FILED
AUG 25 1981
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

KEITH A. SHIELDS,

Petitioner-Appellee,

vs.

CITY OF CEDAR RAPIDS and IOWA DEPARTMENT OF JOB SERVICE,

Respondents-Appellants.

Filed August 25, 1981

1-75
2-65294

Appeal from Linn District Court. August F. Honsell, Jr., Judge.

Respondents appeal ruling of district court reversing a decision by the Appeal Board of the Iowa Department of Job Service that petitioner was not entitled to unemployment benefits because of his discharge for misconduct. A written statement regarding agency rules was properly considered although no cross-examination of its author was made. REVERSED AND REMANDED

Walter F. Maley of Iowa Department of Job Service, Des Moines, Ia., for respondents-appellants.

Teel Haas of Legal Service Corp. of Iowa, Cedar Rapids, Ia., for petitioner-appellee.

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

PER CURIAM

Respondents appeal ruling of district court reversing a decision by the Appeal Board of the Iowa Department of Job Service that petitioner was not entitled to unemployment benefits because of his discharge for misconduct. Respondents assert that the court erroneously applied section 17A.14(3), The Code, in disregarding certain evidence and that certain statutory changes in the method of computing the period of disqualification for misconduct should be given retroactive effect. We reverse and remand.

Claimant filed a petition on November 27, 1979, seeking judicial review of respondent agency's denial of his application for unemployment benefits. The agency appeal board decided on October 19, 1979, that he was discharged for misconduct. Claimant was employed by respondent city as a laborer and driver from June 1, 1977 to June 13, 1979 when he was discharged for allegedly failing to comply with his employer's rule prohibiting employees from writing on or altering their time cards. In this case, he wrote on his card that he thought he was entitled to additional sick pay.

The agency appeal board found that the employer had a policy barring the entering of information on the back of employee time cards, that claimant was told about that rule and he deliberately and willfully disregarded that rule. His claim for unemployment benefits was thus denied. In its ruling of June 17, 1980, the district court rejected the agency's conclusion, noting that the evidence presented to the agency contained a statement written by a Mr. Lockhart on the employer's behalf. This statement referred to the rule regarding the ban on writing on time cards and the fact that notice of the rule was posted. The court found that the statement was received into evidence without giving claimant a chance to cross-examine its author pursuant to section 17A.14(3), The Code. The court found the agency relied on this statement, that there was not substantial evidence to support the agency's decision and remanded the case to the agency to determine by substantial evidence whether petitioner's actions were tantamount to misconduct warranting dismissal. Respondents were granted permission to appeal that ruling on August 4, 1980.

I. Respondents assert that the district court erred in failing to apply retroactively certain 1979 amendments to section 96.5, The Code, relating to the method of computing the period of an employer's disqualification for misconduct from receipt of

unemployment benefits. The Supreme Court has decided that the 1979 amendments have prospective effect only. Green v. Iowa Department of Job Service, 299 N.W.2d 651, 656 (Iowa 1980). The district court was correct in so holding in this case.

II. Respondents also assert that the district court erred in finding that the agency's decision was not supported by substantial evidence.

Pursuant to section 17A.20, The Code, our review in this case is limited to a determination of whether district court made errors of law when it exercised its powers of review of the agency action under section 17A.19. Jackson County Public Hospital v. PERB, 280 N.W.2d 426, 429 (Iowa 1979); City of Davenport v. PERB, 264 N.W.2d 307, 311 (Iowa 1978). Section 17A.19 limits the district court's review to a determination of whether the agency committed any errors of law specified in section 17A.19(8). Thus, to determine whether the district court properly exercised its power of judicial review "this court applies the standards of section 17.19(8) to the agency action to determine whether this court's conclusions are the same as those of the district court. If the conclusions are the same, affirmance is in order. If they are not, reversal may be required." Jackson County, 280 N.W.2d at 429-30.

Section 17A.19(8)(f) provides that district court shall reverse or modify the agency action if such action is "unsupported by substantial evidence in the record made before the agency when the record is viewed as a whole." The possibility of drawing two inconsistent conclusions from the evidence does not prevent a administrative agency's findings from being supported by substantial evidence. City of Davenport, 264 N.W.2d at 311. Evidence is substantial if a reasonable person would find it adequate for reaching a decision. Id. We are limited to the record made before the hearing officer. Section 17A.19(7).

The district court's ruling was based in large part on the fact that claimant did not cross-examine Lockhart, the author of the statement which indicated that claimant was aware of the rule regarding time cards. The court relied on section 17A.14(3), The Code, which states "Witnesses at the hearing, or persons whose testimony has been submitted in written form if available, shall be subject to cross-examination by any party as necessary for a full and true disclosure of the facts." The court's ruling stated in relevant part as follows:

> In addition to the fact that petitioner was not able to cross-examine the author of the statement, the

> record is void of any satisfactory showing concerning availability of Mr. Lockhart and it is apparent that such cross-examination is necessary in order for there to be a full and true disclosure of the facts.
>
> I am of the opinion that although specific allusion is not made in the hearing officer's decision to the assertions made in the written statement of Mr. Lockhart, it is apparent that they were relied on, therefore, there is not substantial evidence to support the agency's decision and the case should be remanded to the agency for further proceedings to effect a determination by substantial evidence as to whether or not petitioner's actions were tantamount to misconduct warranting his dismissal, if such be the case.

We conclude that the court erred in apparently construing section 17A.14(3) to require cross-examination in all cases. We believe it was incumbent on claimant to invoke his statutory right to cross-examine Mr. Lockhart and the claimant's failure to do so waived any objections to the introduction of the written statement. Cf. State ex rel Iowa Employment Security Commission v. Iowa Merit Employment Commission, 231 N.W.2d 854, 857 (Iowa 1975). Lockhart's statement, therefore, was entitled to as much consideration as the rest of the evidence presented to the agency. Given our limited scope of review as described above, we agree with respondents that the district court erred as a matter of law in finding that the agency's decision incorrectly relied upon Mr. Lockhart's statements and consequently was not supported by substantial evidence. The cause is remanded to the district court for further proceedings to determine whether agency's decision is supported by substantial evidence after giving consideration to Lockhart's statement as admissible evidence.

REVERSED AND AFFIRMED.