taken care of by the doctor?

Q Right.

A Well, he's given me medical, you know, pills for the pain, and he just tells me to lay on a heating pad until it goes away. He really didn't give me all -- right now I'm not even covered by a doctor.

Q So you are still having these problems?

A I haven't had it in awhile, well, since I've been -- like three weeks after I've been off. I get triggers but none of those big knife stabbings, you know.

[Mr. Birchett]

Q Ms. Lumm, any questions for the claimant?

[Ms. Lumm]

A No, thank you.

[Mr. Birchett]

Q Anything further from either party?

[Ms. Lumm]

A No further testimony."

Arizona Revised Statutes § 23-727(D), provides:

Benefits paid to an individual whose separation from work with any employer occurs under conditions found by the commission to be within the provisions of paragraph 1 or 2 of § 23-775, or for compelling personal reasons not attributable to the employer and not warranting disqualification for benefits, shall not be used as a factor in determining the future contribution rate of the employer from whose employment the individual so separated, but the employer shall establish the condition of such separation to the satisfaction of the commission by submitting such information as the commission requires within ten days after the date of notification or mailing of notice by the commission that the individual has first filed a claim for benefits (emphasis added).

The Department's guidelines on what factors have to be established by the Employer to meet the burden of proof set forth by A.R.S. § 23-727 and establish "compelling personal reasons" are found in A.C.R.R. R6-3-5105(B). This provision provides:

B. Separation for compelling personal reasons

not attributable to the employer.

1. A separation from work for compelling personal reasons is usually restricted to circumstances which have no direct relation to a worker's employment and usually occurs when a claimant quits his employment for a cause beyond his control. However, under the circumstances set forth in B(2) below, a compelling personal reason determination may be made where the employer acted to discharge the claimant.

2. A determination that the claimant was discharged for a compelling personal reason must establish that:

a. the employer had no reasonable alternative but to discharge the claimant; and

b. one or more of the following circumstances is present:

i. the claimant is discharged because of an absence due to incarceration which is determined not to be misconduct under Rule R6-3-5115(E)(1).

ii. the claimant is discharged because of a physical or mental condition which might have endangered his own safety on the job or the safety of others, for example: epilepsy, active tuberculosis, etc.; or

iii. the claimant is discharged because he was unable to properly perform his work due to a physical or mental condition; or

iv. the claimant is discharged because his employer has entered into an agreement with another party, other than the claimant, which would result in a violation by the employer of a Federal or State law if the claimant is retained in employment.

3. For definitions of "compelling", "personal reasons", and "attributable to the employer", refer to Voluntary Leaving Rule R6-3-5005(C) (emphasis added).

This rule, and Economic Security Commission v. Valley National Bank of Arizona, supra, mandate that no reasonable alternative to termination exists, among other items, before the Employer is not subject to charges. The record herein clearly reveals the Employer has not met his burden of proof. He has not established that no

alternative other than termination existed at the time of the discharge.

The Board will affirm the decision of the Appeal Tribunal unless it is arbitrary, capricious, or against the weight of the evidence if there is substantial evidence to support it [See Webster v. State Board of Regents, 123 Ariz. 363, 599 P.2d 816 (1979).].

We find nothing in the record that would lead us to disturb the findings of the Appeal Tribunal which are amply supported by the evidence.

THE APPEALS BOARD AFFIRMS the decision of the Appeal Tribunal on the record.

DATED: December 8, 1981.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Reana K Sweeney, Chairman

Eugene R. Murray, Member

Robert D. Sparks, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON July 13, 1982.

Having carefully reviewed the entire record in this case, transmitted by the Appeal Tribunal upon the filing of the petition, including any exhibits and transcripts, having considered the issue timely and properly raised, and taking jurisdiction pursuant to A.R.S. §§ 23-671(C) and 23-672(C),

THE APPEALS BOARD FINDS no material error in the Appeal Tribunal's findings of fact, and the reasons for its conclusions are founded upon a proper application of the law to the facts. We, therefore, adopt the [following Tribunal's] findings of fact, reasoning, and conclusions of law as our own.

[This 23-year-old claimant was employed as a clerk by "X" Employer, San Manuel, Arizona for over four years prior to her last day of work January 30, 1981.

The claimant's supervisor testified that she was discharged due to unsatisfactory work performance and poor attendance. The claimant was admonished on or about January 20, 1981 regarding these issues, and advised that both would have to be improved for her to retain her job. The employer identified no further incidents of unsatisfactory work performance after January 20, 1981. The claimant was absent, with proper notice, on January 23; part of her shift on January 27; and her entire shifts on January 28 and January 29. She was discharged on her return to work on January 30, 1981. The claimant submitted appropriate medical substantiation to her employer for these four absences.

The employer has contested a deputy's determination that the claimant's discharge did not warrant disqualification. This case involves the application of Section 23-775 and Section 23-727 of the Employment Security Law of Arizona.

Arizona Administrative Regulation R6-3-51385, provides in pertinent part:

A. Before a disqualification for a discharge for misconduct may be applied, the worker must have committed an act(s) of misconduct connected with

his work and he must have been discharged for such act(s).

B. Generally, only the employer can state authoritatively the reasons for the worker's dismissal. If the discharge does not follow the commission of misconduct in a prompt and reasonable sequence of events, the burden falls on the employer to establish the causal relationship. When an unreasonable length of time has elapsed between the commission of the act [and] the discharge, the employer has in effect condoned the act, and the subsequent discharge is not for work-connected misconduct.

In this case, the employer contends that the claimant was discharged for unsatisfactory work performance and unsatisfactory attendance. The employer identified no incidents of unsatisfactory work performance which occurred after the claimant's warning on January 20, 1981. The only incidents of even arguable misconduct identified as occurring after this January 20 warning were the claimant's absences with proper notice on four days. She had established that those absences were necessitated by her physical inability to work those days, due to illness. The claimant's discharge on January 30, 1981 was caused, as a matter of fact, by her absences between January 20 and January 30, 1981.

Arizona Administrative Rules and Regulations, in Section R6-3-5115, provide in pertinent part as follows:

- A. 1. Implicit in the work relationship is the duty of the employee to report for work and remain at work in accordance with the reasonable requirements of his employer. This duty is not absolute, but is qualified by circumstances relative to the situation of both employee and employer. In determining if a claimant's absence from work is a disregard of his employer's interest, due regard must be accorded to the customs and conditions of work.

In this case, the claimant has substantiated the necessity of her absences on these four days. Under these circumstances, the employer has failed to establish the claimant was discharged for misconduct connected with her work.]

A.R.S. § 23-775 provides that an individual shall be disqualified if she is discharged for misconduct connected with the employment. When a discharge has been established, the Employer

bears the burden of proving that it was for disqualifying reasons [See, A.C.R.R. R6-3-51190].

The issue before this Board is whether the Tribunal erroneously excluded considering the evidence presented by the Employer in support of its contention that the Claimant was discharged for both poor work performance and excessive absenteeism. The exhibits and testimony at the hearing support the Employer's assertion that he gave two reasons for the Claimant's discharge - poor performance and poor attendance. However, A.C.R.R. R6-3-51385 requires the Employer must establish both the acts which caused the discharge and that the Claimant was discharged for commission of the acts. A.C.R.R. R6-3-51385 provides:

A. Before a disqualification for a discharge for misconduct may be applied, the worker must have committed an act(s) of misconduct connected with his work and he must have been discharged for such act(s).

B. Generally, only the employer can state authoritatively the reasons for the worker's dismissal. If the discharge does not follow the commission of misconduct in a prompt and reasonable sequence of events, the burden falls on the employer to establish the causal relationship. When an unreasonable length of time has elapsed between the commission of the act and the discharge, the employer has in effect condoned the act, and the subsequent discharge is not for work-connected misconduct (emphasis added).

The Appeal Tribunal questioned the Employer's witness regarding the grounds for the discharge and the acts of misconduct for which the Claimant was discharged. The transcript, at pages 4 and 5, reveals the following:

[Appeal Tribunal]

"Q Okay. On what grounds?

[Employer witness]

A Misconduct and attendance.

- Q Could you be more specific. What did she do wrong which caused her to leave her job -- to lose her job on January 30th?
- A Taking the two parts, the attendance problem, [Ms.] Lawson had a very serious problem in her inconsistency in work. She ran up an attendance record which came to be over 20 percent absences from her scheduled work shifts. This is not counting a similar -- not near as large -- a similar number of absences from her work shifts of partial days. So her attendance was a very serious problem. And beyond that was her lack of proficiency within her job effort.
- Q Let's take one thing at a time if we can. We've already established that Ms. Lawson's last day of work was January 30th. Was there one particular incident which caused her to be fired on January 30th as opposed to any other time? Why was she fired at the end of January?
- A Not a particular incident as such; some 10 days prior to her termination date I had had another discussion with [Ms.] Lawson indicating to her her attendance was bad. She had to get it corrected. If she had health problems or otherwise that was a problem to her, she must get those problems corrected. If she needed to take time off, whatever was necessary to correct those problems, but they had to be corrected."

This witness also testified that the Claimant had to improve both her performance and attendance or else she would be discharged. The witness had limited opportunity to observe the Claimant's performance and identified no incident of misconduct after the January 20 meeting (Tr. p. 8). The Employer's only other witness, although stressing the Claimant's prior acts of conduct which were of concern to the Employer, made no reference to any incident after the January 20 meeting other than absences (Tr. pp. 10, 11). Thus, there is ample evidence to support the Tribunal's finding that the Claimant was discharged for her absences. But for the absences, she would have complied with the Employer's conditions of continued employment. The record establishes the Claimant gave proper notice

of her absence and was absent due to illness. Absence due to illness, even if repeated, does not constitute misconduct within the meaning and intent of the Employment Security Law [See, A.C.R.R. R6-3-5115]. While recognizing the Claimant's prior work history may be relevant to the issue of eligibility after discharge [See Gardiner v. Arizona Department of Economic Security, 127 Ariz. 603, 623 P.2d 33 (1981)], we are also cognizant that when the evidence reveals that the Employer has elected not to discharge an employee, as in this case, but, rather, continue the employment relationship contingent on the future absence of misconduct, a subsequent act of misconduct must be established before the statutory disqualification may be assessed. The fact that the cumulative actions of the Claimant may have constituted misconduct is irrelevant, for although the Claimant's actions may not be condoned, the Employer's election to forego discharge necessitates a subsequent triggering incident, i.e., a last straw [See Gardiner, supra]. We find no such incident. Discussion of the application of A.C.R.R. R6-3-51300 is unnecessary, for the Employer must first establish that such conduct was the reason for the discharge and this he has failed to do. Accordingly,

THE APPEALS BOARD AFFIRMS the decision of the Appeal Tribunal.

DATED: March 3, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Reana K Sweeney, Chairman

Eugene R. Murray, Member

Robert D. Sparks, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON July 13, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision

No. PD-133

Formerly Decision No.
BR-31-82 (AT 6701-81)

In the Matter of:

SANCIPRIAN,

AND

T.K. DISTRIBUTORS,

Claimant.

Employer.

D E C I S I O N

AFFIRMED UPON REVIEW

THE CLAIMANT, through his attorney, having filed a written request for review and memorandum challenging the Appeals Board's decision, such request having been timely filed, and the Appeals Board having carefully considered same along with any timely response.

THE APPEALS BOARD FINDS:

1. It has jurisdiction in this matter pursuant to A.R.S. § 23-672(F);
2. All interested parties were notified of the filing of the request for review, and were allowed fifteen (15) days in which to respond;
3. The Claimant has not submitted any newly discovered material evidence which, with reasonable diligence, could not have been discovered and produced at the time of the hearing;
4. There was no prejudicial irregularity in the

administrative proceedings on the part of the Department, any referee, or any party to those proceedings sufficient to reverse the decision of the Appeal Tribunal or compel a remand;

5. There was no accident or surprise which could not have been prevented by ordinary prudence;
6. There was no material error in the admission or exclusion of evidence; no errors of law were made at the hearing or during the progress of this action; and
7. The Appeals Board's decision involved no abuse of discretion depriving the Claimant of a fair hearing and was supported by substantial evidence and by applicable law.

The Claimant identifies five items of alleged error which shall be separately addressed. Due to the number and complexity of the alleged errors, they shall be set forth initially and referred to thereafter by item number. The errors are:

- I. Has the Appeals Board, by upholding the decision of the Appeal Tribunal denying the Claimant's request for in-person hearing and treating said motion made pursuant thereto at the time of the scheduled telephone hearing as a hearing on the merits, denied the Claimant, Sanciprian, due process of law by not requiring the Appeal Tribunal to abide by the Agency's rules and regulations applicable thereto?
 - a. Is the Claimant, Sanciprian, entitled to an in-person hearing?
- II. Was the Claimant's failure to go forward with evidence at the time of the scheduled telephone hearing predicated upon his reasonable reliance upon information supplied him by the Agency and so prejudicial to his interest such that he should be afforded an opportunity to present evidence at a formal adjudicatory proceeding?
- III. Did the Appeals Board err in not considering evidence submitted by the Claimant subsequent to the date of the telephone hearing?
- IV. Is the decision of the Appeals Board to accept the findings of fact made by the Appeal Tribunal supported by the evidence?

- V. Is the conclusion made by the Appeal Tribunal denying the Claimant benefits until such time as he is reemployed and earns \$475, contrary to the legislative prescription that specifies that when someone voluntarily terminates his employment without good cause there exists a mandatory waiting period of six weeks before he can become eligible for benefits?

ITEM I.

As stated previously, in the Appeals Board decision of February 18, 1982, there is no absolute right to an in-person hearing before the Appeal Tribunal. Claimant does not now challenge this holding but, rather, asserts that the narrower issue that the agency has not followed its own "rules" and, thus, deprived the Claimant of due process and equal protection, must be addressed (Pet. p. 10). We concur with counsel's contention that the agency must comply with its own rules, but find the cases cited inapplicable to the case sub judice since the informational pamphlet given the Claimant is not a "rule". The informational pamphlet is just that - an informal guide designed to provide some, but by no means an exhaustive, description of how the agency functions. To construe the pamphlet otherwise, would be to confer upon it a legal status beyond general information to the level of a formal rule, a rule that has not been promulgated pursuant to the Arizona Administrative Procedure Act (A.R.S. § 41-1001 et seq).

Counsel's contention that the information contained in the informational pamphlet becomes a rule and confers rights upon the parties due to its incorporation by reference in the form "Notice of Telephone Hearing" is not persuasive. The information contained in this notice must be read in its entirety, not piecemeal. We note the sentence immediately preceding the reference to the

informational pamphlet and the incorporating language read:

The Appeal Tribunal will be at the place of hearing on the time and date set forth on the attached notice. All parties attending in person or by telephone have all the rights set forth in the Appeal information pamphlet, PA-174 (emphasis added).

Thus, the notice calls the Claimant's attention to the time and place set for his telephonic hearing. The language "all parties attending in person or by telephone" does not provide the Claimant with the right to elect an in-person hearing, but merely advises him that there are two types of hearing. We reject, as unnecessarily restrictive, any contention that the phraseology of the informational pamphlet precludes its application to telephonic hearings. The Claimant could have appeared, given testimony, and cross-examined the Employer's witnesses via telephone. He also could have submitted written evidence prior to the hearing.

To the extent that the pamphlet advises a party in error, and prejudicial reliance can be shown to have resulted from a reasonable reliance thereon, the Board would seriously entertain a remand; however, that is not the case here. Here, the Claimant had been advised repeatedly, both verbally and in writing prior to the hearing, of his misplaced reliance upon the informational pamphlet. Although a claimant may challenge the appropriateness of the proceedings, he may not dictate the terms upon which his claim will be heard, and where, as in this case, he voluntarily structured his preparation for, and presentation at, the hearing on his interpretations of his rights, he does so at his peril. We have previously dealt with the Claimant's contention of detrimental reliance and the notice provisions of the telephonic hearing; we

find nothing in the petition which compels alteration of our prior decision.

ITEM II.

The Claimant's election to not proceed at the hearing and present all the relevant evidence, can in no way be attributable to the Appeal Tribunal or any other personnel as error. We do not find the Claimant's election to be based upon a reasonable reliance of the agency notice in light of all the circumstances. Proper notice of the time and place of the telephonic hearing was given. The record is devoid of any preclusion by the Appeal Tribunal of the Claimant's offer of evidence or presentation of his case. Any prejudice that may have resulted could have been avoided by appropriate action by counsel. Counsel has identified no case law or statute which entitles a party to insist upon a procedural point, such as the one advanced here, despite instructions from the Appeal Tribunal that the matter must be based on the evidence of record (Tr. p. 4), and not present evidence at the hearing and subsequently, on appeal, introduce that evidence. The law cited, if cited for this proposition, is misconstrued.

The Appeal Tribunal overruled the Claimant's demand for an in-person hearing and proceeded to hear the merits of the case. Such a ruling, on a procedural issue, in no way precluded the Claimant from presenting his case. The Claimant contends, in essence, that the Appeal Tribunal's refusal to grant an in-person hearing, and failure to give a legal explanation and justification for its ruling, constitutes reversible error. We disagree. Although hindsight reveals that a more formal disposition of the

procedural issues involved in this case might have been advisable, counsel has not demonstrated that any act attributable to the Appeal Tribunal so affected the Claimant's position as to compel reversal or remand.

ITEM III.

Notwithstanding the liberal construction of the law to achieve the intended purpose of the Employment Security Act, evidence must be presented at the Appeal Tribunal hearing to establish the Claimant's entitlement to benefits [See Cramer v. Employment Security Law, 90 Ariz. 250, 367 P.2d 956 (1962)]. This body reviews only the evidence of record as admitted by the Tribunal [See A.R.S. § 23-674]. Although we may remand for the taking of additional evidence, no remand is required when the failure to include the evidence in the record is the direct result of the Claimant's actions rather than the Tribunal's. The record before us reveals no error.

ITEM IV.

The findings of the Appeal Tribunal are amply supported by the evidence of record. The Claimant admitted he voluntarily quit his employment for the reason that "I needed to move back to West Virginia because of my wife's father needing her because of his age and health" (Exh. 3). Only after the issuance of a Determination of Deputy on October 22, 1981, did the Claimant identify several other reasons for his leaving. The record reveals the Appeal Tribunal considered the multiple reasons for the Claimant's leaving, as he expressed them in Exhibit 7, and her findings. The Board considered all the Claimant's reasons in its decision on review.

In a voluntary leaving, the Claimant has the burden of proving his leaving was for non-disqualifying reasons. None of the reasons advanced by the Claimant have been sufficiently established. We do not find error in the Tribunal's findings or conclusions. Although we have authority to reverse, modify, and order that taking of additional evidence, we essentially sit as an appellate body confined to the record. We do not second guess the Appeal Tribunal nor substitute our judgment for the Tribunal. We exercise our broad powers only when the record reveals error.

ITEM V.

Counsel's argument relative to the six-week disqualification and reduction in benefit amount is neither founded in law or fact.

A.R.S. § 23-775 provides in pertinent part:

An individual shall be disqualified for benefits:

1. For the week in which he has left work voluntarily without good cause in connection with the employment, and in addition to the waiting week, for the duration of his unemployment and until he has earned wages in an amount equivalent to five times his weekly benefit amount otherwise payable.

