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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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MARIE J. KLEINBERG,
Petitioner-Appellee,

vs.

IOWA DEPARTMENT OF JOB SERVICE,
Respondent-Appellant.

Filed October 18, 1979

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2-63025

Appeal from Woodbury District Court - D. J. Pendleton, Judge.

Respondent, Iowa Department of Job Service, appeals from a district court order reversing agency action denying petitioner's claim for unemployment insurance benefits. REVERSED.

Walter F. Maley and Blair H. Dewey, Des Moines, Iowa, for respondent-appellant.

LeRoy J. Sturgeon, Sioux City, Iowa, for petitioner-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Respondent, Iowa Department of Job Service, appeals from a district court order reversing agency action denying petitioner's claim for unemployment insurance benefits.

Petitioner became unemployed on February 11, 1976. The record reflects that she thereafter filed a claim for unemployment benefits. Benefits payable under this claim expired and on May 8, 1977, a new or renewed claim was filed by petitioner.

On May 18, 1977, petitioner, who resides in Sioux City, Iowa, was interviewed by an employee of the respondent who referred her to Interbake Foods, Inc., in North Sioux City, South Dakota, to investigate an employment opportunity. Petitioner declined to pursue this referral and when a claims deputy questioned her as to this decision, she stated:

> I did refuse the job referral to Interbake Foods on 5-18-77, as it was not for a specific shift, and my husband would not allow me to work any shift except days. I did apply for a job at Interbake shortly after I was laid off at Dyna Tech, but they would not allow me to complete an application for employment when I told them I could not work any shift except days. My wage credits were earned working the day shift at Dyna Tech in Sioux City. My last day of employment with Dyna Tech was 2-11-76.

As a result of this circumstance, the deputy determined that petitioner had failed without good cause to accept a referral to suitable work, a circumstance which under the provisions of section 96.5(3), The Code 1977, disqualified her from continuing to receive benefits. This decision of the deputy was subsequently upheld by a hearing examiner and the agency appeal board. Upon judicial review of the agency action, the district court determined that the employment to which petitioner had been referred was not "suitable work" and therefore her failure to pursue same did not result in disqualification.

I. Initially, we consider respondent's claim that petitioner's failure to investigate the referral to Interbake Foods was itself ground for disqualification without regard to the suitability of the work. This contention is based upon the premise that if petitioner had in fact investigated the available job openings at Interbake, this might possibly have resulted in employment agreeable to her. We must reject this contention in the present case because it is undisputed in the record and the hearing examiner found that the only job openings at Interbake Foods were during the 6:15 a.m. to 2:45 p.m. shift and the 2:45 p.m. to 11:15 p.m. shift, both of which were not acceptable to petitioner. For this reason, the issue at both the administrative level and in the district court concerned

whether work during these shifts was "suitable work" in view of petitioner's preference for working days.[1] On this appeal we must determine whether the agency's decision that this was suitable work was properly rejected by the district court within the limited scope of review provided in section 17A.19(8), The Code. See Davenport Community School District v. Iowa Civil Rights Commission, 277 N.W.2d 907, 909-910 (Iowa 1979); City of Davenport v. Public Employment Relations Board, 264 N.W.2d 307, 311-13 (Iowa 1978).

II. The statute under which petitioner's claim for benefits must be determined is section 96.5(3), The Code, which provides, in part:

> An individual shall be disqualified for benefits:
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> ....
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> ...If the department finds that he or she has failed, without good cause, either to apply for available, suitable work when so directed by the employment office or the commission or to accept suitable work when offered him or her, or to return to his or her customary self-employment, if any.

The agency found on the record that petitioner had failed, without good cause, to apply for suitable work. In order to overturn the agency action it is necessary for petitioner to show that this finding is (a) unsupported by substantial evidence in the record viewed as a whole, or (b) in violation of statute, agency rule, or otherwise affected by error of law. Section 17A.19, The Code; Davenport Community School District, 277 N.W.2d at 909; City of Davenport, 264 N.W.2d at 311-13.

