IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

51

CITY OF DES MOINES, IOWA,
Petitioner-Employer/Appellant,

vs

IOWA DEPARTMENT OF JOB SERVICE,
Respondent-Agency/Appellee,

and DARRYL E. GREEN,
Respondent-Claimant/Appellee.

Filed March 31, 1987

6-489
86-376

Appeal from the Iowa District Court for Polk County (No. AA 647) - Joel D Novak, Judge.

Petitioner-employer appeals from district court's affirmance of the decision of the appeals board that respondent-claimant's appeal of a claim's deputy decision denying benefits was timely and that the employer failed to establish misconduct **AFFIRMED.**

Nelda Barrow Mickle, City Solicitor, for petitioner-appellant employer.

Joseph L. Bervid, Walter F. Maley, and Blair H. Dewey, of Iowa Department of Job Service, for respondent-appellee agency.

Luis Herrera, Des Moines, for respondent-appellee claimant.

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

SACKETT, J. 52

Petitioner City of Des Moines appeals from a district court ruling affirming the decision of the Appeal Board of the Iowa Department of Job Service that claimant Darryl E. Green was entitled to unemployment benefits. The city asserts (1) Green's appeal from a claims deputy decision denying benefits was not timely, (2) the agency's determination the city failed to show Green was discharged for misconduct is not supported by substantial evidence. We affirm.

Green was employed as a full-time real estate administrator by the city. He was discharged on April 20, 1983. On May 12, 1983, a Job Service claims deputy denied Green's claim for unemployment benefits on the basis on misconduct. Green sought to appeal the decision.

The city filed a special appearance contending Green's appeal was not timely. A hearing officer ruled Green's appeal was timely. The city then appealed to the Job Service appeal board. The appeal board affirmed the hearing officer determination Green's appeal was timely. A second hearing officer then affirmed the claims deputy decision denying benefits on the basis of misconduct.

Green appealed the hearing officer's decision denying benefits to the appeal board. The appeal board reversed the hearing officer and ruled Green was eligible for benefits because the employer had failed to prove misconduct.

The city appealed to the district court. The district court remanded the case to Job Service for the limited purpose of conducting further proceedings on the timeliness issue. Following an evidentiary hearing, a hearing officer concluded Green had filed a timely appeal of the claims deputy decision. The city appealed that ruling to the appeal board, who affirmed the hearing officer's decision.

The district court affirmed the appeal board's decisions holding there was substantial evidence to support (1) the agency's decision Green's appeal was timely and (2) the agency's decision Green was entitled to unemployment benefits because the employer had failed to prove the reasons for Green's discharge constituted misconduct as contemplated by Iowa Code §96.5(2) (1983). This appeal followed.

I. Scope of Review

Our scope of review in cases arising out of the Iowa Administrative Procedure Act (IAPA) is limited under Iowa Code §17A.20 (1985) to the correction of errors of law. Hurtado v. Iowa Department of Job Service, 393 N.W.2d 309, 310 (Iowa 1986); Boyd v. Iowa Department of Job Service, 377 N.W.2d 1, 2 (Iowa App. 1985). We review the decision of the district court, also rendered in an appellate capacity, and determine whether the district court applied the law correctly. Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 734 (Iowa App. 1986); Endicott v. Iowa Department of Job Service, 367 N.W.2d 300, 302 (Iowa App. 1985). To make that determination, this court must apply the standards of Iowa Code §17A.19(8) (1985) to the agency action to determine whether this court's conclusions are the same as those of the district court. Henry, 391 N.W.2d at 734.

II. Timeliness

The city contends the district court erred as a matter of law in its determination Green's appeal of the claims deputy decision was timely. Thus, there was no jurisdiction to support subsequent proceedings. The claims officer's decision was filed May 12, 1983.

Iowa Code §96.6(2) (1983) governs appeals from a deputy's decision and provides in relevant part:

> Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with it.

Compliance with this appeal provision is jurisdictional. Messina v. Iowa Department of Job Service, 341 N.W.2d 52, 55 (Iowa 1983); Beardslee v. Iowa Department of Job Service, 276 N.W.2d 373, 377 (Iowa 1979).