The Appeal Tribunal, pursuant to A.R.S. § 23-775, held "the Claimant is disqualified from June 28, 1981, until he is reemployed and earns \$475, five times his weekly benefit amount."

Accordingly,

THE APPEALS BOARD AFFIRMS its decision, there having been

proved no good and sufficient grounds which would cause us to reverse or modify that decision, or to order the taking of additional testimony.

DATED: May 7, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Reana K Sweeney, Chairman

Eugene R. Murray, Member

Robert D. Sparks, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON July 13, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision

No. PD- 134

Formerly Decision No.
B-200-82 (AT 38-82)

In the Matter of:

HANSOHN,

AND

VOLT TECHNICAL SERVICE,

Claimant.

Employer

D E C I S I O N

AFFIRMED

THE EMPLOYER petitions for review of the decision of the Appeal Tribunal which reversed the determination of the Deputy and held that the Claimant did not fail either to apply for available suitable work when so directed by the employment office, or by the Department, or to accept suitable work when offered to him.

The petition having been timely filed, and the Board having jurisdiction pursuant to A.R.S. §§ 23-671(C) and 23-672(C), we have carefully reviewed the record in this case, including the transcript of the hearing and the exhibits, and have considered the contentions raised in the petition and any response.

THE APPEALS BOARD FINDS no material error in the Appeal Tribunal's findings of fact. The reasons for the decision are founded upon a proper application of the law to the facts. We,

therefore, adopt the [following] Appeal Tribunal's findings of fact, reasoning, and conclusions of law as our own.

[The claimant, an electronic technician, is registered with a temporary help firm, X Corporation, Phoenix, Arizona, and has been employed by them in performing services for clients. On November 24, 1981, a recruiter for X Corporation requested the claimant to interview for a job with one of their clients in Chandler, Arizona. The claimant would have been interviewed with other applicants. Whether he would have been hired for the job was to be determined by the client. The claimant declined interviewing for the job because of a distance of over 25 miles from his home to the client's establishment.

The claimant has appealed the determination he failed without good cause to accept or apply for suitable work. The question raised must be decided under Section 23-776 of the Employment Security Law of Arizona.

Section 23-776 makes clear that a disqualification can be assessed for a failure to apply for work only if the claimant has been directed to apply for such work by the employment office or the Department. "Employment Office" is defined in Section 23-616 of the Employment Security Law as a free public employment office or a branch thereof operated by this or any other state, and "Department" is defined in Section 23-611 as the Department of Economic Security. A disqualification can be assessed for failure to accept offered work only if there is a bona fide offer. No offer was made to the claimant other than the opportunity for interview. There is no basis for assessing the disqualification provided for in Section 23-776. The Tribunal finds the claimant did not fail without good cause either to apply for available suitable work when so directed by the employment office or by the Department or to accept suitable work when offered to him.]

In his petition, the Employer contends that, since an interview is only a formal preliminary to the presentation of a bona fide offer of employment, the Claimant, in refusing to accept the Employer's referral to an interview, failed to apply for, or accept,

suitable work. The Employer also contends that the distance between the Claimant's home and the prospective work place, which was the reason for the Claimant's refusal, was not unreasonable.

The Tribunal found that the Claimant was given only the opportunity for a job interview and was not presented with a bona fide offer of employment.

A.R.S. § 23-776 provides:

An individual shall be disqualified for benefits if the department finds he has failed without cause either to apply for available, suitable work, when so directed by the employment office or the department, or accept suitable work when offered him, or to return to his customary self-employment when so directed by the department.

The Tribunal further found that, under A.R.S. §§ 23-611 and 23-616, the Employer did not meet the definition of an "employment office".

A.R.S. § 23-611 provides:

"Commission" or "employment security commission" or "department" means the department of economic security.

A.R.S. § 23-616 provides:

"Employment office" means a free public employment office or branch thereof operated by this or any other state as part of a state-controlled system of public employment offices, or by a federal agency charged with the administration of a free public employment office.

Under the provisions of A.R.S. § 23-776, refusal without good cause is disqualifying only when the referral has been made by an employment office or the Department of Economic Security. The Tribunal thus found that the Claimant did not fail to apply for work when so directed by the employment office or by the Department.

The Tribunal's decision does not turn on the reasonableness

of the distance between the Claimant's home and the prospective work place.

The Tribunal correctly applied the appropriate statutes to the facts in this case, and the greater weight of the evidence supports the Tribunal's findings. Accordingly,

THE APPEALS BOARD AFFIRMS the decision of the Appeal Tribunal.

The Claimant did not fail without good cause to either apply for available, suitable work when so directed by the employment office or the Department, or to accept suitable work when offered to him.

DATED: May 6, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Reana K Sweeney, Chairman

Eugene R. Murray, Member

Robert D. Sparks, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON July 13, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision
No. PD- 135

Formerly Decision No.
B-1014-80 (AT 6511-80)

In the Matter of:

BLANCHARD,

AND

ARIZONA STATE UNIVERSITY,

Claimant.

Employer

D E C I S I O N

SET ASIDE

THE EMPLOYER has petitioned for review of the decision of the Appeal Tribunal which held that the Claimant was disqualified from the receipt of benefits.

The Appeals Board has carefully reviewed the transcript and exhibits in this matter. The contentions raised in the petition have been considered.

The [following] findings of fact, as determined by the Appeal Tribunal, contain no material error, and are adopted by the Board as its own.

[The claimant had been employed for seven years by X University, Tempe, Arizona and was serving as an associate professor in the College of Engineering and Applied Sciences through the semester ending May 15, 1980. On July 10, 1980, the assistant provost of the University directed a letter to the

claimant, notifying him that the necessary papers for his immediate termination were being processed as he had failed to return his signed contract within the 10-day period allotted from June 17, 1980.

Professors' contracts are prepared in the dean's office and sent through the offices of the department chairman for the chairman to secure the signatures of the professors. They are usually received before the professors leave the campus following the completion of the semester. In 1980 they were not received, however, until June 17, 1980 (contracts dated June 16, 1980). The secretary of the department of electronics, the employer witness at the hearing, was contacted as requested by most of the teaching staff at the beginning of the week of June 16, 1980, so had little trouble in notifying most of them. There were two or three, however, who had left the area (including the claimant) whom she had difficulty contacting. By the time the claimant returned the message she had left for him at his residence near Pine, Arizona, it was Wednesday, June 25. An arrangement was made for him to come in and speak to the department chairman on Thursday, June 26. The claimant did not sign his contract at that time because he was seeking to negotiate a leave of absence without pay and felt he would have sacrificed his only basis for negotiation once he had signed the contract. It was the claimant's intention to sign the contract once he had written assurance his request for the leave of absence without pay would be considered for the 1981-1982 contract period, if formally denied (in writing) for the 1980-1981 period.

The claimant received a provisional denial of his request for the 1980-1981 leave of absence without pay from the department chairman in a phone conversation on the evening of June 26, after the department chairman had received a verbal denial of the claimant's request from the associate dean of the college. This denial was subsequently confirmed by the dean of the college and the division director. The claimant was notified verbally on Wednesday July 2. The claimant wanted to get something in writing rather than rely on the verbal responses, so on July 8, 1980, put his request in writing and addressed it to the department chairman. This letter makes no mention of the 1981-82 school year in the leave request. The claimant's next contact from the university was the letter from the

assistant provost of July 10, notifying him his termination papers were being processed. It is dated one day prior to the written denial of the leave request.

The urgency for having the contracts promptly signed (as reflected in the entry on the forms requiring signing with the 10-day period) is based on the need for planning any replacement in case a contract is not to be completed and for information to the payroll department in preparation for release of the August 24, paychecks.]

On July 29, 1980, a Deputy determined the Claimant left work voluntarily without good cause in connection therewith, explaining his determination as follows:

"Best available information indicates you left your employment when you failed to sign your contract. You state you did not sign the contract because you felt you had no appeal rights concerning leave of absence or performance review. Evidence indicates you did have appeal rights. Good cause for leaving has not been established."

The Claimant, in his timely appeal therefrom, stated:

"I did not quit my position at [the Employer]. I was terminated. I was in negotiation to renew my contract and had planned on renewing my contract with the [Employer] when terminated."

On September 8, 1980, a hearing was held in Phoenix, Arizona, at which the Claimant and an Employer's witness appeared and testified. The Employer also had an authorized representative present. The Appeal Tribunal considered the case based on the evidence of record, and rendered a decision on September 17, 1980. The decision set aside the determination of the Deputy and held that the Claimant was discharged for misconduct connected with the employment, and the appropriate disqualification was assessed.

In the petition, the Employer contends that the Claimant's

separation should be viewed as a voluntary quit without good cause, not a discharge for misconduct.

A.C.R.R. R6-3-50135(A) provides, in relevant part, as follows:

1. A worker's separation from employment is either a quit or a discharge.
2. The claimant quits when he acts to end the employment and intends this result.
3. The separation is a discharge when it results from the employer's intent and action. This includes layoff for lack of work, and requests by the employer for worker's resignation.
4. In borderline cases the determination of whether a separation is a quit or discharge will be made on the basis of who was the moving party.
 - a. The claimant is the moving party when he could have continued to work under conditions of employment not amounting to new work, if the worker is offered continued employment on or before the termination date. This is true even though a date of separation has been stated or agreed to.

The Board finds that the Claimant, in this case, was the moving party. The Claimant was offered continuing employment for the upcoming academic year at a higher rate of pay than for the one just completed. The contract was offered in the same manner as contracts for previous years.

The Claimant, despite being advised by his department chairman to sign the contract within the allotted time and then negotiate for a leave of absence for the following year, refused to do so until he received written assurance that a leave of absence would be considered. The Claimant testified that he did not sign the contract because if he had done so, he would have "nothing left to negotiate with" (Tr. p. 12).

The choice to continue or terminate the employer-employee relationship was the Claimant's. To preserve his teaching position, the Claimant would have merely had to timely sign the proffered contract. He admitted knowledge of the Employer's time limits for signing the contract as well as the emphasis placed thereon. The Claimant further acknowledged being cautioned by his department chairman that he could be jeopardizing his position by his failure to promptly sign the contract. The decision to delay execution of the contract was therefore made with full awareness of the possible consequences.

Although the resultant separation may have differed from the outcome desired, the Claimant risked this consequence in an attempt to gain some imagined strategic advantage in negotiations. Under these circumstances we cannot attribute the separation to actions by the Employer.

A voluntary leaving having been established, the Claimant assumes the burden of establishing good cause therefor. A.C.R.R. R6-3-50210(A) states as follows:

The commonly accepted test of "good cause", when considering voluntary leaving is "What would the reasonable worker have done under similar circumstances?" The following two points should be considered:

1. What was the claimant's reason for leaving?
2. Do the reasons justify leaving.

The Board is unable to find that the Claimant's actions are those of a "reasonable worker". If the Claimant desired to further negotiate prior to signing the contract, without jeopardizing his position, it was incumbent upon him to seek an extension or waiver of the applicable time limit. The Claimant had been aware for at

least one year that the Employer found him to be inadequate in his knowledge of current technology, and had denied him a merit increase for the just concluded year on that basis, yet he waited until the "eleventh hour" to take any ostensible steps to correct the deficiency.

The Board finds no evidentiary basis upon which to support a finding other than the Claimant left work voluntarily without good cause in connection with the employment.

The decision of the Appeal Tribunal is set aside.

The Claimant left work voluntarily without good cause in connection with the employment, and is disqualified from June 22, 1980, until he is reemployed and earns \$450, five times his weekly benefit amount.

This decision creates an overpayment if the Claimant received benefits during all or part of the period of disqualification.

DATED this 26th day of December, 1980.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Mary A. Bass, Chairman

E. D. Crowley, Member

Eugene R. Murray, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON July 13, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision

No. PD- 136

Formerly Decision No.

AB AD-42-80

In the Matter of:

SHOW LOW MEDICAL CLINIC, P.C.

Employer.

D E C I S I O N

AFFIRMED

The issue presented to the Appeals Board is:

Whether benefits paid to Paula Stierlen and to Marlene Mennes should be charged to Show Low Medical Clinic, P.C., on a pro rata basis as provided in A.R.S. § 23-727.

The Appeals Board has carefully reviewed the entire record in this matter, including all information, correspondence and other documents herein. The contentions raised in the Employer's request for reconsideration and protest have been considered.

THE APPEALS BOARD FINDS:

1. Show Low Medical Clinic, P.C., is an Employer subject to the Employment Security Law of Arizona.
2. Paula Stierlen filed a claim for unemployment insurance, a claim notice was mailed to Show Low Medical Clinic, P.C., and a protest to the Claimant

was returned to the Department timely.

3. A Deputy determined on July 6, 1979, that Paula Stierlen was discharged for nondisqualifying reasons, and that the experience rating of Show Low Medical Clinic, P.C., will be charged. No appeal was filed therefrom and the determination of the Deputy became final.

4. A Notice of Benefit Charges dated November 1, 1979, for the calendar quarter ending September 30, 1979, charged the Employer's account for \$138.25; a Notice of Benefit Charges dated February 1, 1980, for the calendar quarter ending December 31, 1979, charged the Employer's account for \$165.90; and a Notice of Benefit Charges dated May 1, 1980, for the calendar quarter ending March 31, 1980, charged the Employer's account for a net amount of \$27.65, all with respect to the Claimant, Paula Stierlen.

5. Show Low Medical Clinic, P.C., did not respond to the charge notices for the calendar quarters ending September 30, 1979 and December 31, 1979.

6. Marlene Mennes filed a claim for unemployment insurance, and a claim notice thereof was mailed on January 3, 1980, to the address of record of the Employer, Show Low Medical Clinic, P.C. The Employer filed a protest to this notice by its letter postmarked January 29, 1980, being 26 days after the mailing of the claim notice.

7. A Notice of Benefit Charges dated May 1, 1980, for the calendar quarter ending March 31, 1980, charged the Employer's account for \$630; a Notice of Benefit Charges dated August 1, 1980, for the calendar quarter ending June 30, 1980, charged the Employer's account for \$1,440; and a Notice of Benefit Charges dated November 1, 1980, for the calendar quarter ending September 30, 1980, charged the Employer's account for \$270, all with respect to Claimant, Marlene Mennes.

8. By its letter of May 1, 1980, with respect to the Notice of Benefit Charges for the calendar quarter ending March 31, 1980; and by its letters of August 12, and September 16, 1980, with respect to the Notice of Benefit Charges for the calendar quarter ending June 30, 1980, the Employer protested these particular notices of charges involving the Claimant.

9. The Department issued a reconsidered determination on November 21, 1980, which it considers an affirmance of all of the foregoing Notices of Benefit Charges. By letter of December 1, 1980, the Employer appealed from this redetermination.

A.R.S. § 23-727 provides in pertinent part:

A. The commission shall maintain a separate account for each employer and shall credit the account with all contributions ... paid by the employer and shall charge the account with all benefit chargeable to it.

* * *

D. Benefits paid to an individual whose separation from work with any employer occurs under conditions found by the commission to be within the provisions of paragraph 1 or 2 of § 23-775, or for compelling personal reasons not attributable to the employer and not warranting disqualification for benefits, shall not be used as a factor in determining the future contribution rate of the employer from whose employment the individual so separated, but the employer shall establish the condition of such separation to the satisfaction of the commission by submitting such information as the commission requires within ten days after the date of notification or mailing of notice by the commission that the individual had first filed a claim for benefits.

* * *

G. A determination that benefits paid shall be used in determining future contribution rates of the employer may be appealed by the employer in the same manner provided for appeals benefit determinations.

A.R.S. § 23-722(B) provides:

All base period employers of a claimant for benefits shall be promptly notified when a claimant files an initial claim for benefits during a period of unemployment.

Department regulation A.C.R.R. R6-3-1708(D) provides in part:

... When chargeability of benefits depends upon the circumstances under which the claimant was separated from his work as set forth in Paragraph D of § 23-727, then a determination that benefits shall not be charged may be made upon information obtained from the claimant or from any other source; but if necessary information is not thus

obtained by the deputy, then to be relieved of charges in a proper case the employer is obligated to submit necessary separation information in writing to the Department within 10 days after the date of written notification or mailing of notice of the Department that the individual has first filed a claim for benefits subsequent to such separation from employment.

A.R.S. § 23-773 provides in pertinent part:

A. A representative designated by the Department as a deputy shall promptly examine any claim for benefits and, on the basis of the facts found by him, shall determine whether or not the claim is valid. If the claim is valid, the deputy shall also determine the week with respect to which the benefit year shall commence, the weekly benefit amount payable and the maximum duration thereof.

B. The deputy shall promptly notify the claimant and any other interested parties of the determination and the reasons therefor. Unless the claimant or interested party, within seven calendar days after the delivery of notification, or within fifteen calendar days after notification was mailed to his last known address, files an appeal from the determination, it shall become final, and benefits shall be paid or denied in accordance therewith. ...

Department of regulation A.C.R.R. R6-3-1404 provides in pertinent part:

A. Except as otherwise provided by Statute or by Department Regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:

1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, ...

* * *

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be

considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, ...

* * *

C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the address on the date it is mailed to the addressee's last known address if not served in person. ...

A.R.S. § 23-732 provides in part:

B. The Department may give quarterly notification to employers of benefits paid and chargeable to their accounts or of the status of such accounts, and such notification, in the absence of an application for redetermination filed within fifteen days after mailing, shall become conclusive and binding upon the employer for all purposes. ...

In this case, the determination of the Deputy dated July 6, 1979, holding among other things, that the experience rating of Show Low Medical Clinic, P.C., will be charged for benefits paid to the Claimant, Paula Stierlen, was not appealed by the Employer.

The Board must conclude that the Determination of Deputy became final. Therefore, benefits paid to the Claimant, Paula Stierlen, were correctly charged to the Employer's account, as shown on the Notices of Benefit Charges from the calendar quarters ending September 30, 1979, December 31, 1979, and March 31, 1980 [See A.R.S. § 23-773(B), supra.].

With respect to Marlene Mennes, the record shows the claim notice was mailed to Show Low Medical Clinic, P.C., on January 3, 1980, and an answer to this notice protesting the payment of benefits and/or charges to its experience rating account with

necessary separation information was not filed by the Employer until January 29, 1980.

This Board finds that this protest was not filed within ten (10) days of the mailing of the claim notice of January 3, 1980. There is nothing in the record herein to indicate that the delay on the part of the Employer in submitting the necessary separation information was due to Department error or misinformation or to the delay or other action of the United States Postal Office, nor has the Employer made any contentions to that effect.

The Board must, therefore, conclude the benefits paid to the Claimant, Marlene Mennes, were correctly charged to the Employer's account, as shown on the Notices of Benefit Charges for the calendar quarters ending March 3, 1980, June 30, 1980, and September 30, 1980 [See A.R.S. § 23-727(D) and A.C.R.R. R6-3-1404 and R6-3-1708(D)].

In accordance with the cited provisions of the Employment Security Law of Arizona and their implementing regulations, this matter is not subject to further review of the Appeals Board.

THE APPEALS BOARD AFFIRMS the reconsidered determination issued November 21, 1980.

Dated this 5th day of February, 1981.

