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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

244

JOHNNY J. PORTER,
Petitioner-Appellant,
vs.
IOWA DEPARTMENT OF JOB SERVICE,
Respondent-Appellee.

Filed February 24, 1981

0-416
2-64846

Appeal from Polk District Court - Louis A. Lavorato, Judge.

Petitioner appeals from district court's ruling on judicial review affirming respondent agency's denial of unemployment benefits. He contends 1) that the district court applied the wrong standard of review, 2) that the agency decision was not supported by substantial evidence, and 3) that consideration should have been given to a written statement that the agency declined to accept as additional evidence because it was not presented to the hearing officer. REVERSED AND REMANDED.

Anthony Touschner, Des Moines, for petitioner-appellant.

Walter F. Maley, Des Moines, for respondent-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

Petitioner-claimant, Johnny J. Porter, appeals from district court's ruling on judicial review affirming respondent-agency's, Iowa Department of Job Services', denial of unemployment benefits. He contends 1) that the district court applied the wrong standard of review, 2) that the agency decision was not supported by substantial evidence, and 3) that consideration should have been given to a written statement that the agency declined to accept as additional evidence because it was not presented to the hearing officer. We reverse and remand.

Petitioner was employed by Ladin Industries, Inc. from October, 1977, to December 18, 1978. He quit his job because he believed that a required job transfer within the company would involve a reduction in pay. His application for unemployment benefits was denied on the grounds that he had voluntarily quit without good cause attributable to the employer. During the hearing on petitioner's appeal of denial of benefits, petitioner's employer testified that he did not recall telling petitioner that his pay would be decreased thirty cents an hour on his next job with the company. The employer later stated during the proceedings that:

> [a]lso I believe if you would like to check—if the union secretary there was at our little meeting with us she was taking notes of the proceedings and if you'd like to check with her to see if I did state that he would be getting paid 30 cents less per hour, I think it should show on her records, you know, on her minutes of the meeting.

The hearing officer concluded that the petitioner ". . . left his job because of his belief that his rate of pay was going to be substantially reduced by the employer . . ." but that petitioner ". . . failed to establish that there would have been a change in his rate of pay . . ." and therefore he did not ". . . establish that his leaving was for good cause attributable to his employer."

Petitioner then appealed to the agency appeal board to present additional evidence pursuant to 370 I.A.C. § 6.4(1)(g). Petitioner wanted to present testimony from two persons present at the time he was notified of his job change to substantiate his claim that he had, in fact, been told his pay would decrease with the job change. Petitioner claimed that he did not present the evidence earlier because he did not know that the two persons would be willing to testify and did not anticipate the dispute over the rate of pay. The appeal board considered petitioner's application to present additional evidence at the time his appeal was reviewed. Petitioner attached to his appeal brief a signed statement from the union president and secretary substantiating

his claim that he had been told by his employer his rate of pay would decrease on his next job with the employer. The appeal board affirmed the hearing officer's decision and denied petitioner's request to present new evidence. Petitioner applied for a rehearing urging the same argument that he had made before the appeal board initially and stating that a copy of the statement to be presented by the witnesses had been previously submitted to the appeal board as an addendum to his brief. Rehearing was denied due to a "[l]ack of evidence other than that which has already been presented." Upon judicial review, district court affirmed the agency's decision. Petitioner's appeal to the supreme court followed.

I. Scope of Review. Review of final agency action under chapter 17A, The Code 1979, is at law, not de novo. Green v. Iowa Department of Job Service, 299 N.W.2d 651, 655 (Iowa 1980). The district court in its review of the case ascertains whether the agency acted arbitrarily or capriciously, committed an error of law, or otherwise violated section 17A.19(8); its review is an appellate proceeding. Cook v. Iowa Department of Job Service, 299 N.W.2d 698, 701 (Iowa 1980). This court's review then is directed to the sole question of whether the district court correctly applied the law, Jackson County Public Hospital v. Public Employment Relations Board, 280 N.W.2d 426, 429 (Iowa 1979), and is limited to the record made before the hearing officer. Section 17A.19(7). To make our determination, we apply the standards of section 17A.19(8) to the agency action to determine whether our conclusions are the same as the district court's; if so affirmance is in order. If our conclusions differ, reversal may be required. Jackson County, 280 N.W.2d at 430.

Because we remand this case on petitioner's contention that consideration should have been given to the written statement that the agency declined to accept as additional evidence, we first address that issue.

II. Request for Consideration of Additional Evidence. As indicated above, petitioner requested to present additional evidence pursuant to 370 I.A.C. § 6.4(1)(g). He contended that the evidence was material and stated reasons why the evidence had not been introduced before the hearing officer. He also attached a note signed by the two witnesses to substantiate his claim for additional evidence. This evidence, if believable, would have substantiated petitioner's claim that the proposed job change would have necessitated a reduction in his rate of pay. The employer also invited consideration of this evidence in his testimony quoted above. The appeal board denied petitioner's request and also denied rehearing based on the same evidence which

plaintiff sought to introduce. The district court, however, did consider the signed note in affirming the appeal board.

We reach a different conclusion and find that under 370 I.A.C. § 6.4(1)(g), petitioner has demonstrated 1) materiality and 2) good reasons for failure to present the evidence earlier. See Cedar Valley Leasing, Inc. v. Iowa Department of Revenue, 274 N.W.2d 357, 362 (Iowa 1979). In Shontz v. Iowa Employment Securities Commission, 248 N.W.2d 88 (Iowa 1976), the supreme court found error in the commission's failure to direct the taking of additional evidence, material to the case, upon the application of the employer, thus resulting in denial of a full and fair hearing to the employer. 248 N.W.2d at 91. The court found the inadequacy of the record made it inappropriate to determine whether the facts presented established a basis for awarding unemployment benefits. Id. at 91-92.

As in Shontz, we conclude the appeal board here erroneously refused to admit petitioner's additional evidence. We thus reverse the agency decision and remand this case to the agency for consideration of this evidence pursuant to section 17A.19(8)(e). In light of this disposition, we do not consider petitioner's other assignments of error at this time.

REVERSED AND REMANDED.