Green testified he hand delivered a notice of appeal to the local Job Service office in Des Moines on Monday, May 23, 1983. The parties are in agreement the 23rd was the last day to appeal. On May 24, 1983, the Job Service appeal division stamped in the appeal. The agency determined Green had in fact delivered the notice to the local office on May 23, 1983. Green's testimony he delivered the notice on the 23rd is the only testimony in support of his contention and the other evidence in the record refutes his claim. We determine there is substantial evidence to support the agency's decision Green did in fact deliver the notice to the local Job Service office on Monday, May 23, 1983.

The city next argues the date the notice was received by the appeals division is the determative date not the date the notice was received by the local office. And because the notice was not received by the appeal division during the required period, there was no jurisdiction to entertain the appeal from the claims deputy's decision.

Job Service rules in effect at the time in question, Iowa Admin. Code r 370-6.2(1)(b) (rescinded January 10, 1984), further determine the timeliness of appeals:

> a. A party appealing from a decision of a representative of the department shall mail to the appeals section, Iowa Department of Job Service . . . Des Moines, Iowa . . . within ten calendar days after such decision was mailed . . . a notice of appeal . . .

b. The date of receipt of the notice of appeal in the appeal section will be used to determine the timeliness of the appeal.

The following Job Service rule, Iowa Admin. Code r. 370-4.35(1), was also in effect at the time Green filed his appeal:

> Except as otherwise provided by statute or by department rule, any . . . appeal, . . . notice, . . . submitted to the department shall be considered received by and filed with the department:
>
> a. If transmitted via the United States postal service . . . on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
>
> b. If transmitted by any means other than the United States postal service or its successor, on the date it is received by the department. (emphasis added).

In Messina, the court held that r. 370 - 4.35(1) "is within the authority granted the department by the legislature." Messina, 321 N.W.2d at 56. See Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 8 (Iowa 1982). In interpreting both Iowa Admin. Code r. 370 - 6.2(2)(b) and 370 - 4.35(1)(b) we follow the general rules governing statutory construction. Motor Club of Iowa v. Department of Transportation, 251 N.W.2d 510, 518 (Iowa 1977). All relevant legislative enactments must be harmonized so as to give meaning to all parts if possible. Messina, 341 N.W.2d at 56. We must construe these rules together with §96.6(2) to harmonize them, using common sense and sound reason. Id., 2 Am. Jur.2d Administrative Law §307 at 135 (1962).

Green testified he hand-delivered his notice of appeal to the local Job Service office. Thus, subsection b of Iowa Admin. Code r. 370 - 6.2(1) and 370 - 4.35(1) are applicable. With regard to personal delivery of an appeal notice, Job Service has apparently harmonized both rules by adopting a practice which considers an appeal "received" if it is accepted in any local Job Service office

within the 10-day appeal period. Johnson and McSweeney, Unemployment Compensation in Iowa: A Primer for Practitioners, 32 Drake L. Rev. 575, 624 (1982-83). The article points out that on August 26, 1982, the Administrator of the Job Insurance Division sent a letter to all local job service office managers stating in part:

> The Iowa Administrative Code Subrule 370-6.2(1)(b) requires that the notice of appeal be received in the Appeals Section within ten calendar days to be considered as being filed in timely manner. The mere mailing or postmarking of an appeal within the ten-day period is not sufficient to confer jurisdiction.
>
> The Appeal Section will only consider "receipt" of an appeal if it is actually in their hands by the tenth day after mailing.
>
> The Appeal Section will consider the appeal as "received" if it is accepted in any Job Service Local Office within the ten-day period because the Job Service Local Office would be considered as an extension of or an agent of the Appeal Section. It is important that the person who accepted the appeal in the Local Office acknowledge the receipt of the appeal by signing the appeal and dating it on the day it is received before it is forwarded to the Appeal Section.

32 Drake L. Rev. at 624 (emphasis added). As such, the accepted practice by Job Service at the time in question was that receipt by the local office was receipt by the department for purposes of appeals.

The fact finder determined the notice was delivered to the local office on May 23, 1983. We determine the appeal was timely filed by delivery to the local office.

III. Misconduct

The city next contends the district court erred as a matter of law in affirming the appeal board decision to reverse the determination of the hearing officer and claims deputy to disqualify Green from benefits arguing that the district court's decision was not supported by substantial evidence. The crux of the city's argument is the appeal board failed to defer to the factual deter-

minations made by the hearing officer. While we agree the hearing officer had the opportunity to observe and question the witnesses, that does not prevent the appeal board from making an independent evaluation of the evidence. Iowa Code §17A.15(3) (1985) provides:

> When the presiding officer makes a proposed decision, that decision then becomes the final decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within the time provided by rule. On appeal from or review of the proposed decision, the agency has all the power which it would have in initially making the final decision except as it may limit the issues on notice to the parties or by rule. . . . (emphasis added).

