IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

ALFRED J. CARLBERG,

Petitioner-Appellee,

vs.

IOWA DEPARTMENT OF JOB SERVICE,

Respondent-Agency-Appellant,

And Concerning

THE GATES RUBBER COMPANY,

Respondent-Employer.

2-114
2-67033

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Appeal from Woodbury District Court --- James P. Kelley, Judge.

Respondent-agency appeals from the district court's ruling on judicial review reversing the agency's decision to disqualify petitioner from receipt of unemployment benefits, asserting that the district court erred in determining there was not substantial evidence in the record to support the agency's determination that petitioner was discharged for misconduct. REVERSED AND REMANDED.

Edmund Schlak, Jr., Walter F. Maley and Blair H. Dewey, Des Moines, for respondent-appellant..

Leroy J. Sturgeon of Smith & Smith, Sioux City, for petitioner-appellee.

Considered by Oxberger, C.J., and Carter and Johnson, JJ.

Respondent-agency, Iowa Department of Job Service, appeals from district court's ruling on judicial review reversing the agency's decision to disqualify petitioner, Alfred J. Carlberg, from receipt of unemployment benefits. On appeal, respondent asserts that the district court erred in determining that there was not substantial evidence in the record to support the agency's determination that petitioner was discharged for misconduct. We reverse and remand with directions.

Petitioner worked for Gates Rubber Company as a laborer from June 20, 1977, until he was discharged on May 9, 1980. Respondent-employer discharged petitioner for alleged excess absenteeism, after he accrued an absentee record of 24.5 hours in 1976, 56.75 hours in 1977, 88.75 hours in 1978, 126.75 hours in 1979, and 72 hours through May, 1980. Immediately prior to his discharge, petitioner was absent from work because he had been arrested the night before for OMVUI.

Following his discharge, petitioner filed for unemployment benefits but was held disqualified by the claims deputy. Thereupon petitioner requested and received a hearing at which the hearing officer concluded that petitioner's absences due to illness and suspension were not properly considered in determining misconduct, and that the remaining absences did not constitute misconduct. The employer appealed to the agency appeal board which held, without specifying a factual basis, that claimant was completely unreliable, and determined that he was disqualified from receiving unemployment benefits. Petitioner thereupon appealed to the district court which reversed the agency's final action, concluding that there was no evidence of any disregard of duty by petitioner. From this adverse judgment, the agency appealed.

I. Scope of Review. Pursuant to section 17A.20, The Code 1981, our review of this case is limited to a determination of whether the district court made errors of law when it exercised its powers of review of the agency action under section 17A.19. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d 162, 165 (Iowa

1982); Jackson County Pub. Hosp. 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); Foods, Inc., 318 N.W.2d at 165. Thus, to determine whether the district court properly exercised its powers 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. Our review is not de novo. Cook v. Iowa Dep't of Job Serv., 299 N.W.2d 698, 700-01 (Iowa 1980).

II. Weight of Hearing Officer's Findings. As a threshold issue, we must first consider petitioner's claim that we are required to give the hearing officer's determination deference over the appeal board's determination because the hearing officer was in a better position to determine the credibility of the witnesses. Petitioner raises an interesting issue, especially where the credibility of witnesses or factual issues in dispute are determinative of the outcome of a case. However, such a situation does not exist in the present case. From our review of the record and parties' briefs, we find no disputed issues of fact, but only the legal issue of whether these facts support a finding of misconduct. It is the final agency action on that issue which is the concern of this appeal. Thus, we look to determine whether or not the appeal board's decision is supported by substantial evidence.

III. Substantial Evidence. The agency argues that its determination was supported by substantial evidence and that the district court erred in reversing its decision. We will first enumerate those principles important to our review of this issue. "Upon application for unemployment benefits, the burden of proving eligibility for those benefits is upon the individual seeking unemployment compensation. [citing cases]." Gipson v. Iowa Dep't of Job Serv., 315 N.W.2d 834, 836 (Iowa App. 1981); see also, Brumley v. Iowa Dep't of Job Serv., 292 N.W.2d

126, 128 (Iowa 1980); Davoren v. Iowa Employment Security Comm'n, 277 N.W.2d 602, 603 (Iowa 1979). The reasoning behind this principle is that the burden of proof generally rests throughout the proceeding upon a party asserting an affirmative issue, or the one who would suffer loss if the issue were not established. See Cosper v. Iowa Dep't of Job Serv., No. 66953, slip op. at 13 (Iowa June 16, 1982); Wonder Life Co. v. Liddy 207 N.W.2d 27, 31 (Iowa 1973). The affirmative issue in a case involving an application for unemployment benefits is whether the claimant qualifies for those benefits. "While it is true that the 'burden of proof' rests upon him who asserts it, it is also true that, when the party having such burden has made his prima facie case the 'burden', or 'duty', rests upon the opposite party to go forward with his proof to meet the prima facie case so made." Johnson v. Board of Adjustment, 239 N.W.2d 873, 885 (Iowa 1976), quoting Howard & Harper v. Chicago, B. & Q. R., 196 Iowa 1378, 1383-84, 195 N.W. 153, 155 (1923). However, "[a] llegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established." 370 I.A.C. § 4.32-(4). Thus, the employer has the burden of proving misconduct. Cosper, No. 66953, slip op. at 12-13.

