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IN THE COURT OF APPEALS OF IOWA

JAMES O. BUFFINGTON,

Petitioner-Appellant,

vs.

IOWA DEPARTMENT OF JOB SERVICE,

Respondent-Appellee.

Filed September 29, 1981

1-206
2-65601

Appeal from Polk District Court - John N. Hughes, Judge.

Petitioner appeals from district court order dismissing his petition for judicial review of the decision of the Iowa Department of Job Service with respect to overpayment of unemployment benefits. AFFIRMED.

Francisco Colon, Jr., Des Moines, for petitioner-appellant.

Joseph Bervid, Iowa Department of Job Service, for respondent-appellee.

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

PER CURIAM

The petitioner appeals from district court order dismissing his petition for judicial review of the decision of the Iowa Department of Job Service (Agency) with respect to overpayment of unemployment benefits. We affirm the district court.

On April 9, 1979, petitioner filed a petition for a judicial review of the agency's determination affirming an assessment of overpayment in unemployment benefits pursuant to notice dated November 8, 1976. The trial court, after a hearing on the matter, affirmed the agency action.

The petitioner was a janitor employed by Building Maintenance Services, Inc. On April 9, 1976, petitioner was discharged from his employment. On April 11, 1976, petitioner filed a claim for unemployment benefits. On May 7, 1976, a claims deputy of the agency decided that petitioner's misconduct was not established in order to defeat his entitlement to unemployment benefits. The employer appealed from this determination and thereafter a hearing officer affirmed the determination of the claims deputy. The hearing officer's decision notes therein the agreement by the employer that petitioner would be rehired effective May 27, 1976. On September 17, 1976, the agency appeal board affirmed the hearing officer's decision on the original discharge.

On September 21, 1976, the employer, a janitorial service, sent a letter to the agency indicating that on May 27, 1976, after reporting to work pursuant to the agreed rehiring, petitioner was arrested on larceny charges and thus unable to begin work. This letter indicated that the alleged larceny took place while petitioner, as part of his job with the employer, was doing janitorial work in a bank. On September 27, 1976, the employer sent to the agency a copy of a court document indicating petitioner's conviction on this larceny charge.

On September 28, 1976, a claims deputy filed a decision finding that petitioner was discharged on April 9, 1976, for gross misconduct and was disqualified from receiving benefits based upon the discharge which occurred on that date. On the basis of this decision, a notice of overpayment was mailed to petitioner in the amount of $2,247. On October 29, 1976, a hearing officer, purporting to act on an appeal by the employer, from the September 28 decision of the claims deputy, found and concluded that the date of qualification should run from May 27, 1976 (found to be the date of the second discharge) rather than from April 9, 1976 (the date of the initial discharge). This modification of the determination of overpayment was based upon the legal conclusion of the hearing officer that the disqualification for gross misconduct could not antedate

petitioner's discharge on that ground. A new notice of overpayment was mailed on November 8, 1976, showing that petitioner had been overpaid $1,448.

The agency received a letter dated November 28, 1978, from petitioner's attorney, indicating that the petitioner wished to appeal from the assessment and collection of the overpayment which had been established. This precipitated a hearing on the matter before the agency at which petitioner testified that he did not return to work on May 27, 1976, and that he had not committed any crime resulting in his disqualification. On January 2, 1979, the hearing officer entered an order affirming the overpayment reduction on the basis of finality of the October 29, 1976, order. This determination was affirmed by the agency appeal board. The latter order is the final agency action subject to judicial review in this proceeding.

I. Our first determination relates to whether, as found by the agency, the October 29, 1976, decision of the hearing officer can be reviewed or modified more than two years later. The agency asserts that it cannot. The petitioner's only basis for claiming such a belated right of review is tied to section 96.5(2)(c), The Code, which provides:

> Gross misconduct is deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with his or her employment, provided the claimant is duly convicted thereof or has signed a statement admitting that he or she has committed such an act. Determinations regarding a benefit claim may be redetermined within five years from the effective date of the claim. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith.

We find considerable ambiguity in this statute and in rule 370-6.4(7)(f)(1), Iowa Administrative Code, which seeks to implement it. We therefore make no attempt to delineate all situations to which the five-year redetermination period referred to in the statute might apply. To do so would be entirely gratuitous with respect to circumstances not involved or at issue in the present controversy. See State v. Boothe, 285 N.W.2d 760, 764 (Iowa App. 1979). We hold only that the claimed right of belated redetermination advanced by petitioner in the present case is not compelled by section 96.6(2)(c), The Code, where the material facts determinative of the issue were available for consideration in 1976 and it is not alleged that circumstances have since changed. The agency was justified in treating its determination of the amount of overpayment fixed in the hearing officer's decision of October 29, 1976 as final.

In reaching our conclusion, we also have considered petitioner's claim that it was procedurally improper for either the claims deputy or the hearing officer to consider the matter of gross misconduct on September 28, 1976, and October 29, 1976, respectively, because they did so in the context of reviewing a prior determination of benefits which had been affirmed by the agency appeal board. We believe such argument may be raised at this belated time only if it defeats the subject matter jurisdiction of the agency to act on the claim of gross misconduct. We find that the agency had jurisdiction to consider and act upon the new information received from the employer which bore upon petitioner's continuing eligibility for benefits as a result of matters occurring after the time of the transaction supporting the initial claim for benefits. Any other conclusion on our part would render the agency powerless to prevent overpayment of benefits authorized by law, based upon matters occurring subsequent to final agency action on a claim. We have considered all issues presented and find no ground for reversal.

AFFIRMED.