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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

RICHARD PIVONKA,	)	
Plaintiff-Appellant,	)	Filed January 29, 1986
vs.	)	228
IOWA DEPARTMENT OF JOB SERVICE, and RICHARD & SONS SANITATION SERVICE COMPANY,	)	5-509 84-1785
Defendant-Appellee.	)	

Appeal from the Iowa District Court for Dallas County - Jack Levine, Judge.

Petitioner appeals the district court's affirmance of the agency decision denying unemployment benefits. **AFFIRMED.**

Robert A. Wright, Jr., of Wright, Wright & Borseth, Des Moines, Iowa, for petitioner-appellant.

Walter F. Maley, Blair H. Dewey, and Joseph L. Bervid, Des Moines, Iowa, for the Iowa Department of Job Service.

John O. Reich, Adel, Iowa, for respondent-appellee Richard & Sons Sanitation Service Company.

Heard by Donielson, P.J., Hayden, and Sackett, JJ.

Petitioner appeals the district court's affirmance of the agency decision denying unemployment benefits. He asserts that 1) there is insufficient competent evidence to support a finding of discharge for misconduct; 2) the employer's failure to protest the claim for benefits precludes investigation of the misconduct issue; and 3) the agency erred in denying his application to present additional evidence to the appeal board. We affirm.

Richard Pivonka was employed as a garbage hauler for Richards & Sons Sanitation Service from July 1981 until April 1983. On the day of his discharge he had arrived late for work.

Pivonka filed a claim for unemployment benefits which the employer did not protest. Nevertheless, the Iowa Department of Job Service subsequently gave notice of a fact-finding interview. In response to the notice, the employer sent a written statement indicating that Pivonka was fired, in part, because he was often late for work. The employer did not appear at the interview, however, the claims deputy disqualified claimant from benefits due to misconduct. Pivonka appealed the decision and a hearing was held.

Pivonka appeared at the hearing unrepresented by counsel. He submitted copies of time cards indicating he had been late on several occasions, however, offered excuses for his tardiness. Petitioner also testified that the employer had posted a notice of the work day starting time. The employer did not appear at the hearing and no evidence was presented on his behalf.

The hearing officer found that Pivonka was on notice that he was scheduled to start work at 7:00 a.m. and that his time cards reflected a pattern of tardiness. It was concluded that misconduct had been established by the record.

Petitioner filed a request to submit additional evidence to the appeal board. He alleged that he had good cause for failing to present material evidence

at hearing. In support of his request, petitioner asserted that the hearing officer prevented a fair presentation of the facts by failing to fully develop his testimony. The appeal board affirmed the hearing officer decision by incorporating his findings of fact and reasoning and conclusions of law. The appeal board also concluded that petitioner failed to show good cause for not presenting his new evidence at the hearing.

On judicial review, the district court affirmed the agency determination. This appeal by Pivonka followed.

I.

Our scope of review in cases arising out of the Iowa Administrative Procedure Act is limited under Iowa Code section 17A.20 to the correction of errors in law. Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 162, 165 (Iowa 1982). The review function of the district court under section 17A.19 is to correct errors of law which are specified in section 17A.19(8). When we review decisions of the district court which were rendered in its capacity as an appellate body under section 17A.19, the issue for our determination is whether the district court correctly applied the law. Budding v. Iowa Department of Job Service, 337 N.W.2d 219, 221 (Iowa Ct. App. 1983). In order to make that determination, we apply the standards of section 17A.19(8) to the agency action to determine whether this court's conclusions are the same as those of the district court. Jackson County Public Hospital v. Public Employment Relations Board, 280 N.W.2d 426, 429-30 (Iowa 1979).

Where the facts are disputed, we will adopt the factual determinations made by the agency as long as they are supported by substantial evidence in the whole record. Temple v. Vermeer Mfg. Co., 285 N.W.2d 157, 160 (Iowa 1979). Where the facts and inferences fairly to be drawn therefrom are undisputed, however, the issue becomes one of law. Green v. Iowa Department of

Job Service, 299 N.W.2d 651, 655 (Iowa 1980). We are limited to the record before the hearing officer in making this determination.