Section 17A.19(8)(f) provides that the 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 review as a whole." Evidence is substantial if a reasonable person would find it adequate for reaching a decision. City of Davenport, 264 N.W.2d at 311. However, the possibility of drawing two inconsistent conclusions from the evidence does not prevent the administrative agency's findings from being supported by substantial evidence. Cook, 299 N.W.2d at 700; City of Davenport, 264 N.W.2d at 311. The fact that a different or opposite result may have been fully justified by the record is of no importance. Carstensen v. Board of Trustees of the Police Ret. Sys., 253 N.W.2d 560, 562 (Iowa

1977). The question is not whether there is sufficient evidence to warrant a decision the agency did not make, rather it is whether there is sufficient evidence to warrant a decision it did make. Deaver v. Armstrong Rubber Co., 170 N.W.2d 455, 464 (Iowa 1969). This is because we are required to regard the agency's findings as tantamount to jury findings; where the evidence presents a question which would be properly submitted to a jury, we are bound by the agency's findings even though we might arrive at a different conclusion from the evidence. Auxier v. Woodward State Hosp. School, 266 N.W.2d 139, 143 (Iowa 1978); Staads v. Board of Trustees of the Fireman's Ret. Pension Fund, 159 N.W.2d 485, 491 (Iowa 1968); see also, Ross v. Ross, 308 N.W.2d 50, 52 (Iowa 1981); Temple v. Vermeer Mfg. Co., 285 N.W.2d 157, 160 (Iowa 1979). We construe such findings broadly and liberally to support rather than defeat the agency's decision. Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 298 (Iowa 1974). We do not pass on the credibility of the witnesses or the preponderance of the evidence. Reisner v. Board of Trustees of the Fire Ret. Sys., 203 N.W.2d 812, 815 (Iowa 1973). Appeal to the district court can only be taken from final agency action after all administrative remedies have been exhausted. Section 17A.19(1), The Code 1981. Thus, it is the final agency action, not intermediate action by the agency, that it is reviewed by the district court and this court on appeal.

370 I.A.C. § 4.32-(1)(a) defines misconduct as:

> a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in

> isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute. (emphasis supplied)

This rule accurately reflects the legislature's intent. Cosper No. 66953, slip op. at 8. Excessive absenteeism may be considered misconduct, but excessive absences are not misconduct unless they are unexcused. (emphasis supplied). Id., slip op. at 13. A discharge for misconduct cannot be based on past acts, but past acts and warnings are properly used to determine the magnitude of a current act of misconduct. 370 I.A.C. § 4.32-(8).

In this case, petitioner's conduct clearly constituted excessive absenteeism. The record reflects "continual interruption of attendance" by petitioner's illness and personal problems. See Cosper No. 66953, slip op. at 8. While the appeal board concluded that petitioner's absences amounted to misconduct, without making a finding on whether most of his absences for illness were excused, we believe its determination is supported by law and fact. We conclude that the record supports, as a matter of law, a finding that most of petitioner's absences were unexcused. In this regard, the employer stated that he had a policy of excusing absences for illness, but that he did not excuse such absences when the policy was abused. The evidence reflects that the employer did not accept the illness excuse after March 27, 1979. The evidence is uncontroverted that for each absence after March 27, 1979, whether for personal reasons, illness, or no reason whatsoever, the employer took disciplinary action against petitioner. This disciplinary action, which included suspension from work, did not purge petitioner's misconduct. On the contrary, the record reflects that the employer instituted a demerit system and charged points against petitioner upon each absence after March 27, 1979. Petitioner's extensive absentee record thus contains only two eight hour periods of excused absences for illness. While suspensions cannot legally be considered for the purpose of determining petitioner's total absentee record, they are certainly relevant and properly considered when determining the magnitude of petitioner's current act of misconduct. The

fact that his absenteeism continued after such action illustrates petitioner's flagrant disregard of his duty. Petitioner was repeatedly warned and disciplined concerning his absences, yet they continued. Further, we believe that the employer's continued disciplinary action, in lieu of termination when termination was appropriate under the demerit system, does not evidence condonation of petitioner's infractions, but demonstrates the employer's managerial effort. The employer made a repeated effort to encourage petitioner to meet his employment responsibilities, but petitioner's work record showed constant and flagrant disregard of his duty. On May 9, 1980, petitioner neglected his obligations once too often and was justly terminated by the employer. On this record, we find overwhelming evidence to support the final agency action and thus reverse the district court's decision with directions to reinstate the agency decision.

REVERSED AND REMANDED.