UNEMPLOYMENT INSURANCE APPEALS BOARD
Mary A. Bass, Chairman
E. D. Crowley, Member
Eugene R. Murray, Member

THIS DECISION DESIGNATED AS A
PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON August 17, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision

No. PD- 137

Formerly Decision No.
AB AD-20-80

In the Matter of:

CHINO VALLEY VOLUNTEER FIRE DEPARTMENT

Employer.

D E C I S I O N

AFFIRMED

Chino Valley Volunteer Fire Department appealed to the Appeals Board from the reconsidered determination of the Arizona Department of Economic Security of April 23, 1980, holding the volunteer fire fighters to be employees of Chino Valley Volunteer Fire Department for unemployment insurance purposes.

The notice of hearing herein stated the following questions:

Whether volunteer fire fighters and training officer(s) are employees of Chino Valley Volunteer Fire Department as defined in A.R.S. § 23-613.01.

Whether services performed by volunteer fire fighters and training officer(s) for or in connection with Chino Valley Volunteer Fire Department constitute employment as defined in A.R.S. § 23-615.

Whether remuneration paid for these services constitutes wages as defined in A.R.S. § 23-622.

Whether Chino Valley Volunteer Fire Department is an employer subject to the Employment Security Law of Arizona with coverage beginning January 1, 1978, as defined in A.R.S. §§ 23-615.01, and 23-615.

Chino Valley Volunteer Fire Department by written communication of April 7, 1980, to the Department, requested that its fire fighters and training officer be excluded from coverage under the provisions of A.R.S. § 23-613.01(A)(3).

In answer thereto, the Department issued its reconsidered determination of April 23, 1980, holding that services of fire fighters constitute employment under A.R.S. §§ 23-615 and 23-615.01; and that the exclusions in A.R.S. § 23-613.01(A)(3) are inapplicable in this case. On May 7, 1980, Chino Valley Volunteer Fire Department petitioned for a hearing. On May 19, 1980, the Department issued a Notice of Liability Determination that Chino Valley Volunteer Fire Department is an employer subject to the Employment Security Law of Arizona on the basis of a political subdivision of this state or an instrumentality of a political subdivision, as provided in A.R.S. §§ 23-615 and 23-615.01, with coverage beginning January 1, 1978. This issue is also one of the questions to be resolved in the instant case.

The hearing was held on July 29, 1980, at Prescott, Arizona, before Max Fishman, the Hearing Officer designated by the Appeals Board to conduct this hearing.

* * *

[Names of individuals appealing omitted]

THE APPEALS BOARD FINDS:

1. It is undisputed that Chino Valley Volunteer Fire Department is an instrumentality of a political subdivision of Arizona.
2. Chino Valley Volunteer Fire Department was formed in 1961. It serves the Chino Valley Fire District, an area approximately four miles in width and eight miles in length. It is funded by tax levy collected by the county.

3. Chino Valley Volunteer Fire Department has a chief, assistant chief, battalion chief, who is also the training officer, and eighteen fire fighters at present. All fire fighters are from within its area. All have regular occupations. All fire fighters, including the officers, receive the same amounts in connection with the performance of the same fire fighting or related services.

4. Chino Valley Volunteer Fire Department also employs a bookkeeper and a janitor. The bookkeeper is currently paid \$75 per month. Until about one year ago, she was paid \$50 per month. The janitor is paid \$20 per month.

5. The checks are prepared by the bookkeeper. She prepares and maintains records showing the dates of fires, rescues, drills, the names of the fire fighters involved, and the amounts earned by them. She submits the necessary information to the county as the basis for payments to be made to the fire fighters.

6. The Chino Valley Volunteer Fire Department has a firehouse and three fire engines. Fire fighters are notified of fire alarms or rescue or emergency missions by way of desk monitors in their homes and pagers on their persons, furnished by the fire department. They are alerted through the Prescott Fire Department which acts as the dispatcher. The fire department also provides the fire fighters with fire fighting clothing or "turnouts". Some fire fighters carry their own emergency first aid gear and equipment.

7. An applicant for fire fighter comes to a business meeting held once a month at the firehouse. He is interviewed as to his fire fighting and emergency experience. If he qualifies, he is engaged on a six-month probationary period during which he is required to attend all fire and emergency calls and to get acquainted with the fire and first aid apparatus. The primary purpose of the probationary period is the training of the new fire fighter. After the probationary period, the fire fighter is expected to respond to fire and emergency calls at any time when available, although it is not mandatory. A fire fighter is not required to attend training after he completes his probation, and is not required to notify the chief if he is going out of town or on a vacation.

8. Within a year's time, there is an average of about 20 to 25 fires. Each fire fighter attends approximately ten fires a year. There are usually about three to four rescue calls for each fire call. Usually, from four to nine fire fighters answer a call. A fire fighter is paid \$10 for showing up at a working fire or for a rescue or emergency. In the past, he also was paid an additional \$2 for each hour over the first hour. He is paid \$5 for showing up at a false alarm. If a fire fighter shows up after a fire has been put out, he receives a courtesy payment of \$5. For every working fire, there are eight or nine false alarms. He is paid \$4 for attending training or drills. He is not paid for attending business meetings. He is reimbursed for care mileage when he has to travel to another city for fire department purposes.

9. It is considered that the payment of \$10 for showing up at a working fire or a rescue is to reimburse the fire fighter for gasoline and the use of his vehicle and for possible damage to his clothing or loss of personal property. No report is required from the fire fighter as to expenses he may have actually incurred. The average round trip in answering a call is six to seven miles. No one receives an expense account identified as such. When a new applicant for fire fighter appears at a business meeting, there is no discussion as to his pay, then or later.

10. No social security or withholding tax deductions are made from payments to fire fighters. They are covered for workmen's compensation purposes, and their wages are arbitrarily estimated at \$600 per month for each fire fighter in case of on-the-job injury. Fire fighters are paid twice a year. The cut-off dates are always June 30th and December 31st, so that they are paid in January and in July of each year.

A.R.S. § 23-615 provides in pertinent part:

"Employment" means any service of whatever nature performed by an employee for the person employing him, ... and includes:

* * *

6(c) Service performed after December 31, 1977, in the employ of this state, or any instrumentality, agency or board of this state, or any one or more of the foregoing and one or more other states.

(d) For purposes of this paragraph, the term "employment" does not apply to service performed: ...

* * *

(iii) In the employ of a governmental entity referred to in § 23-750, subsection A, paragraph 2, if such service is performed by an individual in the exercise of his duties: ...

* * *

(D) As an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency; ...

A.R.S. § 23-615.01 provides in pertinent part:

A. Notwithstanding any provisions of the law to the contrary except for subsection B of this section, for the purposes of this chapter, employment, as defined in § 23-615, paragraph 6 shall include service performed after December 31, 1977 in the employ of:

1. Any political subdivision of this state or any instrumentality of such political subdivisions;

"Wages" are defined in A.R.S. § 23-622 as follows:

A. "Wages" means all remuneration for services from whatever source, including commissions and bonuses and the cash value of all remuneration in any medium other than cash.

Department regulation A.C.R.R. R6-3-1705, implementing

A.R.S. § 23-622, provides in part as follows:

* * *

B. The name by which the remuneration for employment is designated or the basis on which the remuneration is paid is immaterial. It may be paid in cash or in a medium other than cash, on the basis of piece work or percentage of profits, or it may be paid on an hourly, daily, weekly, monthly or annual basis. ...

A.R.S. § 23-613.01 provides in pertinent part:

A. "Employee" means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Absent other evidence indicating the employing unit exercises direction, rule or control over the individual as to both the method of performing or executing the services and the result to be effected or accomplished, the following shall not be considered an employee under this section:

* * *

3. An individual who performs services for an employing unit through isolated or occasional transactions, regardless of whether such services are a part of process of the organization, trade or business of the employing unit or who performs casual services for an employing unit.

* * *

C. Notwithstanding any other provision of this chapter, this section shall apply to an employing unit to which the provisions of § 23-750 apply only to the extent not inconsistent with the requirements of 26 U.S.C. §§ 3304(a)(6) and 3309.

Department regulation A.C.R.R. R6-3-1723, which implements

A.R.S. § 23-613.01, provides in pertinent part:

* * *

F. An individual is an employee if he performs services which are subject to the Federal Unemployment Tax Act or performs services which are required by Federal law to be covered by State law.

A.R.S. § 23-645 provides:

In the administration of this chapter, the department shall:

1. Cooperate with the United States Department of Labor to the fullest extent consistent with the provisions of this chapter;

2. Take such action as may be necessary to secure to this state and its citizens all advantages available under the provisions of the Social

Security Act that relate to unemployment compensation, the Federal Unemployment Tax Act, ...

26 U.S.C. § 3309(a)(1)(B) of the Federal Unemployment Tax Act (FUTA) requires state coverage of services performed in the employ of the State, its political subdivisions and the instrumentalities of states and political subdivisions as a condition for certification for tax offset credit, even though such services are excepted from FUTA coverage. This requirement is contained in the provisions of Paragraph 7 of 26 U.S.C. §§ 3306(c) and 3309(a)(1)(B), as follows:

Paragraph 7 of 26 U.S.C. § 3306(c) FUTA, provides in pertinent part:

For purposes of this chapter, the term "employment" means ... any service, of whatever nature, performed ... by an employee for the person employing him, except --

service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more states or political subdivisions:
...

26 U.S.C. § 3309(a)(1)(B), provides in pertinent part:

For purposes of 26 U.S.C. § 3304(a)(6) --

(1) Except as otherwise provided in subsections (b) and (c), the services to which this paragraph applies are --

* * *

(B) service excluded from the term "employment" solely by reason of paragraph (7) of 26 U.S.C. § 3306(c); ...

26 U.S.C § 3304(a) supra, contains requirements for provisions that must be included in state unemployment compensation laws in order to obtain approval of the Secretary of Labor for employers of a state to get offset credits against the

federal unemployment tax. 26 U.S.C. § 3304(a)(6)(A) contains the requirement that:

compensation is payable on the basis of service, to which 26 U.S.C. § 3309(a)(1) applies in the same amount, on the same terms, and subject to the same conditions as compensation payable on the basis of other service subject to the law; ...

The Employment Security Law of Arizona complies with this requirement by its A.R.S. § 23-750, pertaining to state and local governments, which provides in pertinent part:

* * *

E. Benefits are payable on the basis of employment to which this section applies, in the same amount, on the same terms, and subject to the same conditions as benefits payable on the basis of other employment subject to this chapter; ...

"A cardinal principle of statutory interpretation, is to follow the plain and natural meaning of language to discover what the legislature intended to say" [See Dearing v. Arizona Department of Economic Security, 121 Ariz. 203, 589 P.2d 446 (App. 1978)].

Clearly, the language of A.R.S. § 23-750(E) which was enacted with the purpose of complying with 26 U.S.C. § 3304(a)(6)(A), does not apply to coverage or exclusions and exemptions from coverage, as contended by counsel for Chino Valley Volunteer Fire Department. By the plain and natural meaning of A.R.S. § 23-750(E), the unambiguous intention of the legislature is to say that benefits must be payable to governmental employees in the same amounts and terms, and under the same conditions (of eligibility and disqualification or qualification) as benefits payable to employees of other employers subject to the Employment Security Law of Arizona.

26 U.S.C. § 3309(b)(3) contains five limited exclusions

of governmental services exempt from federally required state coverage. Included therein is subparagraph (3) (D) of 26 U.S.C. § 3309(b) , which provides:

(b) This section shall not apply to service performed --

* * *

(3) in the employ of a governmental entity referred to in paragraph (7) of 26 U.S.C. § 3306 (c), if such service is performed by an individual in the exercise of his duties --

* * *

(D) as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency; ...

It should be noted that the language used in A.R.S. § 23-615 (6)(d)(iii)(D), previously quoted, is identical to the language of 26 U.S.C. § 3309(b)(3)(D)..

Counsel for Chino Valley Volunteer Fire Department takes the position that the fire fighters perform services for the fire department only at such times when they show up at a fire or rescue mission. She contends that under such circumstances the fire fighters perform isolated or occasional services within the meaning of the exclusion of A.R.S. § 23-613.01(A)(3).

Counsel also contends that the services of fire fighters are performed in the employ of a governmental entity in the exercise of their duties as employees serving on a temporary basis in case of fire or similar emergency, as contemplated in A.R.S. § 23-615(6)(d)(iii)(D), and that consequently, they should not be considered in employment.

Counsel further argues that payments to fire fighters should

be considered as reimbursement for expenses rather than wages.

The main question before the Board concerns the status of the fire fighters. Since the training officer is the battalion chief who is also one of the fire fighters, this category can be included under the designation of fire fighters.

It is undisputed that Chino Valley Volunteer Fire Department is an instrumentality of a political subdivision of this state, and that as such, it can be an employer subject to the Employment Security Law of Arizona.

It is evident that when the fire fighters perform their services, they must necessarily be subject to direction or control as to both the method of executing their services and the result to be accomplished. To conclude otherwise would be utterly unrealistic due to the nature of their services. Not to be overlooked is the fact they are required to go through a six-month probationary and training period during which they must attend all fire and emergency calls. The fire fighters are also considered to be employees for workmen's compensation coverage purposes.

The issues remaining to be resolved with respect to fire fighters are:

(1) Whether remuneration received by the fire fighters constitutes wages as defined in A.R.S. § 23-622.

(2) Whether fire fighters perform service as employees serving on a temporary basis in case of fire or similar emergency within the meaning of A.R.S. § 23-615(6)(d)(iii)(D).

(3) Whether the provisions of A.R.S. § 23-613.01(A)(3) are applicable to employees of a political subdivision of this state or an instrumentality of such political subdivision who perform isolated or occasional services.

The record indicates that no part of the amounts received by

the fire fighters was specifically for expenses, or identified as such, at the time of payment or prior thereto. Nor was there an agreement or understanding, express or implied, that the payments received by the fire fighters were to be considered expenses. To the contrary, the record establishes that no mention is made at all regarding payment of expenses at the time of hire or thereafter. No report or account is required from the fire fighters as to expenses, if any, they may have incurred.

In view of the foregoing, a conclusion is warranted that remuneration received by the fire fighters for their services constitutes wages as defined in A.R.S. § 23-622.

The exclusion in A.R.S. § 23-615(6)(d)(iii)(D) applies only to those individuals who are hired or impressed into service to assist in emergencies, and includes such temporary tasks as fire fighting, removal of storm debris, restoration of public facilities, snow removal and road clearance, etc. The exclusion does not apply to permanent or part-time employees whose usual responsibilities may include emergency situations.

An emergency must be declared by competent authority under established procedures [See A.R.S. § 26-301, et seq.].

The fire fighters in the instant case are not hired or impressed into service at the time of a disaster condition such as a local emergency or state emergency as defined in A.R.S. § 26-301, et seq., to deal directly with an emergency or urgent distress associated with an emergency. They are, at the best, employees, working part time when needed, whose usual responsibilities may include emergency situations.

The Board therefore concludes that the exclusion in A.R.S. § 23-651(6)(d)(iii)(D) does not apply to the fire fighters in the instant case.

The evidence establishes that the fire fighters each attend about ten fires a year; that there are about three to four rescue calls for each fire call; and that usually four to nine fire fighters answer a call. In view of the above, the Board concurs with the contention of the counsel for Chino Valley Volunteer Fire Department that the fire fighters perform occasional services.

However, the question still remaining to be resolved here is whether the provisions of A.R.S. § 23-613.01(A)(3) with respect to the exclusion from employment of individuals performing isolated or occasional services is applicable to services performed by the employees of Chino Valley Volunteer Fire Department, an instrumentality of a political subdivision of this state.

Federal law requires (for certification) state unemployment insurance coverage of all services performed in the employ of the state, or any political subdivision thereof, or any instrumentality of the foregoing [See 26 U.S.C. §§ 3304(a)(6)(A), 3309(a)(1), and 3306(c)(7)].

This is a very broad requirement. In effect, all services for governmental entities are covered regardless of how brief that service is, or how little it is compensated. Only the very limited range of governmental services specified in § 3309(b)(3) are exempt from federally required coverage. It is pertinent to note that the five kinds of governmental services exempt from federal coverage do not include an exclusion of isolated or

occasional services.

Further, the language of A.R.S. § 23-615.01 makes it plain that the legislature intended this provision to cover all governmental services required for certification by the Federal Unemployment Tax Act, by the use of the phrase "notwithstanding any provisions of law to the contrary ... for the purposes of this chapter ... " (emphasis added). Clearly, A.R.S. § 23-615.01 supersedes A.R.S. § 23-613.01.

In that connection, it is pertinent to note that Subsection C of § 23-613.01 recognizes that the exclusions of § 23-613.01(A) are not applicable to services performed for this state, its political subdivisions and instrumentalities, by its provisions as follows:

Notwithstanding any other provision of this chapter, this section shall apply to an employing unit to which the provisions of § 23-750 apply only to the extent not inconsistent with the requirements of 26 U.S.C. §§ 3304(a)(6) and 3309."

Further substantiation that the provisions of A.R.S. § 23-613.01 (A)(3) are not applicable to state and local governmental employees can be found in the plain language of Department regulation A.C.R.R. R6-3-1723(F), as follows:

An individual is an employee if he performs services ... which are required by Federal law to be covered by State law (emphasis added).

The record also establishes that a bookkeeper and a janitor performed regular services for Chino Valley Volunteer Fire Department for which they are remunerated at fixed monthly sums. No contention or dispute has been made that they are not employees or that their services are considered exempt for any reason. The Board

concludes their services constitute employment. In all events, they are required to be covered for the same reasons as stated with respect to the fire fighters.

THE APPEALS BOARD AFFIRMS the reconsidered determination issued April 23, 1930.

1. Chino Valley Volunteer Fire Department is an instrumentality of a political subdivision of Arizona.

2. Chino Valley Volunteer Fire Department is an employer subject to the Employment Security Law of Arizona, as defined in A.R.S. §§ 23-615.01 and 23-615, with coverage beginning January 1, 1978.

3. Services performed by fire fighters, the bookkeeper and janitor for or in connection with Chino Valley Volunteer Fire Department constitute employment as defined in A.R.S. §§ 23-615 and 23-615.01.

4. Remuneration received by fire fighters, the bookkeeper and janitor from Chino Valley Volunteer Fire Department constitute wages as defined in A.R.S. § 23-622.

5. The exclusions of A.R.S. §§ 23-613.01(A)(3) and 23-615(6)(d)(iii)(D) are not applicable to employees of Chino Valley Volunteer Fire Department.

DATED this 10th day of October 1980.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Mary A. Bass, Chairman

Eugene R. Murray, Member

E. D. Crowley, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON August 17, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision
No. PD- 138

Formerly Decision No.
AB ADXT-24-81

In the Matter of:

DER WIENERSCHNITZEL OF
TUCSON, INC.

AND

Claimant.

Employer

D E C I S I O N

AFFIRMED

DER WIENERSCHNITZEL OF TUCSON, INC., petitioned the Appeals Board for hearing of the reconsidered determination of the Department dated April 10, 1981, holding that Der Wienerschnitzel of Tucson, Inc., succeeded to or acquired the organization, trade or business, or substantially all the assets of Terry Silva, dba Wienerschnitzel, another covered employer, for purposes of A.R.S. § 23-733(A) and (D).