II.

Iowa Code section 96.5(2) (1985) provides that a claimant is disqualified from unemployment benefits "[i]f the department finds that the individual has been discharged for misconduct in connection with the individual's employment." Pivonka argues that substantial evidence does not support a finding to this effect. He alleges that the only evidence concerning the reasons for discharge was the employer's written statement indicating claimant was fired for being late to work. It is argued that this statement alone is insufficient to support a finding of discharge for excessive tardiness. We are unpersuaded by this argument.

It is well-settled that administrative agencies are not bound by the technical rules of evidence; generally hearsay, such as the employer's written statement, is admissible at administrative hearings. McConnell v. Iowa Department of Job Service, 327 N.W.2d 234, 237 (Iowa 1982); see Iowa Code § 17A.14(1) (1985). In fact, as indicated in McConnell, under federal administrative law hearsay evidence may constitute substantial evidence. Id. Based on these standards, we have little difficulty concluding that the employer's statement was admissible and properly considered by the agency. Furthermore, contrary to Pivonka's assertion, the hearsay evidence was not the sole basis for the finding of discharge for misconduct. Pivonka's time cards, as well as his own testimony, reveal a pattern of reporting to work late, even though a warning had been posted for all employees to report to work on time. His reasons vary from having to pick up a co-worker to difficulty with road conditions. Evidence indicates that on the day he was discharged, petitioner reported to work 50 minutes late due to truck problems; he never contacted his employer to report that he would be late.

Based on the record as a whole, we find that evidence is sufficient to support a finding that petitioner was discharged for excessive, unexcused tardiness. This is a proper basis for disqualifying him from receiving unemployment benefits. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187, 190 (Iowa 1984).

Pivonka also raises a collateral issue regarding the employer's written statement. He claims that reliance on the statement violated his due process right to cross-examine adverse witnesses. We decline to reach the merits of this argument. A review of the record reveals that this issue was not presented to the agency or the district court. We will not consider questions, including constitutional questions, raised for the first time on appeal. Davoren v. Iowa Employment Security Commission, 277 N.W.2d 602, 603 (Iowa 1979).

Petitioner's challenges concerning the nature of the evidence do not constitute reversible error. We therefore affirm the district court's conclusion that substantial evidence supports the agency determination.

III.

Pivonka also claims that the Department of Job Service erred in investigating the existence of misconduct since the employer never protested the claim for benefits.

This issue was recently addressed in Flesher v. Iowa Department of Job Service, 372 N.W.2d 230, 233 (Iowa 1985). In Flesher, the supreme court held that an agency may initiate an issue that would disqualify a claimant from receiving benefits because of misconduct. Id. A claimant is not automatically entitled to benefits merely because the employer does not protest a claim. Id.

Based on Flesher, we conclude that there was no error.

IV.

The final issue before this court is whether the appeal board erred in denying petitioner the opportunity to present additional evidence. Pivonka claims that the hearing officer failed to fully and fairly develop the record; it is argued that this constitutes good cause for failure to present the evidence of evidentiary hearing.

Pursuant to Iowa Administrative Code section 370-6.2(5)(a), the hearing officer has a duty to inquire fully into the matters at issue and receive in evidence the testimony of witnesses and any documents which are relevant and material. If, in fact, this duty was breached, it is likely that it would constitute good cause for failure to present evidence at the hearing. This is especially so since Pivonka was not represented by counsel. Our review of the record, however, convinces us that the hearing officer made all the relevant inquiries and gave petitioner every opportunity to present evidence. We therefore conclude that there was no abuse of discretion in denying petitioner's request.

Finding no reversible error, the judgment of the trial court is affirmed.

AFFIRMED.