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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

Filed March 20, 1984

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WILLIAM HUFF,

Petitioner-Appellant,

vs.

IOWA DEPARTMENT OF JOB SERVICE and THOM'S PROESTLER COMPANY,

Respondents-Appellees.

4-33
83-921

Appeal from the Iowa District Court for Scott County - C. H. Pelton, Judge.

Petitioner appeals from the district court decision on judicial review sustaining respondent agency's special appearance. REVERSED AND REMANDED.

James M. Hood, Davenport, Iowa, for petitioner-appellant.

Blair H. Dewey, Des Moines, Iowa, Walter F. Maley, Des Moines, Iowa, and Joseph L. Bervid, Cedar Rapids, Iowa, for respondents-appellees.

Considered by Schlegel, P.J., Hayden and Sackett, JJ.

Petitioner, William Huff, appeals from the district court decision on judicial review sustaining respondent agency's special appearance.

Respondent, Iowa Department of Job Service, disqualified Huff from receipt of unemployment benefits on grounds of misconduct. Huff filed an application for rehearing with the agency. The application did not show on its face whether or not a copy was mailed to the employer as required by Iowa Code section 17A.16(2). The agency's denial of the application was dated April 18, 1983, with no time of day shown.

Huff filed a petition for judicial review on April 18th at 8:35 a.m. Respondent agency filed a special appearance alleging that a copy of the application for rehearing had not been mailed to the employer as required by the statute. An attached affidavit of the employer stated that no copy had been received. An affidavit of counsel for petitioner attached to the resistance to the special appearance stated that neither he nor his secretary specifically recalled mailing a copy of the application to the employer, but that there was no indication of deviation from custom and practice of the office under which such a copy would have been sent. The district court sustained the special appearance, stating that there was no evidence of the mailing required by statute. The court also stated that it had no jurisdiction on judicial review prior to the agency's denial of the application for rehearing.

Huff asserts on appeal that the evidence was sufficient to show that a copy of the application for rehearing was mailed to the employer, and that the district court did not lack jurisdiction when the petition for judicial review was filed prior to the agency's denial of the application for rehearing.

The district court held that it lacked jurisdiction on judicial review because Huff failed to exhaust all administrative remedies before filing his petition for judicial review. See Iowa Code §17A.10(1)(1983). This holding was based on Huff's

failure to await the agency's ruling on his application for rehearing prior to filing the petition for judicial review.

It is clear that, under Iowa law, a claimant is not required to file an application for rehearing prior to filing a petition for judicial review. Kehde v. Iowa Department of Job Service, 318 N.W. 2d 202, 205 (Iowa 1982). Had Huff failed in this case to first petition the agency for a rehearing, there would be no jurisdictional argument based upon exhaustion of administrative remedies before this court. Furthermore, had Huff's petition for judicial review been filed subsequent to and within thirty days of the agency's denial of Huff's application for rehearing, this issue would not be before the court.

The agency's argument as presented in its brief seems to be that Huff had to have "received a copy of the decision [denying administrative rehearing] prior to filing of the petition [for judicial review]." We disagree.

This situation is similar to the waiver or abandonment of an application for post-trial relief when the moving party files a notice of appeal. See Recker v. Gustafson, 271 N.W. 2d 738, 739 (Iowa 1978); In re Marriage of Novak, 220 N.W. 2d 592, 596 (Iowa 1974). The following language from Novak is instructive:

> The trial court refused to hear the motion for new trial since petitioner had perfected an appeal the same day he filed the motion. Of course, the trial court was correct. well settled in this state that after an appeal is perfected the trial court has no further jurisdiction over the controversy until some part thereof is remanded back for further action. Scheffers v. Scheffers, 241 Iowa 1217, 1227, 44 N.W. 2d 676, 681; McCauley v. Municipal Court of D.M., 254 Iowa 1345, 1346, 121 N.W. 2d 96, 97; and authorities cited in these opinions.

Id.

We note that chapter 17 does not specifically preclude the filing of a petition for judicial review while an application for agency rehearing is still pending. Section 17A.19(3) provides in pertinent part:

> If a party files an application under section 17A.16, subsection 2, for rehearing with the agency, the petition for judicial review must be filed within thirty days after

> that application has been denied or deemed denied. If a party does not file an application under section 17A.16, subsection 2, for rehearing, the petition must be filed within thirty days after the issuance of the agency's final decision in that contested case.

The Job Service appeal board denied benefits on March 23, 1983. Huff filed a petition for judicial review on April 18, 1983. Huff's petition for judicial review was clearly filed within thirty days after the issuance of the agency's final decision. The legislature certainly could have, but did not, require that a claimant await agency action on an application before pursuing judicial review. Absent such a requirement, we find that a claimant may waive an agency decision on a pending application for rehearing in a manner similar to the manner in which a ruling on a post-trial motion may be waived in a civil case.

In this case there is no question that the appeal (petition for judicial review) was perfected. Once it was so perfected, the agency had no further jurisdiction over the controversy. See In re Marriage of Novak, 220 N.W. 2d at 596. Because of our disposition of this issue, we need not address the parties' arguments regarding mailing of the application for rehearing.

The decision of the district court sustaining the special appearance of the Iowa Department of Job Service is reversed and the case is remanded to the district court for further proceedings in accordance with this decision.

REVERSED AND REMANDED.