The issues to be resolved by the Board are:

Whether Der Wienerschnitzel of Tucson, Inc., succeeded to or acquired the organization, trade or business, or substantially all of the assets of Terry Silva, dba Wienerschnitzel, Employer Account No. 1315120, and continued such organization, trade or business; and whether the account of Terry Silva, dba Wienerschnitzel was properly transferred to Der Wienerschnitzel of Tucson, Inc., for the purpose of rate determination, as provided in A.R.S. § 23-733(A).

Whether Der Wienerschnitzel of Tucson, Inc., is liable for any contributions, interest and penalties due to or accrued and unpaid by Terry Silva, dba Wienerschnitzel as provided in A.R.S. § 23-733(D).

A hearing was held at the direction of the Board, at Tucson, Arizona, on August 12, 1981, before Max Fishman, a hearing officer.

* * *

[Names of individuals appearing omitted]

THE APPEALS BOARD FINDS:

1. Der Wienerschnitzel of Tucson, Inc., (sometimes hereinafter referred to as D/W is a covered Employer subject to the Employment Security Law of Arizona for many years, assigned Employer Account No. 0565950. D/W has continued to have its own employees during all periods involved herein. Its president is Ronald G. Bryant. From time to time, D/W has operated restaurants directly and/or leased restaurants to others under a lease program.
2. On or about January 1, 1980, D/W leased the restaurant located at 164 Garden Avenue, Sierra Vista, Arizona, to Terry Silva, dba Wienerschnitzel; and on or about June 1, 1980, D/W leased the restaurant located at 3719 East Speedway, Tucson, Arizona, to the same Terry Silva, dba Wienerschnitzel. The leases included the right to use the equipment owned by D/W. The monthly rental on the Sierra Vista store was \$630; and the monthly rental on the Tucson store was computed on a variable percentage basis of gross sales. Upon normal termination of the leases by maturity thereof, D/W agreed to purchase from the lessee the existing inventories at their wholesale values.
3. On March 11, 1980, the Department issued a Notice of Liability Determination to Terry Silva, dba Wienerschnitzel that he was an Employer subject to the Employment Security Law of Arizona with coverage beginning January 4, 1980. No request for reconsideration was ever filed, and this determination became final.
4. On or about July 31, 1980, Terry Silva abandoned both stores without prior notice. The stores, however, continued to operate until the normal closing hours of that day. The president of D/W became aware of the abandonment on the same day. On August 1, 1980, at the beginning of the business day, both stores were repossessed by D/W and full operations of the stores were continued by D/W without any gap or interruption.

5. The Tucson restaurant was operated by D/W from August 1, 1980, to August 6, 1980, when D/W leased it to a new lessee, Gerry and Linda A. Kern, dba Wienerschnitzel No. 320. The Sierra Vista restaurant was operated by D/W from August 1, 1980, to August 7, 1980, when D/W leased it to a new lessee, Ray J. Huggins, dba Wienerschnitzel.

6. Each of the restaurants had from fifteen to twenty employees, including an assistant manager, during the operations of Terry Silva. D/W continued to employ the same employees at the same salaries and duties, including the former assistant managers who acted as managers during the operations of D/W. In order to avoid reporting these employees, D/W arranged with its new lessees to pay and report these employees to the taxing bodies for the approximate week that they were working for D/W. D/W then reimbursed the new operators by giving them credit on their rent for the equivalent amount.

7. D/W has paid certain bills of Terry Silva, dba Wienerschnitzel such as refrigeration, telephone, electric, gas, trash service and water for a net total of \$267.68, as follows:

Sierra Vista	\$1066.30
Tucson	<u>1953.53</u>
	3019.83
Less "cashed check" (Tucson)	<u>-2752.15</u>
Net bills paid	\$ 267.68

Other substantial accounts payable and creditors of Terry Silva, dba Wienerschnitzel have not been paid by D/W, nor have they requested payment from D/W.

8. The inventory remaining in the two restaurants, at the time of the takeover by D/W on August 1, 1980, consisted of meats and supplies. Bread and dairy products were delivered fresh every day so the inventory of these items was minimal. No actual inventory count was taken. However, the president of D/W estimated the total inventory taken over by D/W was worth \$2,000, of which he allocated \$1800 to meat, and \$200 to supplies.

9. Meat had been delivered to Terry Silva, dba Wienerschnitzel, twice a week, and he was invoiced on each delivery. The president of D/W stated "I was the meat broker." He could not remember whether payment for meat was due on the seventh or fifteenth day after delivery. The meat in the inventory taken over by D/W had not been paid for, and was included among the unpaid accounts payable of Terry Silva at the time of his abandonment of the stores.

10. D/W commenced operations of the two stores on August 1, 1980, with no interruption in utilities such as electric, gas and telephone. The same telephone listings were retained. There were no changes in prices. The public was not notified of any change in ownership or management. The restaurants continued to use the same suppliers.

11. The amount of revenue generated in a typical week from each restaurant was about \$5,000 gross. This revenue produced an average rental of about 24% thereof, or a gross weekly rental of about \$2500 from both stores. The average net profit to the lessor from this gross revenue, after payment of landlord expenses, amounted to about 10% of the 24% of the gross revenue or about \$250 per week.

12. There is due or accrued and unpaid by Terry Silva, dba Wienerschnitzel contributions in the amount of \$786.43; penalties of \$70.00; plus accrued interest to date.

A.R.S. § 23-733 provides in pertinent part:

A. When any employing unit in any manner succeeds to or acquires the organization, trade or business, or substantially all of the assets thereof, excepting any assets retained by such employer incident to the liquidation of his obligations, whether or not such acquiring employing unit was an employer within the meaning of Section 23-613, prior to such acquisition, and continues such organization, trade or business, the account of the predecessor employer shall be transferred as of the date of acquisition to the successor employer for the purpose of rate determination.

* * *

D. Any individual or organization, including the types of organizations described in Section 23-614, whether or not an employing unit, which

in any manner acquires the organization, trade or business, or substantially all of the assets thereof, shall be liable, in an amount not to exceed the reasonable value, as determined by the department of the organization, trade, business or assets acquired, for any contributions, interest and penalties due or accrued and unpaid by such predecessor employer; ...

The recent case of Warehouse Indemnity Corporation v. Arizona Department of Economic Security, 128 Ariz. 235, 627 P.2d 235 (App. 1981), a first impression case for Arizona, interpreted the meaning of the language "which in any manner acquires the organization, trade or business, or substantially all the assets thereof ... and continues such organization, trade or business," as contained in A.R.S. § 23-733, as follows:

"It is this court's opinion, however, that Arizona's statute does not focus on the direct transfer of title for successorship. Rather, the statute focuses on the transfer of the business or assets. The statute does not say 'acquire from'. Instead, the language 'which in any manner acquires' was used. Therefore this court will consider the substance of the transaction and not the form. Courts in other jurisdictions generally concur with this interpretation and hold that the word acquire as used in successor statutes does not require privity of contract. See State v. Gibson's Barbecue, 369 So.2d 1229 (Ala. App. 1978); Mark Hotel Corp. v. Catherwood, 9 A.D.2d 412, 194 N.Y.S.2d 580 (1950); Mason v. City Cartage Co., 124 Ind. A. 314, 117 N.E.2d 387 (1954). Courts in other jurisdictions have also held that the word acquire includes the holding of a lesser estate than fee simple, such as a leasehold interest. See Chief Freight Lines Co. v. Industrial Commission, 366 S.W.2d 48 (Mo. App. 1963); Mark Hotel Corp. v. Catherwood, supra; Sea Crest Hotel v. Dir. of Div. of Employment Security, 330 Mass. 226, 112 N.E.2d 813 (1953); and State v. Whitehurst, 231 N.C. 497, 57 S.E.2d 770 (1950)."

The Court also considered that continuity of employment is an important factor when it stated:

"Although state laws that establish standards for determining transfer of an experience rating vary from state to state, it is clear that one of the more important considerations involving

successorship is continuity of employment -- is the acquired employer performing essentially the same operation with substantially the same work force as did the seller of the enterprise? See generally Action Corporation v. Labor & Ind. Relations Com'n, 602 S.E.2d 53 (Mo. App. 1980); Escambia Mid-City Development Corp. v. State, 356 So.2d 855 (Fla. App. 1978); State v. Gibson's Barbecue, supra; Robert Snyder and Associates, Inc. v. Cullerton, 75 Ill. App.2d 1, 221 N.E.2d 148 (1966); and Mark Hotel Corp. v. Catherwood, supra.

The wide scope of the term "acquires" is further illustrated in the court rulings of other jurisdictions, with similar succession statutes, cited with favor, by our Court of Appeals.

The Missouri case of Chief Freight Lines Co. v. Industrial Commission, 366 S.W.2d 48 (Mo.App. 1963), adopted the following definition of the word "acquire", as used in a statute similar to ours, to mean:

The word "acquire" is one of very broad meaning ... The word "acquire" is comprehensive and includes the meaning of "to gain by any means; to get as one's own" and is synonymous with to obtain and to procure "Webster's International Dictionary". It is significantly stated in Black's Law Dictionary, "It (the work acquire) does not necessarily mean that title has passed." Goodwin v. Tuttle, 70 Or. 424, 141 p. 1120, 1122."

In that case, the appellant did not purchase the business but operated it for a time under a lease agreement while awaiting approval of its application for the purchase from the I.C.C. It was held, nevertheless, to have "acquired" substantially all of the business of the predecessor for experience rating purposes and to have continued to operate the business.

The New York case of Mark Hotel Corp. v. Catherwood, 9 A.D.2d 412, 194 N.Y.S.2d 580 (1950), held that where there

was no direct transfer between two operating corporations, the new operating corporation was entitled to the employment experience of the other because the business of a hotel operation was continued without interruption and with the same employees when the owner of real estate terminated its lease with its tenant and leased the premises to another.

The Illinois case of Robert Snyder and Associates, Inc., v. Cullerton, 75 Ill App.2d 1, 221 N.E.2d 148 (1966), held that the transfer of experience rating is based upon a succession to a going business responsible for giving employment to workers, and not merely upon a succession to physical assets.

It is, therefore, evident that A.R.S. § 23-733 does not make any distinction regarding the reason for the acquisition, or whether it be voluntary or involuntary. Clearly, an acquisition by a repossession falls within the purview of this statute.

The Board has carefully reviewed the record in this instant case. The contentions of the parties have been considered.

The record establishes that Terry Silva ceased operating the two restaurants as of the end of the business day of July 31, 1980; that Der Wienerschnitzel of Tucson, Inc., took possession of and commenced operations of the two restaurants at the beginning of the business day of August 1, 1980; that there was no interruption in the operations; that all employees of Terry Silva were continued in employment at

the same rates of pay and the same duties; that the managerial employees were also continued to be employed in the same capacities; that all fixtures, inventories and suppliers were continued to be used; that there was no change as far as the general public was concerned; that the telephone listings were not changed; and that all utilities were continued without interruption.

The above facts constitute ample evidence that Der Wienerschnitzel of Tucson succeeded to or acquired the organization, trade or business or substantially all the assets of Terry Silva, dba Wienerschnitzel as of August 1, 1980, within the meaning of A.R.S. § 23-733(A) and (D).

The contention of counsel that the operation of one of the restaurants for six days and the operation of the other restaurant for seven days should not be considered as a continuation of the organization, trade or business, is not persuasive.

We do not read the statutory provisions of A.R.S. § 23-733(A) as requiring a continuation of an organization, trade or business to be equal to or exceed any particular period of time. The language of the statute is plain and natural that the successor "continues such organization, trade or business," for the purpose of rate determination.

In view of the reasons stated, the Board concludes that Der Wienerschnitzel of Tucson, Inc., succeeded to or acquired the organization, trade or business, or substantially all the assets of Terry Silva, dba Wienerschnitzel and continued the organization trade or business of this predecessor for purpose

of A.R.S. § 23-733(A).

The issue remaining to be resolved is whether Der Wienerschnitzel of Tucson, Inc., is liable for any contributions, interest and penalties due or accrued and unpaid by Terry Silva, dba Wienerschnitzel as defined in A.R.S. § 23-733(D). Particularly, it is important to determine the reasonable value of the acquisition by D/W, and whether it equaled or exceeded the delinquencies of the predecessor.

The record shows that there is due and accrued and unpaid by Terry Silva dba Wienerschnitzel contributions in the amount of \$786.43, penalties of \$70.00, plus accrued interest to date.

We have already concluded herein that Der Wienerschnitzel of Tucson, Inc., acquired the organization, trade or business and substantially all the assets of Terry Silva, dba Wienerschnitzel.

Counsel for Der Wienerschnitzel of Tucson, Inc., argues that nothing of any value was acquired, and questions whether any value can reasonably be placed on a business that was abandoned with unpaid bills outstanding.

With respect to the inventory taken over by Der Wienerschnitzel of Tucson, Inc., the record shows it consisted of meat valued at \$1800, and supplies valued at \$200, for a total of \$2,000.

Counsel takes the position that inasmuch as the meat was purchased from or through Der Wienerschnitzel of Tucson, Inc., (or its president) and had not been paid for, no value should be placed on it.

The evidence establishes that as a regular practice, meat was sold and delivered to Terry Silva, dba Wienerschnitzel twice a week, and was invoiced when delivered. Payment was not due and payable until a week or more after delivery. Further, Der Wienerschnitzel of Tucson, Inc., as lessor, had agreed to pay for any meat remaining in inventory at the normal maturity of the lease with Terry Silva, dba Wienerschnitzel.

A.R.S. § 44-2346 provides for passing of title, in pertinent part:

1. (T)itle to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.
2. Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, ...

In view of the facts and the applicable law herein, the Board finds that title to the meat in inventory passed to Terry Silva, dba Wienerschnitzel at the time of the physical delivery of the meat to him. Consequently, he was the owner of the meat inventory when Der Wienerschnitzel of Tucson, Inc., took possession of the meat valued at \$1800, together with the supplies inventory of \$200.

It is, therefore, determined that the reasonable value of the organization, trade or business, or of the assets acquired by Der Wienerschnitzel of Tucson, Inc., is in excess of the amount of contributions, interest and penalties due and unpaid by its predecessor. Accordingly, Der Wienerschnitzel of Tucson,

Inc., is liable for such delinquencies pursuant to the provisions of A.R.S. § 23-733(D). Accordingly,

THE APPEALS BOARD AFFIRMS the reconsidered determination issued April 10, 1981.

1. Der Wienerschnitzel of Tucson, Inc., succeeded to or acquired, and continued the organization, trade or business, or substantially all the assets of Terry Silva, dba Wienerschnitzel, Employer Account No. 1315120; and the employment experience to Der Wienerschnitzel of Tucson, Inc., for purpose of rate determination as provided in A.R.S. § 23-733(A).
2. Der Wienerschnitzel of Tucson, Inc., is liable for any contributions, penalties and interest due or accrued and unpaid by Terry Silva, dba Wienerschnitzel as provided in A.R.S. § 23-733(D).

DATED: September 11, 1981.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Mary A. Bass, Chairman

Eugene R. Murray, Member

Robert D. Sparks, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON September 28, 1982.

Services, Inc., Employer Account No. 1367220, is the correct Employer of the individuals listed on the attachments hereto, and by reference made a part hereof; total wages and contributions due and unpaid thereon for these employees being as follows:

<u>Quarter Ending</u>	<u>Gross Wages</u>	<u>Taxable Wages</u>	<u>Contributions Due & Unpaid</u>
3-31-81	156,295.12	150,295.72	4057.98
6-30-81	188,185.42	155,111.13	4188.00

This issue arose as a result of actions previously taken by the Department against Cox Communications, Inc., pursuant to the provisions of A.R.S. § 23-737.01, for the collection of delinquencies with respect to the first and second calendar quarters of 1981. It is the position of Cox Communications, Inc., that Western Cablevision Services, Inc., is the correct Employer of the individuals in question. Western Cablevision Services, Inc., contends that the correct Employer is Cox Communications, Inc.

Accordingly, a hearing was held at the direction of the Board, on January 20, 1982, at Phoenix, Arizona, before Max Fishman, a hearing officer.

* * *

[Names of individuals appearing omitted]

THE APPEALS BOARD FINDS:

1. On August 19, 1981, the Arizona Department of Economic Security issued a Notice of Liability Determination to Cox Communications, Inc., Employer Account No. 1288571, that Cox Communications, Inc., is an Employer subject to the Employment Security Law of Arizona as successor to a covered Employer, Terence Cox & Douglas May, as provided in A.R.S. § 23-613, with coverage beginning January 1, 1981. This determination is final.

Terence Cox & Douglas May, dba Pacific Communications, Employer Account No. 1288570, predecessor to Cox Communications, Inc., was a covered Employer subject to the Employment Security Law of Arizona, with coverage beginning September 1, 1979.

Western Cablevision Services, Inc., Employer Account No. 1367220, is a covered Employer subject to the Employment Security Law of Arizona during the periods involved herein, namely, the first and second calendar quarters of 1981. Its president is Kenneth Higgins.

2. Terence Cox and Douglas May, dba Pacific Communications were engaged in the installation of cable TV systems in Kingman, Arizona and Alpine, California since about September, 1979. The final contribution and wage report filed under the name of Pacific Communications covered the calendar quarter ending December 31, 1980. Western Cablevision Services, Inc., was licensed by the City of Phoenix in September, 1980, to provide cable TV services in the north-west Phoenix area. Commencing in September or October, 1980, and terminating December 31, 1980, Pacific Communications engaged in the installation of a cable system for Western Cablevision Services, Inc.

3. About June, 1980, Kenneth Higgins and Terence Cox, had discussions regarding the forming of a corporation to engage in cable TV construction. To that end, they met in the office of the attorney for Mr. Higgins, on or about June 27, 1980, and signed articles of Incorporation of Cox Communications, Inc., which were filed with the Corporation Commission on the same day. The Articles of Incorporation provided substantially that the name of the corporation shall be Cox Communications, Inc., the incorporators and initial Board of Directors are Terry Cox and Ken Higgins who are to serve as directors until the first annual meeting of shareholders or until their successors are elected and qualified; the purpose of the corporation is the transaction of any and all lawful business for which corporations may be incorporated under the laws of Arizona; the initial intended business of the corporation is to construct and operate cable communication systems in Arizona and elsewhere; the authorized capital is 1,000,000 shares of common stock of

\$1.00 par value per share; and the initial statutory agent was the then attorney for the corporation who handled the corporate organization. Active operations of Cox Communications, Inc., in the installation of cable for Western Cablevision Service, Inc., commenced as of January 1, 1981, and terminated about June 15, 1981.

4. The cable installation by Cox Communications, Inc., was performed pursuant to an oral agreement whereby Cox Communications, Inc., provided such services to Western Cablevision Services, Inc., at "cost" to be paid by Western Cablevision Services, Inc. This cost included all direct costs related to the cable instruction such as payroll, payroll taxes, insurance, material and all other burden items. Payroll covered wages of all workers, and included the weekly salary of Terence Cox. In addition, it was agreed that Cox Communications, Inc., would eventually receive stock purchase warrants equal to 5% of the common stock of Western Cablevision Services, Inc. Costs were used in preparing forecasts and budgets, and were estimated at a certain amount per mile. Estimates of the cost-per-mile varied from \$5,000 to possibly \$12,000, according to several witnesses.

