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AUG 26 1980
IOWA SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

OPAL TOOMER, KAREN K. STANGL, ROBERT JONES, WILLIAM ALDRICH, ARNT FROSHAUG, PATRICIA O'GRADY, TERRY O. KNOCKEL, JO A. REESE, WILLIAM C. JACOBS, EDWARD R. LEVY,

Plaintiffs-Appellants,

vs.

IOWA DEPARTMENT OF JOB SERVICE, and COLLEEN SHEARER, in her official capacity as Director,

Defendants-Appellees.

Filed August 26, 1980

0-180
2-64204

Appeal from Polk District Court - Harry Perkins, Judge.

Plaintiffs appeal district court's order sustaining defendants' special appearance in action seeking declaratory and injunctive relief to prevent defendants from applying chapter 96, The Code 1979, as amended by 1979 Session, 68th G.A., ch. 33, to deny plaintiffs unemployment benefits. AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Linda S. Pettit of Legal Aid Society of Polk County, Des Moines, Lois Cox of Legal Services Corporation of Iowa, Iowa City, and John M. Cashman of Legal Services Corporation of Iowa, Cedar Rapids, for plaintiffs-appellants.

Walter F. Maley, Blair H. Dewey, and Michael Levine of Iowa Department of Job Service, Des Moines, for defendants-appellees.

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

DONIELSON, J.

Plaintiffs appeal district court's order sustaining defendants' special appearance in action seeking declaratory and injunctive relief to prevent defendants from applying chapter 96, The Code 1979, as amended by 1979 Session, 68th G.A., ch. 33, to deny plaintiffs unemployment benefits. On appeal, plaintiffs contend the district court erred in determining it lacked subject matter jurisdiction to decide issues raised in their petition on the ground the exclusive method of review of contested case proceedings was under section 17A.19, The Code. Plaintiffs also appeal district court's rejection of their claim the agency engaged in invalid rulemaking, contending the court possessed jurisdiction to hear the matter, but erred in determining the merits in this special appearance proceeding. We affirm the district court's ruling on the exclusivity of judicial review under section 17A.19, The Code, and plaintiffs' failure to exhaust their administrative remedies; we reverse the district court's ruling on the claim of illegal rulemaking and remand this part of plaintiffs' action to the district court for further proceedings on the merits.

I.

Plaintiffs filed their claims for unemployment benefits prior to July 1, 1979, the effective date of amended chapter 96, The Code. In memorandums dated June 6, 1979, and August 2, 1979, agency officials concluded the amended law should apply to claims brought prior to July 1, 1979, but reviewed after that date. The second memorandum stated the amended law would be applied retroactively unless directed otherwise by the Iowa Supreme Court. Due to defendants' retroactive application of amended chapter 96, The Code, the plaintiffs were either denied benefits or required to undergo a lengthier requalification period in order to be eligible for benefits.

On September 12, 1979, seven of the current ten plaintiffs filed a petition seeking injunctive and declaratory relief against defendants on two claims. In the first division of their petition, plaintiffs asserted defendants had applied amended chapter 96, The Code, to plaintiffs' claim for unemployment benefits in violation of section 4.5, The Code, and section 4.13, The Code, and they suffered irreparable harm by being deprived of such benefits. Plaintiffs sought injunctive relief to prohibit application of amended chapter 96, The Code, to deny them benefits, and a declaratory judgment that defendants had violated section 4.5, The Code, and section 4.13, The Code, in applying the amendments retroactively. Plaintiffs also requested defendants be required to

recalculate benefits owed the plaintiffs under the law in effect on the dates their claims were filed. In the second division, plaintiffs asserted defendants failed to follow the rulemaking procedures required by section 17A.4, The Code, in adopting two memorandums that allegedly implement a rule requiring retroactive application of the amended law. Plaintiffs requested injunctive relief to prevent defendants from applying the allegedly invalid rule to deny them unemployment benefits. The petition was subsequently amended to add additional plaintiffs.