In determining whether or not a particular job is suitable for an individual, section 96.5(3) requires the respondent to consider:

> a. ...the degree of risk involved to his or her health, safety, and morals, his or her physical fitness and prior training, his or her experience and prior earnings, his or her length of unemployment and prospects for securing local work in his or her customary occupation, and the distance of the available work from his or her residence, and any other factor which it finds bears a reasonable relation to the purpose of this subsection.
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> b. Notwithstanding any other provision of this chapter, no work shall be deemed suitable and benefits shall not be denied under this chapter to any otherwise eligible

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[1] Initially, petitioner claimed before the hearing examiner that she had received no definite referral to Interbake Foods, a contention not pursued in the district court or in this court.

> individual for refusing to accept new work under any of the following conditions:
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> . . . .
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> (2) If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality.

In applying this statute, the agency determined that at the beginning of her unemployment, the petitioner could have set up the restriction against working night hours, but because it had been over one year since she had been employed, such restriction could no longer be imposed as a valid reason for refusing a job referral. This is consistent with 370 I.A.C., sections 4.24(2) and 4.22(1)(x).[2] Petitioner asserts the agency action is contrary to 370 I.A.C., section 4.22(1)(d), which provides:

> The claimant does not have to be available for a particular shift. If a claimant is available for work on the same basis on which the claimant's wage credits were earned and if after considering the restrictions as to hours of work, etc., imposed by the claimant there exists a reasonable expectancy of securing employment, then the claimant meets the requirements of being available for work.

We conclude that the latter rule in no way precludes and in fact permits consideration of the length of petitioner's unemployment in determining whether she had a reasonable expectancy of securing employment during a daytime shift. As such, section 4.22(1)(d) is not inconsistent with sections 4.24(2) and 4.22(1)(x).

In reviewing the record as a whole, including that portion thereof which detracts from the agency's finding, we find no misapplication of applicable law. Nor can we say that the agency's finding that the work was suitable is not supported by substantial evidence. Petitioner had previously applied for the job in question and considered it suitable but for the particular shifts upon which work was available. The agency was free to find that this self-imposed restriction was unreasonable under this circumstance. We accordingly reverse the judgment of the district court with direction to enter a judgment affirming the agency action.

The result which we reach is not inconsistent with the judicial decisions relied upon by petitioner and the district court. Forrest Park Sanitarium v. Miller, 233 Iowa

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[2] "As the period of unemployment lengthens, work which might have originally been unsuitable may become suitable. . . . A claimant may not be eligible for benefits if the claimant has imposed restrictions which leave the claimant no reasonable expectancy of securing employment.

1341, 11 N.W.2d 582 (1943) involved the issue of whether job termination was attributable to the employer. It was held that a change of employment from day shift to night shift was good cause for termination attributable to the employer. This holding perhaps would support the right of an unemployed person to not immediately make herself available for night shift work as a condition for drawing benefits if day jobs were believed to be available. When, however, the passage of time and continued unemployment suggests that day jobs are not available to the particular claimant, the agency is free to view the matter differently.

The other case relied upon by petitioner and the district court is In re Watson, 273 N.C. 629, 161 S.E.2d 1, 35 A.L.R.3d 1114 (1968). In that case the claimant's refusal to work a particular shift only one month after her initial unemployment was held not to disqualify her from benefits. In the present case the unemployment had existed well over one year. In addition, the claimant in Watson offered evidence that the care of her child precluded her from working on the shift in question. In the present case, no evidence of peculiar hardship was presented.[3]

For the reasons stated, we reverse the determination of the district court.

REVERSED.

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[3] While petitioner alludes to the distance involved, it is clear that this would not have disuaded her from accepting a day shift job at Interbake Foods. She also alludes to her age, 61, and potential danger in working at night. No evidence of a particular danger is made to appear in the record, nor is there any indication as to why her age would preclude her from working a night shift.