5. Cox Communications, Inc., maintained a checking account with authorized signatures of Terence Cox, Donna Cox, his wife, and Don Holloway, a supervisory employee of Cox Communications, Inc. Federal and state payroll tax reporting accounts were opened in the name of, and with employer identification numbers of Cox Communications, Inc. Workers were paid by payroll checks Cox Communications, Inc., and they were reported to the taxing bodies by and in the name of Cox Communications, Inc. In addition to the individuals performing cable installation services, Cox Communications, Inc., also utilized individuals to follow up complaints of the general public, to schedule the work, to do secretarial work and to repair sprinkler systems damaged by its cable installation activities. The workers were recruited and

supervised by Terence Cox and the foremen designated by him. All such employees were covered by workmens compensation in the name of Cox Communications, Inc. The accounting systems of Cox Communications, Inc., and Western Cablevision Services, Inc., such as they are, were independent of each other.

6. Cox Communications, Inc., held no corporation meetings. No corporate stock has been issued. There has been no formal election of officers. There has been no change in the directors named in the Articles of Incorporation. The address of Cox Communications, Inc., is the same as that of Western Cablevision Services, Inc.

7. Since January 1981, Cox Communications, Inc., utilized a payroll preparation service named "Paychex", a firm which renders a computerized payroll service to various companies in the Phoenix area. Daily sheets with the workers' hours, footage and location were given to Terence Cox by the site foreman. This data was communicated to Paychex by Cox Communications, Inc., and Paychex prepared a computer printout showing gross amounts and tax deductions. A copy of the printout was then given to the office manager of Western Cablevision Services, Inc., at the end of each week. Rates for employees were established by Terence Cox. The office manager of Western Cablevision Services, Inc., was not informed as to the amounts the individual workers were supposed to be earning. Individual payroll checks in the name of Cox Communications, Inc., prepared by Paychex for net amounts, showed the customary deduction and withholding information. The office manager of Western Cablevision Services, Inc., issued one weekly check to the order of Cox Communications, Inc., to cover the total weekly net payroll of Cox Communications, Inc., which in turn deposited this check into its own checking account. Cox Communications, Inc., then issued its own individual net checks to the cable installers and other employees. Likewise, in regard to the payment of payroll taxes, Western Cablevision Services, Inc., issued its checks to the order of Cox Communications, Inc., for these purposes, these checks were deposited by the latter in its own checking account, and then Cox Communications, Inc., issued its own checks to the taxing bodies.

8. Pursuant to the cost basis arrangement between Western Cablevision Services, Inc., and Cox Communications, Inc., and the payroll and payroll tax payment procedure as

previously described, Western Cablevision Services, Inc., issued separate checks, each dated May 26, 1981, to the order of Cox Communications, Inc., to cover payroll taxes of Cox Communications, Inc., as follows: a check for \$42,409.81 to cover payment of federal social security and withholding taxes for the first calendar quarter of 1981; a check for \$32,494.33 to cover payment of undeposited federal social security and withholding taxes for the period from April 1, 1981 through May 22, 1981; and a check for \$2,162.68 to cover payment of Arizona withholding tax for the first calendar quarter of 1981.

Cox Communications, Inc., deposited the above checks into its own checking account; and on June 3, 1981, Cox Communications, Inc., issued a check for \$42,409.81 to the Internal Revenue Service to cover its payment of federal social security and withholding taxes for the first calendar quarter of 1981; a check for \$32,494.33 to the Arizona Bank to cover payment of its federal tax deposit for the period from April 1, 1981 through May 22, 1981; and a check for \$2,162.68 to the Department of Revenue to cover its payment to Arizona withholding tax for the first quarter of 1981.

9. On May 26, 1981, Western Cablevision Services, Inc., also issued its check payable to the order of Cox Communications, Inc., for \$4,057.98, "in payment of 1st quarter Unemployment contributions to AZ DES due 4/30/81." Cox Communications, Inc., deposited this check in its checking account, and issued its own check for that amount to AZ DES. This check "bounced", and contributions due to the Department for the first quarter of 1981 remain unpaid. Terence Cox acknowledged that Cox Communications, Inc., did receive this amount from Western Cablevision Services, Inc., and stated that the shortage was caused by the failure of Western Cablevision Services, Inc., to provide sufficient funds at the time, to enable Cox Communications, Inc., to cover the payroll checks it had issued to the employees.

10. As part of the cost basis arrangement Western Cablevision Services, Inc., also paid the other billings presented to it by Cox Communications, Inc., including payments for equipment and materials. A trencher for use in laying cable was purchased in the name of Terence Cox on his personal credit because neither Western nor Cox Communications, Inc., had established credit lines of their own. The payment thereon by Western Cablevision Services, Inc., constitutes part of the cost-basis of the job. No other equipment was provided by Western Cablevision Services, Inc.

11. In 1981 a dispute arose between Western Cablevision Services, Inc., and Cox Communications, Inc., when Western Cablevision Services, Inc., discovered instances of payroll payments to nonexisting employees duplicate payroll payments, and other questionable disbursements and irregularities. This eventually led to a termination of the relationship of Western Cablevision Services, Inc., with Cox Communications, Inc. As of June 15, 1981, Western ceased making further payments to Cox Communications, Inc., and construction was shut down.

12. On September 11, 1981, a written mutual release was executed by and between Western Cablevision Services, Inc., an Arizona corporation, and Terry Cox in his individual capacity and as an officer of Cox Communications, an Arizona corporation. This agreement was signed on behalf of Western Cablevision Services, Inc., by its vice president, and on behalf of Cox Communications, Inc., by Terry P. Cox, its president. The release provided, inter alia, that "in consideration of the cancellation and release of any and all claims of Western Cablevision against Cox for unauthorized expenditures or irregularities in amounts claimed to have expended by Cox on behalf of Western Cablevision," Cox agrees to the cancellation of the five percent (5%) stock purchase warrants for Western Cablevision stock due it pursuant to the parties' construction contract; and that the parties mutually agree that the contract has otherwise been fully performed.

In addition to the release, Western Cablevision Services, Inc., paid Terry Cox \$6,000; \$3,000 of which went to the bank to pay his personal note for money borrowed because of bad payroll checks, and \$3,000 went for payment on equipment to avoid repossession.

13. The paid wages with respect to the first and second calendar quarters of 1981, have been corrected to reflect reductions for checks that were later voided by reason of their irregularities and inaccuracies. Corrected reports for these periods had not as yet been filed with the taxing bodies but the corrected amounts are detailed in amended contribution and wage reports received in evidence herein (Exhibits 12a and 12b), as follows:

	Amended Qtr. end. 3-31-81	Amended Qtr. end. 6-30-81
Gross Wages.	\$155,860.59	\$172,238.21
Excess over \$6,000	<u>6,000.00</u>	<u>32,653.54</u>
Taxable Wages	\$149,860.59	\$139,584.67

14. According to Terence Cox, the accountants for Cox Communications, Inc., are in the process of preparing the 1981 corporation Income Tax Return of the Cox Communications, Inc., together with its W-2 forms to be mailed to the employees showing their 1981 wages and withholdings and social security deductions.

It is undisputed that the individuals performing cable installation services, and other categories of services, listed in the wage reports submitted to the Department under the name of Cox Communications, Inc., with respect to the calendar quarters ending March 31, 1981, and June 30, 1981, are employees; that they performed services in employment; and that their remuneration constitutes wages subject to the payment of contributions.

The question to be resolved by the Board is whether their correct Employer is Cox Communications, Inc.; or whether the correct Employer is Western Cablevision Services, Inc.

The representative of the Contribution Section of the Department contends that Cox Communications, Inc., was correctly determined by the Department to be the Employer of the individuals in question because this corporation hired them; the workers were directed and controlled in the method of performing or executing their services as well as the result to be accomplished by this corporation; their wages were determined by Cox Communications, Inc.; this corporation paid the wages directly to the workers; and it reported these individuals as its employees for federal and state payroll tax purposes.

Counsel for Cox Communications, Inc., takes the position that Cox Communications, Inc., is a sham corporation, organized

at the behest of Kenneth Higgins, an officer of Western Cablevision Services, Inc., as a conduit for Western Cablevision Services, Inc.; and that therefore, the correct Employer is Western Cablevision Services, Inc., or Kenneth Higgins.

Counsel for Western Cablevision Services, Inc., argues that Cox Communications, Inc., is a separate and distinct corporate entity which entered into a contract with Western Cablevision Services, Inc., to perform cable installation services in a Phoenix area where Western Cablevision Services, Inc., was licensed by the city to provide cable-television services. This contract provided for payment to Cox Communications, Inc., on a basis of cost-per-mile payments by Western Cablevision Services, Inc., to Cox Communications, Inc.; that these payments were based on the bills, payroll, and payroll taxes submitted by Cox Communications, Inc.; and that the work was performed and supervised by employees of Cox Communications Services, Inc., using equipment of Cox Communications, Inc.

The term "employment" as defined in A.R.S. § 23-615, in pertinent part:

"Employment" means any service of whatever nature performed by an employee for the person employing him. ...

The term "wages" is defined in A.R.S. § 23-622, in pertinent part:

A. "Wages" means all remuneration for services from whatever source, including commissions and bonuses and the cash value of all remunerations in any medium other than cash. ...

The term "employee" is defined in A.R.S. § 23-613.01,
in pertinent part as follows:

A. "Employee" means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. ...

It is important to first consider the contention that Cox Communications, Inc., was not a valid corporation.

A.R.S. § 10-004, defines general powers of a corporation provides, inter alia:

A. Each corporation shall have power to:

* * *

8. Make contracts. ... and incur liabilities. ...

* * *

10. Conduct its business, carry on its operations and have offices and exercise its powers within and without this state.

* * *

16. Have and exercise all powers necessary or convenient to effect its purposes.

B. Notwithstanding any of the provisions of this section, each corporation may, in its articles of incorporation, deny, limit, or otherwise reduce in any lawful manner any of the powers set forth in subsection A. Unless so denied, limited or otherwise reduced the powers enumerated in this section are to be construed broadly (emphasis added).

It is to be noted that the articles of incorporation of Cox Communications, Inc., do not limit, deny or reduce any of the general powers of the corporation.

A.R.S. § 10-007 provides in pertinent part:

No act of a corporation ... shall be invalid by reason of the fact that the corporation was without capacity or power to do such act. ...

Arizona Revised Statutes § 10-007(1)(2) and (3) goes on to provide that such lack of capacity or power may be asserted only (1) by a member or a director in a proceeding against the corporation to enjoin the doing of an act or transfer of property; (2) in a proceeding by the corporation against the officers or directors; and (3) in a proceeding by the attorney general to dissolve or enjoin the corporation.

It is pertinent to note that none of the foregoing conditions was or is present in the instant case.

A.R.S. § 10-028 regarding meetings of shareholders provides in relevant part:

B. ... Failure to hold the annual meeting shall not work a forfeiture of the corporate charter or dissolution of the corporation.

A.R.S. § 10-036 provides in pertinent part:

The Board of directors of a corporation shall consist of one or more members. The number of directors shall be fixed by, or in the manner provided in, the articles of incorporation or the bylaws. ... The members of the initial board of directors shall be named in the articles of incorporation. ... Each director shall hold office until his successor is elected and qualified, or until his earlier resignation or removal. ...

Cox Communications, Inc., has complied with A.R.S.

§ 10-036 with respect to the naming of and holding office by its directors.

A.R.S. § 10-053 provides:

Two or more persons capable of contracting may act as incorporators of a corporation by signing and delivering to the commission an original and one or more copies of articles of incorporation for such corporation.

It is to be noted that Cox Communications, Inc., has complied with the provisions of the above section regarding the signing and delivering to the commission of proper articles of incorporation.

A.R.S. § 10-056 provides in pertinent part:

A. Upon the filing of the articles of incorporation, the corporate existence shall begin, and such filing shall be conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under this chapter, except as against this state in a proceeding to revoke or cancel such filing or for involuntary dissolution of the corporation.

In the instant case, pursuant to A.R.S. § 10-056(A), supra, the corporate existence of Cox Communications, Inc., began on June 27, 1980, upon the filing of its articles of incorporation. Since there is no evidence of probative value that the state had revoked the filing of the articles of incorporation, we must conclude that the filing of the articles of incorporation is conclusive evidence of the corporate existence of Cox Communications, Inc., subsequent to June 27, 1980, under the provisions of A.R.S. § 10-002 et seq.

In the instant case, Terence Cox, an organizer and director of Cox Communications, Inc., constantly and continuously used the corporate structure and powers of the corporation during the entire period involved here. He is a signatory to the checking account of Cox Communications, Inc.; he hired and supervised the employees in the name of and as agent of the corporation; he paid the wages of the workers, including

his own weekly salary, by corporation check; the corporation was registered for payroll tax and withholding tax purposes with the federal and state taxing bodies and payments were made in the corporation name and identification number; he testified that an income tax report for 1981, and W-2 forms for 1981, are being prepared in the name of the corporation by its accountants; the employees were covered by workmens compensation in the name of Cox Communications, Inc.; the mutual release was signed by Terence Cox individually, and as president of Cox Communications, Inc.; and Cox Communications, Inc., had its own books and records, such as they were, independent of Western Cablevision Services, Inc.

One who deals with an association as a legal entity capable of transacting business and thus receives money or value from that association is estopped from denying legality of association's existence or right to contract [See Associated Students of University of Arizona v. Arizona Board of Regents, 120 Ariz. 100, 584 P.2d 564.].

In view of the foregoing, we must find that Terence Cox, individually and/or on behalf of Cox Communications, Inc., cannot now deny the legality of the corporate existence of Cox Communications, Inc. The record shows that all of the employees in question were under the direction and control of Cox Communications, Inc.; and that this corporation through Terence Cox and other supervisory individuals had complete supervision over the activities of these employees. The corporation assigned them to their work, and through its

supervisors, was physically present at all times to direct and control them in all particulars of their work. The corporation set the rates of pay of the workers and it kept their time cards.

It is pertinent to note that the key element in the statutory definitions of "employee" [See A.R.S. § 23-613.01, supra], of "employment" [See A.R.S. § 23-615, supra], and of "employer" [See A.R.S. § 23-613, supra], is the performance of services by an individual for the employing unit which employs him.

For the reasons stated, we find, without question, that the workers were employed by and performed their services for Cox Communications, Inc.

The record establishes that the wages of the employees of Cox Communications, Inc., were paid to them by checks of this corporation. The net payroll funds received by Cox Communications, Inc., from Western Cablevision Services, Inc., was pursuant to the cost basis agreement between the two corporations.

Assuming, arguendo, Western Cablevision Services, Inc., did pay the wages of these employees, these wages are nevertheless remuneration for employment for Cox Communications, Inc., the employing unit for whom the services were performed.

In Dearing v. DES, 121 Ariz. 203, 589 P.2d 446 (App. 1978), where the issue was the meaning of "all remuneration for services from whatever source" as provided in A.R.S. § 23-622, defining the term "wages", our Court of Appeals stated:

"Further, the unambiguous intention of the legislature, in saying 'from whatever source' is to include within 'wages' payments from sources other than the employer" (emphasis added).

It follows that wages for services, though generally paid by the employing unit for whom the services are performed, can be paid "from whatever source": and are nevertheless surely remuneration for employment, or wages subject to the payment of contributions on the part of the employing unit for whom the services were performed, within the contemplation of A.R.S. § 23-622.

There is only one situation where an individual is not deemed to be in employment for the employing unit for whom he performs his service. This exception is expressed in A.R.S. § 23-614 which provides in pertinent part:

C. ... Notwithstanding any other provisions of this chapter, ... an individual who performs services in or for a particular employing unit shall not be deemed to be in the employment of such employing unit if such individual's wages for services in or for the particular employing unit are paid by another employing unit, and if the contributions required by this chapter on such wages are paid by such other employing unit.

It is pertinent to note that A.R.S. § 23-614(C), supra, contains two conditions which must be satisfied conjunctively before an individual may be deemed to be in employment of an employing unit other than the one for whom he performs his services. They are: (1) the individual's wages are paid by another employing unit; and (2) the contributions required on such wages are paid by the employing unit which paid his wages.

It is uncontroverted here that in any event, Western Cablevision Services, Inc., did not pay the contributions to the Department, required on the wages of the workers in question. Consequently, these individuals must be deemed to be in employment for Cox Communications, Inc., for whom they performed their services.

Counsel for Cox Communications, Inc., also takes the position that Western Cablevision Services, Inc., is liable for the state unemployment insurance contributions, penalties and interest, due from Cox Communications, Inc., as a third party paying or providing for wages of the employees of Cox Communications, Inc. He relies on Section 3505, Internal Revenue Code. This reliance is misplaced for the following reasons.

Our courts have consistently held that determinations and administrative rulings by courts and agencies of other jurisdictions with respect to Arizona unemployment insurance issues are not binding upon courts [See Arizona Department of Economic Security v. Little, 24 Ariz. App. 480, 539 P.2d 954 (1975); McClain v. Church, 72 Ariz. 354, 236 P.2d 44 (1951); Sisk v. Arizona Ice and Cold Storage Co., 60 Ariz. 496, 141 P.2d 395 (1943).].

Further, the issue here, is to determine whether Cox Communications, Inc., is the correct Employer of certain

employees. The instant case is not to be confused with a collection procedure by way of civil court action [See A.R.S. § 23-737]; or collection of amounts due by certificate for judgment [See A.R.S. § 23-737.01].

In any event, Section 3505, Internal Revenue is clearly not applicable to the situation presented here. That section provides for third party liability under certain circumstances for taxes required to be deducted and withheld from such wages where the third party pays wages directly to employees of another, or who supply funds for wage payments. This third party federal liability referred to in Section 3505 covers deductions for social security and income taxes withholdings that should have been made and were not made. Unemployment contributions are not, and must not be deducted from wages of employees under any circumstances. [See A.R.S. § 23-735].

THE APPEALS BOARD AFFIRMS the determination issued August 19, 1981.

1. Cox Communications, Inc., is the Employer of the individuals who performed cable installation services and other related services, identified and listed in the amended contribution and wage reports (Exhibits 12a and 12b) with respect to the calendar quarters ending March 31, 1981, and June 30, 1981.

2. The wages, as amended, of Cox Communications, Inc., Employer Account No. 1288571, with respect to the calendar quarters ending March 31, 1981, and June 30, 1981, are:

<u>Quarter Ending</u>	<u>Gross Wages</u>	<u>Taxable Wages</u>
3-31-81	\$155,860.59	\$149,860.59
6-30-81	172,238.21	139,584.69

Dated this 26th day of April, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Reana K Sweeney, Chairman

Eugene R. Murray, Member

Robert D. Sparks, Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON September 28, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF ECONOMIC SECURITY
STATE OF ARIZONA

Precedent Decision

No. PD- 140

Formerly Decision No.
AB AD-26-81

In the Matter of:

TRANSWORLD SYSTEMS, INC.

Claimant.

D E C I S I O N

AFFIRMED

TRANSWORLD SYSTEMS, INC., petitioned the Appeals Board for hearing of the reconsidered determination of the Arizona Department of Economic Security dated April 14, 1981, which affirmed an original determination of June 13, 1980; and held that individuals classified as regional sales agents and sub agents are employees of Transworld Systems, Inc., as contemplated by the provisions of A.R.S. § 23-613.01, and that remuneration received by these individuals for their services constitutes wages as defined in A.R.S. § 23-622. The aforementioned reconsidered determination of April 14, 1981, is applicable to services performed after July 20, 1979.