Defendants filed a special appearance, asserting the district court did not have subject matter jurisdiction over the petition because judicial review of agency action was exclusively controlled by section 17A.19, The Code, which plaintiffs had not satisfied. Defendants asserted plaintiffs failed to mail copies of the petition to their former employers as required by section 17A.19(2), The Code, or exhaust all administrative remedies as required by section 17A.19(1), The Code. With plaintiffs resisting, the district court sustained the special appearance on November 5, 1979, stating the challenged agency action was subject to judicial review only after exhaustion of all adequate administrative remedies. The court stated defendants' claim of invalid rulemaking "has been considered and rejected . . . ."

II.

Section 17A.19, The Code, is "the exclusive means by which a person or party who is aggrieved or adversely affected by agency action may seek judicial review of such agency action." Id. The Iowa Supreme Court has strictly construed section 17A.19, The Code, as the exclusive means of judicial review of agency action without exception for common law writs such as certiorari, declaratory judgment, or injunction. Iowa Industrial Commissioner v. Davis, 286 N.W.2d 658, 660-61 (Iowa 1979); Salsbury Laboratories v. Iowa Department of Environmental Quality, 276 N.W.2d 830, 833-35 (Iowa 1979). The provisions of section 17A.19, The Code, are jurisdictional and must be satisfied. Kerr v. Iowa Public Service Co., 274 N.W.2d 283, 287 (Iowa 1979); Richards v. Iowa State Commerce Commission, 270 N.W.2d 616, 619 (Iowa 1978). Since review of agency action is purely statutory, statutorarily prescribed procedures must be followed in seeking the review, especially those that are jurisdictional or mandatory. Richards, 270 N.W.2d at 619 (quoting 2 Am. Jur. 2d Administrative Law § 716, at 618 (1962)).

Plaintiffs' petition in equity did not comply with section 17A.19, The Code, and did not confer jurisdiction on the court to hear this matter. Even though plaintiffs' petition

was filed after the Salsbury Laboratories decision, we look beyond the caption of the petition and treat their petition as a petition for judicial review, as the supreme court did in Davis, 286 N.W.2d at 661, and Salsbury, 276 N.W.2d at 83. See Neumeister v. City Development Board, 291 N.W.2d 11, 13 (Iowa 1980) ("That petition was labeled one for declaratory judgment and not review is not fatal if the instrument, its filing and other procedural steps, met section 17A.19 requirements.").

III.

A party seeking judicial review under section 17A.19, The Code, must mail within ten days after the filing of a petition for judicial review file stamped copies to all parties named in the petition and, if the petition involves review of agency action in a contested case, to all parties of record in that case before the agency. § 17A.19(2), The Code. There is no evidence in the record of plaintiffs mailing such a notice to their respective employers, who would appear to be interested parties. In resisting defendants' special appearance, plaintiffs argue the employers were not indispensable parties to the action because their action was not a proceeding for judicial review of their contested cases. Rather, they claim they are seeking to challenge the defendants' interpretation of the retroactive effect of amended chapter 96, The Code, as a matter of law, not of particular application to their individual situations. While we do not accept entirely the logic of plaintiffs' position since it is difficult to separate their contested claims from their claim asserted here, we will assume for argument plaintiffs were not required to mail notice to their employers and have satisfied this jurisdictional requirement of section 17A.19(2), The Code, and will address the exhaustion of remedies argument.

IV.

A party seeking review of any final agency action must show exhaustion of all adequate administrative remedies. § 17A.19(1), The Code. However, a preliminary, procedural, or intermediate agency action is immediately reviewable if all adequate administrative remedies have been exhausted and review of the final agency action would not provide an adequate remedy. Id. The issue here on appeal is whether plaintiffs exhausted all adequate administrative remedies and, if the agency action is deemed to be a preliminary, procedural, or intermediate agency action, whether review of the final agency action would not provide an adequate remedy.

