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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

MARVIN E. ANDERSON,	)	
Petitioner-Appellee,	)	Filed August 26, 1982 227
vs.	)	
IOWA DEPARTMENT OF JOB SERVICE and **CLINTON CORN PROCESSING COMPANY,**	)	2-267 2-67471
Respondent-Appellant.	)	

Appeal from Clinton District Court - L. D. Carstensen, Judge.

Respondent agency and employer appeal the decision of the district court reversing the agency's finding that petitioner was disqualified by misconduct from receiving unemployment benefits. REVERSED AND REMANDED.

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

Donald G. Senneff of Shaff, Farwell and Senneff, Clinton, Iowa, for Clinton Corn Processing Company.

Bert Watson, Clinton, Iowa, for petitioner-appellee.

Considered en banc.

PER CURIAM

Respondents agency and employer appeal the decision of the district court reversing the agency's finding that petitioner was disqualified by misconduct from receiving unemployment benefits. They claim that there was substantial evidence in the record to support the agency's findings that petitioner refused to perform a job assigned to him and that he left his place of employment without permission. We reverse and remand.

Petitioner was employed as a process operator in the feed department of the Clinton Corn Processing Company. At one point during the week of July 5, 1980, foreman Terry Eads asked for two volunteers to shovel some wet feed. Petitioner was the first to volunteer, but Eads chose two others. At this point Eads directed petitioner to resume a different work-related task which petitioner had been doing the past two or three days. Petitioner balked at accepting the assignment and was told by Eads that he was suspended until he had talked to someone at personnel and was given his time card. Petitioner was unable to talk with anyone at personnel until the following afternoon when he was told that he was discharged.

Petitioner filed his claim for unemployment benefits on September 10, 1980. The claims deputy ruled that the employer did not establish misconduct on petitioner's part and that he was not disqualified from receiving benefits. The employer appealed, and after a hearing, the Job Service hearing officer reversed the decision of the claims deputy and held that petitioner was discharged for misconduct in connection with his employment and was therefore disqualified from receiving benefits. This decision was affirmed by the Job Service appeal board. Petitioner then filed a petition for judicial review in district court pursuant to Iowa Code § 17A.19(8), alleging that the agency's decision was not supported by substantial evidence in the record made before the agency when the record is viewed as a whole. On September 30, 1981, the court reversed the agency's decision, finding there was no substantial evidence supporting the

agency's conclusions that petitioner refused to do an assigned job or that he left his place of employment without permission. Employer and the Department of Job Service both appealed the court's ruling.

The principles governing our review of agency decisions were summarized in Iowa Civil Rights Commission v. Woodbury County Community Action Agency, 304 N.W.2d 443 (Iowa App. 1981):

> In its exercise of section 17A.19 review powers, the district court acted in an appellate capacity to correct errors of law specified for contested cases in section 17A.19(8)(f). This court's review then is limited to the sole question of whether the district court correctly applied the law. To make that determination, we ask whether the agency action is supported by substantial evidence in the record before the agency when the record is viewed as a whole. ... The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. ... Evidence is substantial if a reasonable person would find it adequate for reaching a decision. Id. We are limited to the record made before the hearing officer. ... If our conclusions are the same as district court's, affirmance is in order; if not, reversal may be required.

304 N.W.2d at 446 (citations omitted). In this case, the dispute is whether there was substantial evidence that petitioner was guilty of misconduct; if so, he may not receive unemployment benefits. Iowa Code § 96.5(a)(2). "Misconduct" for this purpose is defined in Iowa Admin. Code 370-4.32(1)(a) as follows:

> Misconduct is defined 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 interests 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. (emphasis added).

The decision of the hearing officer, which became the final agency action, placed the agency finding of misconduct on two grounds: (1) refusal by petitioner to perform an assignment within his job description, and (2) leaving the employer's premises without permission. In this case, as in any case of alleged misconduct, the burden of proof falls on the employer. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982). Our review of the record as a whole before the agency results in a sharing of the concern which the district court expressed as to the correctness of the agency action. But we must disagree with the conclusion of the district court that the employer's evidence is insufficient as a matter of law to support a finding of misconduct. Unresolved factual issues make such a determination inappropriate on judicial review.

We agree with the district court's conclusion that there is no substantial evidence in the record as a whole to support a finding that petitioner's leaving the employer's premises constituted misconduct under the circumstances surrounding his suspension. We are not prepared to say as a matter of law, however, that the alleged refusal to perform assigned work did not constitute misconduct. We cannot determine whether the agency found that such refusal, standing alone, was misconduct, or whether the finding of misconduct was based upon the cumulative effect of such refusal and the unsupported charge of unauthorized leaving. We also believe that to permit proper resolution of this issue for possible further judicial review, the agency should be required to make specific findings concerning the following matters: (1) whether petitioner's actions constituted a refusal to perform assigned work or merely a complaint, (2) whether the timing of

the suspension imposed negates the finding of refusal to work, and (3) whether if there was a refusal to perform an assigned task, such action rose to the level of misconduct. On the latter point, we do not believe that any refusal to perform an assigned task requires a finding of misconduct. This must be determined on an ad hoc basis, based upon the facts of the individual situation.

For the reasons stated, we reverse the district court's order, vacate the final agency order, and remand the case to the agency for further proceedings and findings not inconsistent with our decision. Upon remand petitioner shall be permitted to submit the additional evidence proffered to the agency appeal board but not considered by it.

REVERSED AND REMANDED.