The questions to be considered by the Board are:

Whether individuals classified as regional agents and sub agents, also known as special sales agents, are employees of Transworld Systems, Inc.,

within the meaning of A.R.S. § 23-613.01.

Whether services performed for or in connection with Transworld Systems, Inc., by individuals classified as regional sales agents and sub agents constitute employment, as defined in A.R.S. § 23-615.

Whether all forms of remuneration paid to these individuals for such services constitute wages, as defined in A.R.S. § 23-622.

* * *

[Names of individuals appearing omitted]

THE APPEALS BOARD FINDS:

1. Transworld Systems, Inc., formerly known as Transworld Accounts, Inc., (hereinafter TSI) is a California corporation, with its home office in Santa Rosa, California. TSI conducts business in approximately 25 states, including the State of Arizona, where it maintains a regional office in Phoenix, Arizona, as a licensed out-of-state collection agency. Throughout the United States, TSI engages about 24 regional sales agents and from 350 to 375 sub agents, also known as special sales agents. Within Arizona, TSI utilizes one regional sales agent (hereinafter RSA), and about eight sub agents to sell the TSI collection system to the commercial accounts.
2. Credit Management Services (hereinafter CMS) is a division of TSI, which is actively operating in Arizona, offering collection services on a percentage basis. Transworld Computer Systems another division of TSI, offers computer services to corporations entirely in California and conducts all of its business there.
3. TSI is an Employer subject to the Employment Security Law of Arizona, with admitted employees in its CMS division, which is basically an intensive collection division maintaining a permanent staff of employees in Arizona including a collection supervisor, collectors, and secretaries who perform collection, office and secretarial services. Sales of the TSI collection services are made through a sales structure in the CMS division, consisting of the RSA and the sub agents. It is these individuals whose status is in dispute here.

4. The Regional Sales Agency Agreement between TSI, also known as CMS, and the RSA (Exhibit 6), provides inter alia, that:

TSI designates a non-exclusive area as the sales territory of the RSA; the materials and sales aids furnished by TSI may be used by the RSA and his sub agents; other materials must be submitted to TSI for approval before use or distribution; TSI agrees to provide sales kits to the RSA at \$50 per kit, and the RSA and his sub agents may purchase sales aids and advertising materials from TSI as needed, to be deducted from commissions; it is the intention of the parties that the relationship of the RSA and his sub agents is that of independent contractor; the RSA to have authority (among other authorities) to supervise the regional sales office, and to hire, train, manage and supervise sub agents to represent TSI; the agreement shall immediately terminate in event of administrative or judicial determination of an employer-employee relationship rather than of independent contractor; the RSA and/or his sub agents shall not represent that he is an employee of TSI; TSI and the RSA agree that TSI will not deduct or pay any of the customary payroll taxes; the RSA and his sub agents agree they are responsible for their own payroll taxes, and if they so desire, they will arrange their own coverage for benefits, including unemployment benefits; TSI agrees to make available to the RSA reasonable office spaces and adequate office equipment and furniture; TSI agrees to install an adequate telephone system in the regional sales office, and to pay the basic monthly cost; TSI to furnish the RSA with a specified number of photocopies per month at no charge, and the RSA to pay 10¢ per photocopy in excess of agreed amount; TSI and the RSA agree to share on an equal basis the cost of advertisement for recruiting sub agents up to a maximum of \$350 during any one calendar month; TSI may assign accounts to RSA from time to time for servicing; TSI establishes the suggested retail price as shown on the price schedule, and retains the right to change suggested retail price schedule on 30 days written notice to the RSA. If the RSA and his sub agents sell at less, then TSI will still retain the amount it would have received had the order been sold at the suggested retail price, and it will remit only the difference to the RSA and/or his sub agents. If the RSA and his sub agents sell the collection service for more, TSI will mail a refund check to the client for the difference between the suggested

retail price and the amount of the sale, and TSI will pay commission only on the suggested retail price; the RSA shall forward to TSI each sales order received by him or his sub agents within two working days following the sale; the RSA and his sub agents agree to receive payment only by check payable to the order of TSI, from clients for sale of the collection services, and they shall have no right to personally receive payment, or to endorse or deposit any check for sale of the collection services of TSI; sales commissions shall be in accordance with commission schedules as attached and made part of the contract; all sales materials, contracts, client lists are confidential the sole property of TSI during the term of the contract and for one year after its termination, and shall be returned to TSI within five working days upon termination of agreement; the RSA acknowledges he has had no prior experience in the collection industry prior to his association with TSI. He agrees that the total value of his training programs provided to him by TSI is in excess of \$25,000. If he competes with TSI in any capacity within twelve months after termination of the relationship, the RSA agrees to pay \$25,000 to cover the training given to him as a condition to so compete; the RSA agrees not to solicit any clients of TSI within the period of twelve months after termination, and to pay \$5,000 as liquidated damages for each violation; commission charge-backs shall be made where TSI makes refunds to customers due to misrepresentations by the RSA or his sub agents, or in the case of a N S F check, a stop payment, or an order cancellation; TSI has the right to withdraw the sale of its collection services from any area or part of it under any circumstances, if in the judgment of TSI, it would suffer undue risk to its reputation, goodwill or business image, and in such event, the agreement shall have no further force and effect in such specific area; the failure of a party to insist on full performance of any part of the agreement, or the waiver by a party of any breach of the agreement, does not preclude later demand for full performance; the agreement may be terminated upon death of the RSA for cause upon breach by the RSA of any covenant, in the event the RSA fails to earn a quarterly sales bonus for two consecutive quarters.

5. The Special Sales Agent Agreement between TSI, also known as CMS, and the sub agent (Exhibit 7) contains substantially the same terms and conditions as the Regional Sales Agency Agreement (Exhibit 6) with the few changes as hereinafter noted:

<u>Caption</u>	<u>Changes in Exhibit 7</u>
Territory	Same
Company Name	Same
Sales Materials	Sub agent agrees to pay TSI for each sales kit furnished to him as rental the sum of \$ _____. Upon termination of agreement, sub agent to be refunded \$ _____ of rental upon return of sales kit. Also, sub agent to pay in advance for sales materials ordered.
Independent Contractor Relationship	Sub agent agreement contains no provision relating to the supervision of the regional sales office and to hire, train, manage and supervise sub agents to represent TSI. Sub agent agreement contains provision that agreement shall immediately terminate in the event of an administrative or judicial determination of an employer-employee relationship rather than that of independent contractor.
Representations by the Agent	Same
Withholding	Same

Office Space, Equipment, Furniture, Telephone, basic Monthly Cost, providing photocopies	Not present in sub agent agreement
District Sub Office	Not present in sub agent agreement
Accounts Assigned for Servicing	Not present in sub agent agreement
Suggested Retail Sales Price	Same
Payment for the Services	Same
TWI (CMS) Commission Schedules	Per Schedules
Confidential Information	Same
Right to Compete	Same as to acknowledge- ment of no prior experience. Value of training set at \$5,000.
Interference with TSI clients	Damages set at \$1,000.
TSI Right to Withdraw Service from Area	Same
If Agent is a Corporation	If sub agent is dba, a corporation, he agrees to submit to TSI a certified copy of Articles of incor- poration and to notify TSI of any changes in stockholders, officers or directors. This provision is absent from RSA agreement.
Part Performance does not Preclude Later Demand for Full Performance	Same
Termination	Sub agent may terminate relationship upon 15 days written notice to TSI. This pro- vision absent from

RSA agreement. Same as Exhibit 6, as to termination by death, for breach of contract, and failure to sell 2 new orders within 2 consecutive months. Also, for misrepresentation fraud, withholding TSI funds, and insolvency.

6. The sales kit (Exhibit 5) contains materials explaining the TSI system of collection services. It is used, in whole or in part, by the sales agents as a sales aid in selling the collection services to a potential client. The sales kit lists names of well known corporations and local clients who use the service. It recites that the system is designed to collect a delinquent account for a flat fee; to substantially reduce collection costs of the client; to reduce or eliminate friction in customer relations; to eliminate risk of violation of applicable laws; and to provide monthly accounts of status reports to the client. It explains to small companies how the TSI system implements the company system by use of computer forms and shows how larger firms can be set up with a computer system designed for the particular client. It shows how the client can arrange to have accounts automatically transferred to the basic intensive collection CMS division of TSI. It contains a facsimile of the accounting or status report sent by TSI to its clients, identifying the various debtors by name, their balances, the age of the accounts, the status of the contacts accounts put into the TSI system. The status report also contains the name and telephone number of the TSI Account Representative for that particular client.

7. A TSI instruction and storage kit (Exhibit 8) given to new clients of TSI by the sales agents, instructs the clients how to use the TSI and CMS service. Phase 1, pertaining to the TSI collection service instructions, includes directions on how to use the transmittal forms, how to start and suspend the service, how to report a payment and continue the service, and an explanation of the monthly status report to be given to the client regarding each debtor and a complete analysis of all collection activity pertaining to the client. Phase 2, pertaining to the CMS instructions, explains the need for CMS collection services on a percentage commission basis for unresponsive accounts to the Phase 1 services, instructions for the automatic transfer of assignments to CMS, and calls

attention to the availability of the Account Representative to answer any questions.

A sales brochure (Exhibit 9) given to clients of TSI by the sales agents in the course of selling the collection service, contains a comparison between TSI services and the ordinary collection agency. One of the advantageous aspects of TSI services stresses the fact that a TSI Account Executive is assigned to service each client personally.

Some sales agents provide their own sales aids. Examples are a Rolodex card which can also be used as a business card. It contains the TSI logo, the name of "Transworld Systems, Inc.", and its address and telephone number, the word "collections," and the name of the sub agent. Sales aids provided by the RSA include a small mirror in a vinyl case with the TSI logo, the name of Transworld Systems, Inc., and its address and telephone number, and the name of the RSA. He also provides a money clip with knife-blade and nailfile, which contain the TSI logo.

8. A former practicing Arizona lawyer, terminated his active practice of law on August 1, 1978, when he became associated with TSI as a sub agent. He continued as a TSI sub agent pursuant to a sub agent agreement (Exhibit 7) for about three years until about July 16, 1981, when he moved to California to become the TSI regional sales agent in San Francisco. Upon becoming the regional sales agent, he entered into the RSA contract (Exhibit 6).

He had had no prior experience in the collection industry, in the laws or regulations pertaining thereto, or in data processing before he became a sub agent for TSI. He attended training sessions given by TSI in order to acquire the sophistication and expertise to market the product competently. The training program covered specific sales techniques and systems of the collection industry, and evaluation of the adequacy or sufficiency of a client's system. The agenda at the weekly sales meetings covered computer changes frequently made by TSA.

When he started as a sub agent he went out with experienced sub agents, and on two occasions he went out with the regional sales agent. On the first occasion, he watched the regional sales agent make a presentation. On the second occasion, he made his own presentation.

As a sub agent, he was not required to perform his services during set hours or to devote a specific amount of time. He is not required to make reports. He was provided with office space and telephone in the TSI Phoenix regional office, but performed most of his services from his home. He came in to the office to turn in orders. He had no business telephone listing at his home. He does not know how his accountant reported his income for income tax purposes. He has no knowledge of the schedule known as "Schedule C" used to report income or loss from business or profession for income tax purposes. He paid his own automobile expense and used it for business and personal use. He had no trade name. He purchased a TSI sales kit for about \$40 or \$45, as well as sales brochures, the cost of which were deducted from his commissions. He paid for his calling cards which contained the TSI logo, name, address, and office telephone number. He was not given leads. His order books were furnished to him at no cost. They contained different methods of payment on credit terms devised by TSI. The sub agent is responsible for the collections, as he is paid his commissions when the clients pay TSI. Invoices mailed out by the agent do not contain his name. He had no assistants, and performed all of his services personally. At times he chose not to attend the sales meetings. All of his collection service sales were performed exclusively for TSI. He turned his sales orders over to the regional sales agent, together with the client's check payable to TSI. He has no right to endorse or deposit the check or to receive checks payable to himself. For a period of about three months immediately after he started as a sub agent, TSI guaranteed him a fixed amount conditioned upon doing a certain volume of business. This fixed amount was higher than his earned commissions. From the fourth month and thereafter, he was paid by commission only. TSI submits a weekly computer printout (Exhibit 11) to the regional sales agent and his sub agents listing a breakdown by names of the salesmen, the names of the clients to whom the TSI collection services were sold, the fees collected, the percentage basis of commissions, the amount of regular commissions earned, the override commissions, and charge-backs, if any, for cancelled orders or client defaults. He had never sold an account for less than the suggested retail price. In one case, the commissions were split between another sub agent and himself, and they donated their services on the first order because of the large potential in future earnings.

9. A former TSI sub agent performed his services from about July-August 1979 through January 1980. He had answered a newspaper "ad", and was interviewed at the TSI regional office in Phoenix. He was charged for a briefcase and brochures used in the presentation of potential clients. He was given an opportunity to purchase business cards at a reduced rate. He incurred his own transportation expenses. He entered into the written sub agent agreement with TSI. He was told he would be paid a certain net amount of dollars over a certain sales amount for the first three months. He had no assistants, and he performed his services personally. He was required to participate in very extensive training when he started as a sub agent. Training sessions commenced in the middle of the week and continued into the next week. The opening presentation was made by the executive vice-president of TSI, and the training was conducted by the regional sales agent as well as by some sub agents. Training consists largely of memory work. He had to learn a "canned" presentation. He was also given training in setting up appointments. He then went out with experienced sub agents and listened to their presentation. Later, someone went with him to listen to his presentation to potential clients. He was not required to come to the office other than to turn in contracts or to work particular hours. He worked about eight hours each day for five days each week, and did not perform soliciting services for anyone else at the time. He made his sales of TSI services at the suggested retail price. Checks of the customers were payable to the company. He did not extend credit to customers. He generally worked out of his home when making contacts. He performed no work for anyone else, although he was not restricted from engaging in other activities. He did not have a business telephone listing at home. In a typical sale, the sub agent fills in the contract form (Exhibit 12), the contract must be signed by the customer, the sub agent signs his name on the line marked "representative's signature - Transworld Systems, Inc.". The contract includes the client's name and address, the sub agent's number, the client's type of business or profession, the amount of the order, the amount of payment, the balance due, if any, and the mode of payment. There are follow-ups by the sub agent to see if the customer is happy with the services, and to answer questions.

in connection with TSI. He is considered the most successful salesman for TSI during the past year.

The regional sales office, and the collection division of TSI operate from the same location in Phoenix. TSI has the lease on the premises. The rental for the facilities used by the regional sales agent is paid by TSI to the landlord of the premises. The regional sales agent pays no rent for the use of the facilities. He conducts the training sessions of the new TSI sub agents. The material covered during training is considered sophisticated and technical. The sub agents are taught how to interface the systems of the various type of clients of TSI with the TSI systems. This involves an understanding of computer systems and aging analysis. Portions of the training sessions are devoted to requirements of applicable laws and regulations. The regional sales agent is given authority to hire, train, manage and supervise the sub agents in his region. In one case, a sub agent was trained in a home study program of TSI material, subject to later review by the regional sales agent to make sure that he had a proper understanding of the material. There is a probationary or trial period of 90 days during which a sub agent is expected to meet a minimum volume. It basically sets a dollar volume that they must turn in to qualify for a guaranteed minimum. TSI provides the office furniture and equipment. The regional sales agent owns the photocopy machine which he had personally purchased about a year ago. Prior to acquiring the photocopy machine, TSI paid for the cost of about 400 photocopies each month. TSI continues to reimburse him at the same rate since his acquisition of this equipment.

Prior to November 7, 1980, the regional sales agent had owned a company called Meyers & Associates, Investments, for real estate investments, in which capacity he had devoted about 5% of his time. About November 7, 1980, after Meyers & Associates ceased to operate, he formed Financial Sales Management, Inc., basically a marketing management company. He is still performing as regional agent in the capacity of an individual, and eventually plans to change over to a corporate operation. He does not know of any sub agent who is incorporated, or who is in partnership, or who uses

The sub agent also contacts the customer to deliver necessary TSI forms, for starting service, suspending service or payment notice, reinstated service and stopping service. The sub agent also prepared the direct assignment form to CMS, (Exhibit 13) which is signed by the customer to authorize further collection action on a percentage basis. He terminated the relationship because he could not make an adequate living as a sub agent.

10. Another former TSI sub agent was actively engaged as a sub agent from about September or October 1979, until April 1980. He learned about the sub agent opening through a newspaper ad. He was interviewed and hired by the regional sales agent and signed the sub agent contract. He was unemployed at that time, and had no prior experience in that activity. His investment consisted of a sales kit which cost him \$50. He paid his own car expense. He contacted potential clients from his home, and from six to eight hours per week at the company office. He had no set hours of work, and no written reports were required. He had no office-in-home, no business listing, and no trade name. He never had an assistant. The regional sales agent provided him with business cards at no cost. His business card (Exhibit 15) contains the TSI logo, its name, address and telephone number, and the name of the sub agent. His title is shown as "Account Executive".

He was given formal training for about six days at the TSI offices. There were about four persons in his training class. The training was conducted by the regional sales agent, and covered subjects on how to sell the product, what to do and not to do, and legal aspects of selling the product. He was required to attend the weekly sales meetings while active as a sub agent.

From April 1980 until August 1980, he was employed as a supervisor for the U.S. Census. He had no earnings from TSI during this period. There was no objection from the regional sales agent to his taking this census job, which was his only other activity at the time. He terminated his relationship with TSI because he could not make a living as a sub agent.

11. The TSI regional sales agent for the State of Arizona has served in that capacity since about 1970. He has performed his services under the terms and conditions of the Regional Sales Agency Agreement. About 95% of his time is devoted to selling and regional sales agent activities

a trade name in the sale of RSI services. He is remunerated by TSI by way of commissions for his own sales and also for overrides on sales by his sub agents. There have been occasions when he has been back-charged.

The help wanted newspaper ad for recruiting sub agents to call on business and professional firms to run in the classified section under "sales-persons". The ads are placed by regional sales agent. TSI reimburses one-half of the cost to him up to \$350 a month. Advertising exceeds that amount infrequently. The regional sales agent purchases sales kits from TSI whenever he needs them for distribution to new sub agents, or for replacement. He pays TSI for the kit and collects from the sub agent. TSI pays the commissions earned to sub agents by giving the funds to the RSA in one lump sum, pursuant to the breakdown of commissions as indicated on the weekly printout (Exhibit 11). The RSA then makes the payments to the sub agents accordingly. The sub agents turn the customer checks over to the RSA, who then submits them to TSI.