Plaintiffs assert the two memos written by the agency constituted final agency action since the memos stated an apparently fixed decision by the agency to apply amended chapter 96, The Code, retroactively unless ordered to do otherwise by the supreme court. We find, however, plaintiffs did not exhaust all available and adequate administrative remedies in challenging this action. Section 17A.9, The Code, and agency rule, 370 I.A.C. § 6.5, provide for declaratory rulings as to the applicability of any statutory provision, rule, or other written statement of law or policy, decision or order of the agency. This avenue was open to plaintiffs to argue against the agency's position. While the likelihood of success of such an effort would not have been high in light of the agency's stated position, we must assume the administrative process will discover and correct its errors. See McKart v. United States, 395 U.S. 185, 195, 89 S. Ct. 1657, 1663, 23 L. Ed. 2d 194, 204 (1969); B. Schwartz, Administrative Law § 173, at 499 (1976). The probability the agency will deny relief is not sufficient to show futility in the administrative remedy. Davis, 286 N.W.2d at 662 (quoting Salsbury Laboratories, 276 N.W.2d at 837); see United States v. Felt & Tarrant Manufacturing Co., 283 U.S. 269, 273, 51 S. Ct. 376, 378, 75 L. Ed. 2d 1025, 1027-28 (1931). Plaintiffs did not avail themselves of this adequate remedy and failed to satisfy the exhaustion requirement of section 17A.19, The Code.

Moreover, in the case of procedural agency actions, which this would appear to be, an inadequate remedy still must be exhausted if judicial review from the final agency action is adequate. § 17A.19(1), The Code; see Salsbury Laboratories, 276 N.W.2d at 837. Plaintiffs contend judicial review of each individual case following administrative rulings would be an inadequate remedy. Delayed judicial review would be inadequate, plaintiffs argue, because of the irreparable harm they would suffer during the interim between the time they were denied benefits and final judicial review after exhausting administrative remedies. This irreparable harm allegedly stems from their deprivation of unemployment benefits to which they are entitled, and "upon which they must rely to maintain their purchasing power during their periods of unemployment." Plaintiffs contend an award of damages by the court would not compensate them for this irreparable harm.

The law of Iowa recognizes an adequate showing of irreparable injury resulting from following the administrative process would make judicial review of final agency action an inadequate remedy for purposes of section 17A.19(1), The Code. Salsbury

Laboratories, 276 N.W.2d at 837 (citing Mathews v. Eldridge, 424 U.S. 319, 331-32, 96 S. Ct. 893, 901, 47 L. Ed. 2d 18, 31 (1976)). But, only a clear showing of irreparable injury from anticipated agency action justifies judicial intervention prior to exhaustion of administrative remedies. Davis, 286 N.W.2d at 662 (citing California ex rel. Christensen v. Federal Trade Commission, 549 F.2d 1321, 1323 (9th Cir.), cert. denied, 434 U.S. 876, 98 S. Ct. 227, 54 L. Ed. 2d 156 (1977)). Plaintiffs did not make a clear showing of any irreparable harm they would suffer by being required to exhaust administrative remedies before obtaining judicial review.

The circumstances of this case are unlike those found in Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed 2d 18 (1976). In Mathews the person seeking relief raised at least a colorable claim that because of his physical condition and dependency upon disability benefits, an erroneous termination of those benefits by the agency would damage him in a way not recompensable through retroactive benefits. Id. at 331-32, 96 S. Ct. at 901, 47 L. Ed. 2d at 31. Here, plaintiffs cannot make such a showing since qualifying for receipt of unemployment benefits is not a showing of need, but of an involuntary termination of employment without good cause. See §§ 96.4, .5, The Code. In most cases, unemployment benefits do not exist as the only barrier between the worker and impoverishment. In so holding, we do not ignore the stated public purpose underpinning the unemployment benefits program. § 96.2, The Code. We merely fail to find a showing of clearly irreparable injury of sufficient degree to justify by-passing the stringent exhaustion requirements of section 17A.19, The Code. See Sampton v. Murray, 415 U.S. 61, 91-92, 94 S. Ct. 937, 953, 39 L. Ed. 2d 166, 186-87 (1974); Nor-Am Agricultural Products, Inc. v. Hardin, 435 F.2d 1151, 1159-60 (7th Cir. 1970), cert. denied, 402 U.S. 935, 91 S. Ct. 1399, 28 L. Ed. 2d 870 (1971); 5 B. Mezines, J. Stein, & J. Gruff, Administrative Law § 49.02[2] (1980).