A hearing officer's decision is merely a proposed agency decision. Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293, 294 (Iowa 1982). Section 17A.15 gives the agency an "unfettered" right to find the facts in the first instance. Id. It makes the hearing officer an adjunct of the agency rather than an independent decisionmaker. Id.

The city also argues the decision determining Green was not guilty of misconduct is not supported by substantial evidence.

Iowa Code §17A.19(8)(f) (1985) provides that in a contested case the court shall grant relief from an agency decision which is "unsupported by substantial evidence in the record made before the agency when that record is viewed as a whole." See Myers v. Iowa Department of Job Service, 373 N.W.2d 507, 509 (Iowa App. 1985). In judicial review of agency action in a contested case we are limited to the record made by the agency. Iowa Code §17A.19(7) (1985); Henry, 391 N.W.2d at 734. We do not make an independent evaluation concerning the preponderance of the evidence. Henry, 391 N.W.2d at 734.

Evidence is substantial when a reasonable person would accept it as adequate to reach a conclusion. Cerro Gordo County v. Public Employment Relations

Board, 395 N.W.2d 672, 675 (Iowa App. 1986). The question is not whether the evidence might support a different finding but whether the evidence supports the findings actually made by the agency. Id.; Boyd, 377 N.W.2d at 2. The fact two inconsistent conclusions can be drawn from the evidence does not mean that one of those conclusions is unsupported by substantial evidence. Cerro Gordo County, 395 N.W.2d at 675; Myers, 373 N.W.2d at 509.

Green's work product at the time he was discharged was sloppy and unsatisfactory. Green does not dispute those errors or poor job performance. There is evidence that at the time of his discharge Green was suffering from job-related depression and was seeking medical help for his condition.

Iowa Code §96.5(2) (1985) provides that a claimant is disqualified from unemployment benefits if Job Service finds the individual has been discharged for misconduct. The Iowa Administrative Code 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 interest 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.

Iowa Admin. Code r. 370 - 4.32(1). The Iowa Supreme Court has accepted this definition as accurately reflecting the intent of the legislature. Myers, 373 N.W.2d at 510.

Misconduct must be substantial in order to support a disqualification from unemployment benefits. Newman v. Iowa Department of Job Service, 351 N.W.2d 806, 808 (Iowa App. 1984). The focus of the administrative code definition of misconduct is on acts or omissions by the petitioner which rise to the level of being deliberate, intentional or culpable. Eaton, 376 N.W.2d at 917.

Although cumulative acts can be used to determine the magnitude of a current act of alleged misconduct, the cumulative acts must still be sufficient to manifest an intentional and substantive disregard for the employer's interest. 370 Iowa Admin. Code r. 4.32(8) (1985); Budding, 337 N.W.2d at 223.

Actions of an employee which do not rise to the level of culpability sufficient to be deemed misconduct may be due to:

1. Inefficiency
2. Unsatisfactory conduct
3. Failure in good performance as a result of:
   a. Inability
   b. Incapacity
   c. Ordinary negligence in isolated incidences
   d. Good faith errors in judgment or discretion.

Iowa Admin. Code r. 370 - 4.32(1) (emphasis added). The employer has the burden of proving misconduct. Iowa Admin. Code r. 370 - 4.32(4); Eaton v. Iowa Department of Job Service, 376 N.W.2d 915, 917 (Iowa App. 1985).

By the decision of its appeal board, Job Service decided that although Green's errors were sloppy and recurrent and his work product was unsatisfactory and inefficient, the city had not proven Green's conduct had risen to the level of intentional and substantial disregard of the employer's interest. The question is whether there is substantial evidence in the record as a whole to support the agency's decision. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187, 189 (Iowa 1984). The agency's findings are conclusive when the facts are

in dispute or when reasonable may differ on the inferences to be drawn from the evidence. Harlan v. Iowa Department of Job Service, 350 N.W.2d 192, 193 (Iowa 1984).

We determine there is substantial evidence supporting the decision reached by the agency. We affirm the trial court.

AFFIRMED.