TSI provides the office space and facilities for use of the regional sales agent and the sub agents. TSI pays for their local telephone calls. The CMS division of TSI occupies four rooms in the office premises, the regional sales agent occupies an office, and the sub agents are provided with space which contains tables, chairs, and other office equipment for their use. Specific desks are not assigned to them. They use the facilities at random. The regional sales agent has never made sales at a higher price than the suggested price list because his commission is limited to the suggested price list, and TSI would send the excess back to its client. He has occasionally sold at less, and the amount of the reduction has been deducted from his commission. The TSI share was not reduced. Each sales order sold by the regional sales agent or his sub agent, is accompanied by a check, if any, payable to the order of TSI, and is required to be forwarded by the regional sales agent within two work days. Contracts and customer lists are the property of TSI, to be returned by the regional sales agent at the termination of the relationship. In the case of sub agents, they would return them to

the regional sales agent. TSI will not process a contract of sale of a new sub agent unless he has entered into the sub agent agreement with TSI.

12. TSI is licensed in Arizona, and maintains an office in this state as an "out-of-state collection agency", pursuant to the provisions of A.R.S. § 32-1001 et seq. According to TSI, the sales agents in Arizona are not required to be licensed.

Counsel for TSI contends that the regional sales agent and the sub agents performed services for or in connection with TSI as independent contractors, or in a capacity characteristic thereof.

The term "employment" is defined in A.R.S. § 23-615, in pertinent part as follows:

"Employment" means any service of whatever nature performed by an employee for the person employing him. ...

The term "wages" is defined in A.R.S. § 23-622, in pertinent part:

A. "Wages" means all remunerations for services from whatever source, including commissions and bonuses and the cash value of all remunerations in any medium other than cash. ...

Administrative rule A.C.R.R. R6-3-1705, which implements A.R.S. § 23-622, provides in pertinent part:

B. The name by which the remuneration for employment is designated or the basis on which the remuneration is paid is immaterial. It may be paid in cash or in a medium other than cash, on the basis of piece work or percentage of profits, or it may be paid on an hourly, daily, weekly, monthly or annual basis. ...

The term "employee" is defined in A.R.S. § 23-613.01, effective July 21, 1979, which provides in pertinent part:

A. "Employment" means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Absent other evidence indicating the employing unit exercises direction, rule or control over the individual as to both the method of performing or executing the services and the result to be effected or accomplished, the following shall not be considered an employee under this section:

1. An individual who performs services for an employing unit which are not a part or process of the organization, trade or business of the employing unit and who is not treated by the employing unit in a manner generally characteristic of the treatment of employees.
2. An individual deemed subordinate or subject to the direction, rule or control, or the right thereof, of an employing unit solely because of a provision of law regulating the organization, trade or business of the employing unit.
3. An individual who performs services for an employing unit through isolated or occasional transactions, regardless of whether such services are a part or process of the organization, trade or business of the employing unit or who performs casual services for an employing unit.
4. An individual who performs services for an employing unit in a capacity as an independent contractor, business person, agent or consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation.

Effective July 25, 1981, the Arizona legislature amended A.R.S. § 23-613.01 to read in pertinent part:

A. "Employee" means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished, except does not include:

1. An individual who performs services as an independent contractor, business person, agent or consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation.
2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit solely because of a provision of law regulating the organization, trade or business of the employing unit.

B. The following services are exempt employment under this chapter, unless there is evidence of direction, rule or control sufficient to satisfy the definition of an employee under subsection A of this section, which is distinct from any evidence of direction, rule or control related to or associated with establishing the nature or circumstances of the services considered pursuant to this subsection:

1. Services which are not a part or process of the organization, trade or business of an employing unit and which are performed by an individual who is not treated by the employing unit in a manner generally characteristic of the treatment of employees.
2. Services performed by an individual for an employing unit through isolated or occasional transactions, regardless of whether such services are a part or process of the organization, trade or business of the employing unit.

This amendment did not basically change the definition of the term "employee". It is submitted that the principal

reason for the 1981 change in the language of A.R.S. § 23-613.01 was to correct a problem in the administration of the 1979 section in issues involving job separations. Thus, by placing certain individuals [described in A.R.S. § 23-613.01(B)(1) and (2), supra,] in the category of "exempt" employment, the 1981 amendment allows the job separation to be used in determining claimant eligibility.

Administrative rule A.C.R.R. R6-3-1723(A) provides:

A. "Employee" means any individual who performs services for an employing unit, and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Whether an individual is an employee under this definition shall be determined by the preponderance of the evidence.

1. "Control" or "exercise ... control" as used in Section 23-613.01, A.R.S., includes the right to control as well as control in fact.
2. "Method" is defined as the way, procedure or process for doing something; the means used in attaining a result as distinguished from the result itself.

Administrative rule A.C.R.R. R6-3-1723(C)(2) identifies common indicia of control over the method of performing or executing services that may create an employment relationship. Administrative rule A.C.R.R. R6-3-1723(D) lists factors to be considered, in addition to factors of control, when determining whether an individual is performing services in a capacity as an independent contractor, or characteristic as an independent profession, trade, skill or occupation.

The indicia of control enumerated in A.C.R.R. R6-3-1723(C) include: (a) who had authority over the individuals' assistant, if any; (b) requirement for compliance with instruction; (c) requirement to make reports; (d) where the work is performed; (e) requirement to personally perform the services; (f) establishment of a work sequence; (g) the right to discharge; (h) the establishment of set hours of work; (i) training of an individual; (j) whether an individual devotes full-time to the activity of an employment unit; (k) whether the employing unit reimburses an individual's travel or business expenses.

Factors to be considered in determining whether an individual may be independent, enumerated in A.C.R.R. R6-3-1723(D) are: (1) whether an individual is available to the public on a continuing basis; (2) the basis of the compensation for the services rendered; (3) whether an individual is in a position to realize a profit or loss; (4) whether the individual is under obligation to complete a specific job or to end his relationship at any time without incurring liability; (5) whether the individual has a significant investment in the facilities used by him; and (6) whether the individual has simultaneous contracts with other persons or firms at the same time.

Administrative rule A.C.R.R. R6-3-1723(E), which provides guidance to evaluate the weight to be given to the indicia and factors in a particular case, reads:

E. Whether the preponderance of the evidence is being weighed to determine if the individual performing services for an employing unit is an employee under the general definition of employee contained in Subsection A., or may be independent when Paragraph 4, of Subsection B, is applicable,

the factors considered shall be weighed in accordance with their appropriate value to a correct determination of the relationship under the facts of the particular case. The weight to be given to a factor is not always constant. The degree of importance may vary, depending upon the occupation or work situation being considered and why the factor is present in the particular occupations or situations, while there may be other factors not specifically identified herein that should be considered (emphasis added).

By way of general observation, it may be stated that there is no single factor which determines the status of an individual as to whether he may be performing services in an employer-employee relationship or independently. Nor are the factors limited to the indicia delineated in Regulation A.C.R.R. R6-3-1723, as there may be other factors not specifically identified therein which should be considered [See A.C.R.R. R6-3-1723(E), supra].

In Smith v. Arizona Department of Economic Security, 128 Ariz. 21, 623 P.2d 810 (App. 1980), the Arizona Court of Appeals stated:

"A.R.S. § 23-613.01 defines employee in much the same manner as the Federal Unemployment Tax Act. The Federal Unemployment Tax Act has adopted the common law test applied realistically. ..."

The Court also noted that a comparison of applicable Internal Revenue Service (IRS) regulations with A.C.R.R. R6-3-1723 "reveals much similarity."

To date, the Smith case has been the only case in our courts of appellate jurisdiction specifically dealing with the issue of "employee" as defined in A.R.S. § 23-613.01.

In the light of the Smith case, supra, it is pertinent to note that the regulation issued under the Federal Unemployment Tax Act defines the term "employee" in pertinent part, as follows:

Section 31.3306(i)-1. (a) Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee. ...

(b) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor in indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee. ...

(c) Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

(d) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no

consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

However, in a more recent decision on another issue, our Court of Appeals in Warehouse Indemnity Corporation v. Arizona Department of Economic Security, 128 Ariz. 235, 627 P.2d 235 (App. 1981), made it clear that all sections of the Employment Security Law should continue to be given the long established liberal construction when it stated:

"The Arizona Supreme Court has noted, however, that the Arizona Employment Security Act is remedial legislation. All sections, including the taxing section, should be given a liberal interpretation so as to effectuate the legislative purpose (emphasis added)."

[See also, e.g., Beaman v. Superior Products, Inc., 89 Ariz. 119, 358 P.2d 997 (1961); Beaman v. Westward Ho Hotel, 89 Ariz. 1, 357 P.2d 327 (1960).].

It is also interesting to note that the Court in the Warehouse case, went on to say:

"Although closely complementary, the federal and state unemployment tax laws are separate and may be administered and interpreted by the respective officials within the limits of their granted powers."

Authority Over Individual Assistant

The Board agrees with counsel for TSI that the sub agents have no assistants, and that they perform their selling or soliciting services personally.

This factor, of itself, is not determinative of status, since neither a worker nor a self-employed individual needs to have assistants.

Compliance with Instructions

Control is present when the individual is required to comply with instructions about when, where and how he is to work. Some individuals may work without receiving instructions because they are highly proficient in their line of work and can be trusted to work to the best of their abilities; however, the control factor is present if the employing unit has the right to instruct or direct. The instructions may be oral or in the form of manuals or written procedures which show how the desired result may be accomplished.

The record shows that the sub agents, without exception, have had no prior experience in the sale of collection services; and that the TSI system has been described as an extremely sophisticated, computerized direct mail collection system. Realistically, from time to time, the sub agents have to be instructed in the particular sales techniques to be used in the solicitation and sale of the TSI unique collection services, such as: how to make the original presentation to the potential client, how to sell the TSI collection services, how to prepare the sales forms, how to arrange to have the sales contracts processed by TSI, how to handle fees collected from the clients of TSI, how to close sales, data processing utilized by TSI collection services, TSI computer capabilities and changes, aging analysis of clients' accounts, and legal aspects of the collection industry.

Further discussion on the scope of TSI instructions are

deferred to our consideration hereinafter of the training factor. The extent of control required in this area by regulatory requirements will also be discussed later.

For the aforementioned reasons, the Board finds substantial evidence to support the finding that the control factor of compliance with instructions is present here.

Oral or Written Reports

If regular oral or written reports bearing upon the method in which the services are performed must be submitted to the employing unit, it indicates control in that the worker is required to account for his actions. Reports used to establish entitlement to partial payment based upon percentage of completion may not be indicative of control.

The Board agrees with counsel for TSI that oral or written reports are not required in the present case, other than documentation related to the accomplishment of a sale.

Place of Work

Doing the work on the employing unit's premises is not control in itself, but it does imply control to the extent that the individual is physically within the employing unit's direction and supervision. Likewise, the fact that some work is done off the premises does indicate some freedom from control, but does not, by itself, indicate the individual is not an employee particularly where in some occupations, the services are necessarily performed away from the premises of the employing unit.

The record shows that the sub agents were provided with office space and local telephone facilities at the regional office of TSI, although they performed most of their sales services outside of the regional office, in making telephone and personal contacts with customers.

In this case, the sub agents were contractually engaged by TSI as its sales agents to solicit and sell its collection services to commercial customers. This is a type of service that contemplates personal contact with customers to convince them through effective sales presentation, including the TSI literature, the proven advantages of purchasing the unique and sophisticated collection services offered by TSI and its division. This is the kind of a service or occupation where the services must necessarily be performed in substantial part away from the premises of TSI.

In view of the foregoing, in weighing the appropriate value of the place of work factor in the instant case, the Board finds that the performance of most of the services off the premises of TSI, by itself, is not an indication that the sub agents can be said to be free or not to be free from control over the performance of their services. Here this factor must be considered in context with other applicable factors to arrive at an overall appropriate evaluation.

Personal Performance

If the service must be rendered personally it indicates that the employing unit is interested in the method as well as

the result. Personal performance might not be indicative of control if the work is highly specialized and the worker is hired on the basis of his professional reputation. Lack of control may be indicated when an individual has a right to hire a substitute without the employing unit's knowledge or consent.

Here, the fact that the sub agents personally performed their services for or in connection with TSI and that they had no assistants of their own is undisputed. There is no provision in the written contract authorizing the sub agents to hire a substitute without TSI's knowledge or consent. Also, the record clearly shows the sub agents, at the time of hire, had no prior knowledge whatsoever regarding the collection industry. It cannot be said, therefore, that they were hired on the basis of their professional reputation or expertise.

The Board must find that with respect to sub agents, the control factor of personal performance has been established, by the preponderance of evidence in this case.

Establishment of Work Sequence

If a person must perform services in the order or sequence set for him by the employing unit, it indicates the worker is subject to control as he is not free to follow his own pattern of work, but must follow the established routines and schedules of the employing unit.

The Board is inclined to concur with the position of counsel for TSI that the routine sequence performed by all sales

agents is not necessarily an indication of an establishment of sequence. If such normal sales steps were to be considered in all cases to be a sequence established by the employing unit, then it would unrealistically follow that sales agents of all kinds, with little exception, if any, would automatically be subject to control in that regard.

Since there is no evidence of any value that TSI has set an order or work sequence that sub agents must follow in their sales activities in the field, the Board finds this control factor absent here.

Right to Discharge

The right to discharge as distinguished from the right to terminate a contract, is an important factor indicating control, which is strongly indicated if the individual may be terminated with little or no notice, without cause, or for failure to use specified methods, and if the worker does not make his services available to the public on a continuing basis. Many contracts provide for termination upon notice or for specified acts of nonperformance or default, and may not be indicative of the existence of the right of control (emphasis added).

The sub agent agreement provides for the termination of the relationship by TSI under a number of conditions that can be generalized to be situations where he fails to produce a contractual end result within a consecutive two calendar month period; upon death of the sub agent; upon breach of a contractual covenant; for misrepresentation, fraud, withholding

TSI funds, or insolvency.

These contractual provisions, of themselves, may not be indicative of realistic control. However, the evidence adduced herein shows that the sub agents do not have employees or assistants, do not advertise, are not licensed, are not listed in the yellow pages, have no trade names or commercial offices of their own, and thus do not make themselves available to the public on a continuing basis. Coupling these facts with the contractual provisions, the Board thinks that there exists a basis to find the control factor of right to discharge present here.

It is pertinent to note, also, that pursuant to another provision of the TSI contract with the sub agents, TSI reserves the right to withdraw the sale of its collection services from any area or part of any area, under any circumstances, if in the unilateral judgment of TSI, it would suffer undue risk to its reputation, goodwill, or business image; and in such event, the agreement shall have no further force and effect in such specific area.

The identical language in that regard reads as follows:

A. The Company reserves the right to withdraw the sale of the services from any state, province or territory or any part thereof in the event of any circumstances which in the reasonable business judgment of the Company would cause the Company to suffer undue risk to its reputation, goodwill or business image. The Company shall give the (agent or RSA) thirty (30) days written notice of such withdrawal. If the Company should withdraw the services from the territory or any part thereof

covered by this agreement, this agreement and all of its provisions shall be deemed terminated with respect to that portion of the territory from which the services are withdrawn and this agreement shall have no further force and effect in the area.

We feel that the last mentioned provision has probative value to indicate a right to discharge because, in effect, TSI retains thereby the sole right to terminate the relationship on thirty days notice.

Set Hours of Work

A factor indicative of control is the establishment of set hours of work so that the individual is not master of his own time.

Here, the sub agents are not required by contract to work set hours, and fixed hours are not practical because of the nature of the services. Consequently, this factor is not present in the instant case.

Training

A factor of control is training of an individual by an experienced employee working with him, by required attendance at meetings, and by other methods because it is an indication that the employing unit wants the services performed in a particular method or manner.

In the present case, the sub agents go through a training period conducted by the regional sales agent where they are instructed in the area of product knowledge and sales presentation. During the training period, the sub agents spend

time in the field with experienced agents to observe and be observed in the manner of making a sales presentation. All sub agents acknowledge that they had no prior experience in the collection industry prior to their association with TSI.

A former sub agent in Arizona who is currently a regional sales agent in California, stated he attended training sessions which covered specific sales techniques, systems of the collection industry, and evaluation of the adequacy or sufficiency of a client's system. He went out in the field with experienced sub agents, and on two occasions he went out with the regional sales agent. The first time, he watched the regional sales agent make a presentation. The second time, he made his own presentation. He attended subsequent weekly sales meetings to keep abreast with TSI changes in their computer activities, but he was not required to attend all sales meetings.

Another former sub agent stated that he was required to participate in very extensive training; that training sessions commenced in the middle of the week and continued into the next week; that the opening presentation was made by the executive president of TSI; and that training was conducted by the regional sales agent and by some sub agents. Training stressed memory work and he had to learn a "canned" presentation. He was given training in setting up appointments. He went out with experienced sub agents to observe their manner of presentation. Then someone went out with him to listen to his presentation.

Another former sub agent stated he was given formal training at the TSI offices for about six days. There were others in his training class. Training was conducted by the regional sales agent and covered subject on how to sell the product, what to do in the sales process, and legal aspects of selling the product. He was required to attend the weekly sales meetings until he became an inactive sub agent while working on a temporary job elsewhere.

The TSI regional sales agent stated he conducts the training sessions of the new TSI sub agents. Training is sophisticated and technical, and involves an understanding of computer systems, aging of clients' accounts receivable, an interfacing of the systems of various types of clients' businesses with the TSI systems and requirements of applicable laws and regulations. There was one case where a new sub agent was permitted to substitute training in a home study program of TSI material, subject to later review by the regional sales agent. The contract between TSI and the regional sales agent provides, among other things, for the regional sales agent to hire, train, manage and supervise the sub agents.

In view of the foregoing, the Board must conclude that the control factor of training is clearly present here.

Amount of Time

If an individual must devote full time to the activity of the employing unit, the employing unit has control over his working time and impliedly restricts him from doing other

gainful work. Its meaning may vary with the intent of the parties, the nature of the occupation and customs of the locality.

The evidence establishes that this factor is not present here.

Tools and Materials

The furnishing of tools, materials, supplies, etc., by the employing unit is indicative of control.

The record shows that materials and sales aids are furnished by TSI to the sub agents, and that in almost all instances, the agents pay for the materials by a charge against their earned commissions. Materials not furnished by TSI must be submitted to TSI for approval before use. Materials and sales aids furnished by TSI, include a sales kit, for which a refund of part of the cost is made to the sub agent upon termination of the relationship; a TSI instruction and storage kit; a sales brochure; forms to start, suspend, reinstate and stop TSI service; CMS director assignment forms; and TSI business cards containing TSI's name, business address, telephone number and logo, and the name of the sub agent. The order books are furnished by TSI at no cost.

One sub agent provided his own combination roladex card and business card as a sales aid.

We find the preponderance of evidence supports a conclusion that materials and supplies were substantially provided by TSI, albeit at a charge to the sub agents.

Expense Reimbursement

Payment by the employing unit of the individual's business and/or traveling expenses is a factor indicating control over the worker.

Here, the sub agents pay their own car expense and long distance telephone calls. However, TSI pays other business expenses including office space, office furniture and equipment, and local telephone calls.

Here, we have a combination of facts indicating both independence and control, and the Board concludes this factor is of no particular significance with respect to sub agents.

Additional factors of control, not specifically identified in the foregoing indicia of control enumerated in A.C.R.R. R6-3-1723(C) should also be considered [See A.C.R.R. R6-3-1723(E), supra.].

The Board is aware that the Arizona Supreme Court decision in the Superior Products, Inc. case, supra, was rendered prior to that the elements of control in that case, considered by the Court in determining whether control is present over performance of services in cases involving salesmen are applicable to the present case.