We affirm the trial court's ruling that it lacked subject matter jurisdiction of plaintiffs' claim challenging the agency's retroactive application of amended chapter 96, The Code.

V.

In division II of plaintiffs' petition, they allege the two memorandums setting forth the challenged agency policy constituted rulemaking that did not comply with the procedure prescribed in section 17A.4, The Code. The district court in its ruling on defendants' special appearance stated plaintiffs' contentions on this issue were

considered and rejected. Plaintiffs contend the district court erred in considering and ruling on the merits of the issue rather than ruling on strictly jurisdictional grounds. We agree.

The exclusive purpose of a special appearance is to attack the jurisdiction of the court. Iowa R. Civ. P. 66; see DeCook v. Environmental Security Corp., 258 N.W.2d 721, 725 (Iowa 1977). In passing on a special appearance, allegations of plaintiffs' petition are accepted as true. DeCook, 258 N.W.2d at 725 (quoting Tice v. Wilmington Chemical Corp., 259 Iowa 27, 34, 141 N.W.2d 616, 621 (1966)). When confronted with defendants' special appearance, plaintiffs had the burden to establish prima facie the district court's jurisdiction by proof of notice and compliance with all relevant statutory requirements. Gray v. Lukowski, 241 N.W.2d 35, 40 (Iowa 1976).

The memorandums plaintiffs' challenge constitute, at least facially, agency rulemaking. "Rule" being defined as "each agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure or practice requirements of any agency." § 17A.2(7), The Code. The memorandums set forth the agency's position on the retroactive applicability of amended chapter 96 and must be viewed at least for purposes of the special appearance as a rule.

Promulgation of rules by an agency constitutes agency action, Schmitt v. Iowa Department of Social Services, 263 N.W.2d 739, 743 (Iowa 1978), and must be in conformance with section 17A.4, The Code. A failure by the agency to conform to the requirements of § 17A.4, The Code, can be challenged in a proceeding commenced within two years of its effective date, § 17A.4(3), The Code, which is what plaintiffs did here. See Bonfield, The Iowa Administrative Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process, 60 Iowa L. Rev. 731, 873-74 (1975). The propriety of a particular rule is therefore subject to judicial review under section 17A.19, The Code. Hiserote Homes, Inc. v. Riedemann, 277 N.W.2d 911, 912 (Iowa 1979). Here, plaintiffs challenged the agency rule as in violation of constitutional and statutory provisions. § 17A.19(8)(a), The Code.

Plaintiffs satisfied all requirements of section 17A.19, The Code, in this challenge to the agency's rulemaking. Plaintiffs correctly filed their petition. Notice to the various employers is not required since this was not an appeal from a contested case. § 17A.19(2), The Code. Since the agency's action was an allegedly invalid promulgation

of a rule, there were no further agency remedies to exhaust. Accordingly, the district court had jurisdiction to hear plaintiffs' challenge to the agency's alleged invalid rulemaking. This being the sole issue facing the district court, it erred in holding against plaintiffs.

We reverse the district court's dismissal of plaintiffs' challenge to the agency memorandums as an invalid rule and remand this part of plaintiffs' action to the district court for further proceedings on the merits.

Plaintiffs shall pay three-fourths of the costs of this appeal; defendants shall pay one-fourth of the costs of this appeal.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.