In the Superior case, the Court stated:

"Although each case must necessarily depend on the peculiar facts we think the following excerpt is correct and should serve as a useful guide in cases involving salesmen.

Salesmen are generally employees even though paid on a commission basis and comparatively free from control. In most cases the services are performed in the course of the employer's

business and not at the furtherance of an independently established business of the salesman. Although actual control may be apparent, the person for whom the services are performed generally has the right to control the salesman's activities. Thus it has been held that where 'the subject of sale, the terms of sale, and the proceeds of sale remaining in control of the company ... constituted a general control'."

Likewise in the instant case, the services of the sub agents are performed in the regular course of business of TSI, the subject of the sale, the terms of the sale, and the proceeds of the sale remain in the control of TSI.

We will now consider the factors identified in A.C.R.R. R6-3-1723(D), which tend to be indicative of independence, as contemplated in A.R.S. § 23-613.01.

Availability to Public

In this case, the record shows that the sub agents are prohibited from making themselves available in any way to the general public to perform related services. In general, also, they do not make themselves available to the public on a continuing basis. They do not have their own offices. They do not have employees or assistants of their own. They do not advertise by displaying a business sign. They are not licensed. They are not listed in a business or classified telephone directory. They do not advertise in newspapers or any other type of publication. They do not have trade names.

Compensation on a Job Basis

An independent contractor is customarily paid on a job basis. Payment on a job basis may include a predetermined

lump sum computed by the number of hours required to do the job at a fixed rate per hour; or it may involve periodic partial payments based on a percent of the total job price.

Here, the sub agents are paid by the employing unit on a commission basis. A.R.S. § 23-622 includes commissions in its definition of "wages".

The guarantee of a minimum salary drawing account with no requirement for repayment of the excess over earnings, tends to indicate the existence of an employer-employee relationship. This is the situation we find in the present case when sub agents are guaranteed a fixed amount.

The Board finds from the preponderance of the evidence that the manner of compensation to the sub agents is indicative of an employee status, rather than an independent status.

Realization of Profit and Loss

An individual who is in a position to realize a profit or suffer a loss as a result of his services is generally an independent contractor, while the individual who is an employee is not in such a position.

In the present case, the evidence establishes that the sub agents are in no position to realize a profit or suffer a loss as contemplated by the above factor, because they do not have continuing and recurring significant liabilities or obligations in connection with the performance with the work involved; their success or failure does not depend, to an appreciable degree on the relationship of receipts to expenditures; and they have not agreed to perform specific jobs in advance and

pay expenses such as wages, rents or other, significant operating expenses.

Obligation

We quote from A.C.R.R. R6-3-1723(D)(4):

An employee usually has the right to end his relationship with his employer at any time he wishes without incurring liability. ... An independent worker usually agrees to complete a specific job ... and would be legally obligated to make good for failure to complete the job, if legal relief were sought.

This factor of itself, is not necessarily indicative of either an independent contractor or employment relationship. In the context of the entire record herein, however, we find that the fact that the right of the sub agent to terminate the relationship without cause on a fifteen day written notice to TSI, is not indicative of an independent relationship.

Significant Investment

The furnishing of all necessary facilities by the employing unit tends to indicate the absence of an independent status. A significant investment by a person in facilities used by him in performing services for another tends to show an independent status.

We quote from the Social Security Handbook, DHEW Publication No. (SSA) 73-10135 February 1974, section 825, in part, as follows:

Facilities include such items as office furniture and fixtures, premises, and machinery. A salesman maintaining an office in his own home may not have a substantial investment; but a salesman maintaining an office outside his home frequently does have a substantial investment in facilities.

Facilities do not include education, training, experience, tools, instruments, or clothing commonly or frequently provided by employees or a vehicle used for the worker's own transportation, or for carrying the goods or commodities he sells, or for supplying laundry or dry cleaning service."

Here, TSI furnishes facilities, including office premises, equipment and telephone; and the sub agents maintained no commercial offices of their own.

We must conclude that the sub agents make no significant investment, and the absence of this factor tends to indicate the absence of an independent status.

Simultaneous Contracts

If an individual works for a number of persons or firms at the same time, it indicates an independent status because, in such cases, the worker is usually free from control by any of the firms. It is possible, however, that a person may work for a number of people or firms and still be an employee of one or all of them. The decisions reached on the other pertinent factors should be considered when evaluating this factor.

We find that in the present case, the record shows that the sub agents devoted all or substantially all of their time to working for TSI during the existence of their relationship. A lawyer ceased his active private practice of law when he became a sub agent. A sub agent ceased his activities as such, when he obtained a job with the U.S. Census. Another sub agent stated he performed work for no one else, and finally terminated the

relationship because he could not make a living.

The Board concludes that in view of all factors in this case, the circumstances in the present case, pertaining to this factor of "simultaneous contracts", is not indicative of an independent status.

The Board has carefully reviewed and evaluated all of the factors pertaining to the sub agents of TSI, in order to determine their status from an integrated picture of the working relationship formed by concatenation of factors weighed by being judged, rather than mere consideration of component parts.

After due consideration of the appropriate value of all factors, we must conclude that the sub agents are employees of TSI.

Authority Over Individual's Assistants

Administrative rule A.C.R.R. R6-3-1723(C)(2)(a) provides:

a. Authority over individual's assistants. Hiring, supervising, and payment of the individual's assistants by the employing unit generally shows control over the individuals on the job. Sometimes, one worker may hire, supervise, and pay other workers. He may do so as the result of a contract in which he agrees to provide materials and labor and under which he is responsible only for the attainment of a result; in which he may be independent. On the other hand, if he does so at the direction of the employing unit, he may be acting as an employee in the capacity of a foreman for or representative of the employer.

In the instant case, the record shows that the contract between TSI and the regional sales agent (RSA) contains the following provisions, among other things, that: "The company

agrees to make available to the RSA reasonable office space and to make available to the RSA equipment and furniture to adequately furnish the office. . . .;" "The company agrees to install what they consider an adequate telephone system in the Regional Sales Office and to pay the basic monthly cost. . . .;" TSI authorizes the regional sales agent "to supervise the regional sales office", and "to hire, train, manage and supervise sub agents to represent the company." References are also made in numerous instances in the contract to the "RSA and his sub agents." The regional sales agent is also authorized to run an advertisement for the sole purpose of recruiting sub agents; and the regional sales agent is required to forward to the company each sales order received by the RSA or his sub agents.

In this connection, it is pertinent to note that the regional sales agent is not a party to the separate written service contract between the sub agents and TSI.

As previously quoted, A.C.R.R. R6-3-1723(A)(1) provides:

"Control" or "exercises . . . control" as used in A.R.S. § 23-613.01 includes the right to control as well as control in fact.

The record shows that TSI has given the regional sales agent authority "to hire, train, manage and supervise sub agents to represent the company." Clearly, this authority obviously must include the right to control as well as control in fact. Any other interpretation would be contrary to common sense and reason.

In view of the foregoing facts, the Board finds that the preponderance of the evidence establishes that the regional sales agent exercises control over the sub agents in the capacity of a representative of TSI, and not on his own.

It is important to note that A.R.S. § 23-614, provides in pertinent part:

C. Each individual employed to perform or assist in performing the work of any person in the service of an employing unit shall be deemed to be engaged by the employing unit for all the purposes of this chapter, whether the individual was hired or paid directly by the employing unit or by such person, provided the employing unit had actual or constructive knowledge of the work. ...

The evidence is undisputed that the sub agents are engaged by the regional sales agent in the capacity of a representative of TSI, and they are hired by him with the authorization and actual knowledge of TSI. Pursuant to A.R.S. § 23-614(C), it follows that the sub agents must be considered to be employees of TSI, and not of the regional sales agent.

Compliance with Instructions

In this case, the regional sales agent has been TSI's Arizona regional sales agent for over ten years. It is undisputed that he can perform his services satisfactorily without receiving instructions because of his proven proficiency in this line of work.

Oral or Written Reports

Regular oral or written reports bearing upon the method in which the regional sales agent performs his services are

not required. Rather, only periodic reports relating to sales accomplishments and entitlement of the regional sales agent and the sub agents to commissions are required.

Place of Work

The previous discussion and analysis of this factor with regard to the sub agents, as applicable to the regional sales agent, is adopted herein.

In addition, the record shows specific availability is made by TSI to the regional sales agent of an office, equipment and furniture; that the regional sales agent supervises the regional sales office; that he uses the regional office premises for hiring, training, managing and supervising the sub agents; that the sales contracts of the sub agents are submitted to him by the sub agents; and the commission accounting statements of the sub agent, and commission checks to the sub agents are submitted and paid to them in the regional office. Obviously, the regional sales agent must spend much more time physically within the regional office premises than is required of a sub agent. For the reasons stated, we find that the place of work of the regional sales agent is a factor indicative of control in the instant case.

Personal Performance

In this case, the regional sales agent is required to perform, and does perform his regional agency services for TSI in person, both by contract and in fact. He has no authority to hire a substitute. There is no provision or authorization

in his contract for acting as a corporation or other legal entity in the performance of his regional services.

A corporation recently organized by the regional sales agent admittedly is not presently acting as regional sales agent. What the regional sales agent may do or attempt to do in the future in that regard, with or without the consent of TSI, is purely speculative.

We find from the preponderance of evidence that the control factor of personal performance is present here.

Establishment of Work Sequence

The record warrants the conclusion that there is no order or work sequence established by TSI that must be followed by the regional sales manager, other than the particular times scheduled for training of new sub agents, and the holding of sales meetings.

Right to discharge

This factor was explored in depth regarding the sub agents, and our analysis therein is adopted with respect to the regional sales agent.

Set Hours of Work

As in the case of the sub agents, the regional sales agent is not subject to set hours of work.

Training

The regional sales agent is highly proficient in this line of work and obviously can be trusted to expertly perform his services for TSI, without further training. As a matter of

fact, he is authorized by TSI to train their new sub agents.

Consequently, in the present case, this factor is inapplicable with respect to the regional sales agent.

Amount of Time

The record shows that the regional agent devotes substantially his full time to the activities of TSI. He is restricted from competing with TSI.

The preponderance of the evidence warrants a conclusion that this factor of control is applicable to the regional sales agent.

Tools and Materials

The comments and analysis on this factor regarding the sub agents are applicable and adopted herein.

Additionally, the evidence shows that the regional sales agent obtains the sales kits directly from TSI whenever a sub agent needs one, and that he sells it to the sub agent. The regional sales agent arranges to have business cards printed which bear the name of TSI and the sub agent. Sales aids provided by the regional sales agent for himself, consist of a small mirror in a vinyl case bearing the TSI logo, the name of Transworld Systems, Inc., with its address and telephone number, as well as his own name. He has also provided for himself, a combination money clip, knife-blade and nail file containing the TSI logo.

For the reasons stated above, we conclude that TSI has substantially provided materials and supplies to the regional

sales agent, and that this control factor must be considered as applicable here.

Expense Reimbursement

The record shows that TSI provides the regional sales agent with a private office, telephone and office facilities. Also, that TSI paid or reimbursed the regional sales agent for one half of a monthly cost of \$350 for advertising for new sub agents. The regional sales agent pays his car expense and long distance calls.

TSI also provides the regional sales agent with a substantial amount of photocopies per month at its expense, and has continued to reimburse the regional sales agent for photocopies at the same rate after his recent purchase of a copy machine.

TSI argues that the evidence shows that the regional sales agent contributed substantially toward the expenses necessary for space in the regional sales office, by way of a reduction in his commission base.

This contention is based on the following statements on direct examination of the regional sales agent (Tr. pp. 160-161):

"Q. With regard to the payment of rent for the premises at 2150 East Highland and the prior office, the rent check is physically cut and paid to the landlord by Transworld Systems, is it not?

A. Yes. It is.

Q. But is it not also a fact that this is a deduction from your commission, at least to the extent of approximately \$180 per month?

A. Well, in the contract they list the bonus figure; and the bonus figure equates to the overhead expense.

Q. So what it comes down to is \$18,000 upon which ---

A. I'm paid a lesser commission, and then anything over that I paid a greater commission; so in the wash I was effectively paying for the overhead.

Q. I see. So then there's no commission on the first \$18,000 per month?

A. That's correct.

Q. And that computes out at the rate of 6 per cent to \$880?

A. That's correct.

Q. So then your contribution and payment of overhead is \$880 per month?

A. Plus the phone the phone bill."

The Board is not persuaded by the uncorroborated speculation, surmise and inference of the witness that a reduced bonus for the first \$18,000 (of sales?) equates to his payment of office rent and overhead.

For all of the above reasons, the Board finds that the preponderance of evidence establishes that TSI paid substantially all of the office expense of the regional sales agent.

It is to be expected, that much of the discussion and evaluation made in the review of the factors delineated in A.C.R.R. R6-3-1723(D), supra, pertaining to the sub agents, is equally applicable to the regional sales agent. In view of this, the Board hereby incorporates by reference as if fully restated, the arguments and conclusions as to each of these factors with

respect to the sub agents insofar as applicable to the regional sales agent.

Briefly, in the interests of reducing the length of this decision, the evidence adduced at the hearing establishes that: the regional sales agent is not available to the public to perform related services; he is compensated on a commission basis, with bonuses and/or overrides, and not on a job basis; he does not have expenses such as wages, rents, or other personal significant operating expenses in connection with his services as regional sales agent for TSI; TSI furnishes him with his office, office facilities and local telephone service. His recent purchase of a copy machine for several thousand dollars is not significant in view of TSI continuing to reimburse him for photocopies; and the regional sales agent devotes substantially all of his time to his duties and responsibilities as regional sales agent of TSI in hiring, training, managing and supervising the sub agents, in selling TSI services, and generally in supervising the Phoenix regional office of TSI which is in his charge.

As in the case of the sub agents, the Board has carefully weighed the evidence in its totality, pertaining to the factors and their appropriate values regarding the regional sales agent. Under all of the circumstances of this particular case, we find the factors indicative that the regional sales agent is an employee of TSI for purposes of the Employment Security Law of Arizona far outweigh factors capable of other interpretation.

The Board, therefore, concludes that the regional sales manager is an employee of TSI.

TSI also takes the position that its sub agents and regional sales agent should be considered exceptions to the definition of "employee" contained in A.R.S. § 23-613.01, because that definition excludes from the term "employee", an individual subject to the direction, rule or control "of an employing unit solely because of a provision of law regulating the organization, trade or business of the employing unit."

Administrative rule A.C.R.R. R6-3-1723(B)(2)(a) defines the word "solely" as used in A.R.S. § 23-613.01, as meaning, but not limited to: "only, alone, exclusively, without other".

Administrative rule A.C.R.R. R6-3-1723(B)(2)(c) restricts the exception or exclusion to those cases involving control of the employing unit "only to the extent specifically required by law of regulation governing the organization trade or business of the employing unit."

This regulatory definition of "solely" is not inconsistent with Webster's New Collegiate Dictionary which defines "solely" to mean: "without another; to the exclusion of all else".

The position of TSI minimizes the fact that the statutory term "solely" is clearly defined to mean only, alone, exclusively, without other, to the exclusion of all else.

It is pertinent to note that provisions of law affecting the collection business have not been shown to be the only and exclusive reason for TSI exercising control over the performance

of the services of its regional sales agent and sub agents. To the contrary, the evidence establishes that the many indicative factors of control herein before fully detailed, are of major significance independently of provisions of law.

As an illustration, we refer to A.R.S. § 32-1001 et. seq. providing for the licensing and regulation of collection agencies, strongly relied on by TSI as support for its argument that control in the instant case exist solely because of provisions of law, or their regulations.

Title 32, Professions and Occupations, Arizona Revised Statutes which provides for the licensing and regulation of 27 professions and occupations, has 27 Chapters, of which Chapter 9, Collection Agencies is but one. Among others, architects, assayers, engineers, geologists, surveyors, lawyers, doctors, barbers, cosmetologists, contractors, nurses, pharmacists, pest control, security guards, driver training school, etc.

With respect to Collection Agencies, A.R.S. § 32-1001 provides pertinent definitions as follows:

2. "Collection Agency" means and includes:

(a) All persons engaged directly or indirectly in soliciting claims for collection or in collection of claims owed, due or asserted to be owed or due another.

3. "Collection Agency" does not include the following when engaged in the regular course of their respective businesses:

* * *

(g) Employees of licensees under this chapter.

* * *

6. "Superintendent" means the superintendent of banks.

A.R.S. § 32-1024(4), provides:

The superintendent shall issue a license to operate a collection agency to a person who holds and presents with his application a valid and subsisting license to operate a collection agency issued by another state or an agency thereof, if; ...

4. The applicant agrees to maintain an office in this state for collection of claims.

A.R.S. § 32-1055 lists acts of collection agencies considered to be unlawful, to include among others: failure to render an account of and pay to the client, the proceeds collected less charges, within 30 days from the last day of the month in which it is collected; failure to deposit with a local depository all collections until remitted to clients; failure to maintain an office or place of business in this state; and failure to keep a record of collections and remittances.

The point we want to stress by the foregoing quotes from Title 32, is that collection agencies are but one of twenty-seven professions and occupations which are subject to licensing and regulatory laws in this state.

If the contention of TSI that A.R.S. § 32-1001 et. seq. covering collection agencies, represents a sole control over its sales agents were to be accepted as valid, would it not equally be true with respect to all individuals performing services in employment for the other twenty-six trades and professions also licensed and regulated by Title 32?

In such an event, it would follow that all employees performing services for contractors, for pharmacists, for pest

control businesses, for security guards, or for driver training schools, would be excluded as "employees" for unemployment insurance purposes.

We think it unnecessary to further belabor the applicability and effect of this particular law as a basis for exclusion of the sales agents as employees.

In its brief, TSI names several federal acts by titles only and submits that the disputed individuals should be excluded as its employees because of these acts.

TSI undoubtedly places significance upon these federal acts. However, the conclusions of the Board must necessarily be based upon the record before us, and upon the application of the Employment Security Law of Arizona to the evidence contained in that record.

The Board finds that the record herein does not support the position of TSI that the sub agents and the regional sales agent are subject to the direction or control of TSI solely because of A.R.S. § 32-1001 et. seq., and the federal laws in question.

In view of the foregoing, it is concluded that the sub agents and the regional sales agent of TSI are employees of TSI, as contemplated by the provisions of A.R.S. § 23-613.01, and that they are not excluded or excepted as employees by the exclusionary provision thereof.

THE APPEALS BOARD affirms the reconsidered decision issued April 14, 1981.

1. Individuals referred to as special sales agents, also known sub agents and as a regional sales agent performing services for Transworld Systems, Inc. (TSI), are employees of TSI, within the meaning of A.R.S. § 23-613.01.

2. Services performed for or in connection with TSI by these individuals constitute employment, as defined in A.R.S. § 23-615.

3. All forms of remuneration paid these individuals for such services constitute wages, as defined in A.R.S. § 23-622.

Dated this 7th day of January, 1982.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Reana K Sweeney, Chairman

Robert D. Sparks, Member

Marcia A. Miller, Acting Member

THIS DECISION DESIGNATED AS
A PRECEDENT DECISION BY THE
DEPARTMENT OF ECONOMIC SECURITY
ON September 28, 1982.

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