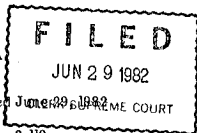


IN THE COURT OF APPEALS OF IOWA



Filed June 29, 1982

OLIVER J. TINKER,)

Petitioner-Appellant,)

vs.)

IOWA DEPARTMENT OF JOB SERVICE)

AND GAY AND GAY, INC.,)

Respondents-Appellees.

Appeal from Johnson District Court -- August F. Honsell, Jr. Judge.

Petitioner-claimant appeals from the district court's decision on judicial review affirming respondent-agency's decision disqualifying him from receipt of unemployment benefits, asserting: (1) that the record lacks substantial evidence to support a finding of misconduct; (2) that the agency decision was improperly based on past acts of alleged misconduct; and, (3) that the agency appeal board improperly considered facts outside the record through an ex parte communication by respondent-employer. **AFFIRMED.**

Sylvia A. Lewis and Lois Cox of Legal Services Corp. of Iowa, Iowa City, for petitioner-appellant.

Edmund Schlak, Jr., Walter F. Maley and Blair H. Dewey, Des Moines, for respondent-appellee agency.

Heard en banc.

JOHNSON, J.

Petitioner-claimant, Oliver J. Tinker, appeals from the district court's decision on judicial review affirming respondent-agency, Iowa Department of Job Service's, decision disqualifying him from receipt of unemployment benefits. He asserts: (1) that the record lacks substantial evidence to support a finding of misconduct; (2) that the agency decision was improperly based on past acts of alleged misconduct; and, (3) that the agency appeal board improperly considered facts outside the record through an ex parte communication by respondent-employer, Gay & Gay, Inc. We affirm.

Petitioner-claimant was an ambulance driver for respondent-employer from October 1978 until April 21, 1980, when his employment was terminated by his employer. During the period between January 16, 1979, and November 13, 1979, while in the course of his employment, petitioner received five convictions for speeding and one conviction for failure to stop at a stop sign. On February 15, 1980, he was involved in an accident while driving an ambulance in the course of his employment, however, he did not receive a traffic citation in connection with that incident. Sometime prior to April 2, 1980, petitioner was notified by the Iowa Department of Transportation that his driver's license was to be suspended as of that date because he was considered an habitual violator. On or about April 17, 1980, the employer was notified by its insurance company that the insurer desired to have petitioner placed in a position other than that of a driver. The memorandum also conveyed the erroneous information that petitioner's drivers license had already been suspended as of April 10, 1980.¹ On April 21, 1980, in response to the communication from its insurance company, the employer discharged petitioner.

Petitioner filed his initial claim for unemployment insurance benefits shortly

¹ Pursuant to petitioner's request, I.D.O.T. granted the petitioner a hearing to determine whether or not his license would be suspended. The hearing commenced on or about May 29, 1980; thereafter his license was suspended for ninety days as of June 2, 1980.

following his discharge. The agency initially determined he was disqualified from receiving benefits but, upon petitioner's appeal, a hearing was held in which the hearing officer determined that petitioner was "discharged for no disqualifiable reason and is entitled to unemployment insurance benefits, if otherwise eligible." The employer appealed the hearing officer's decision to the agency's appeal board. The notice of appeal included a letter from the employer's insurance agent concerning the insurance company's intention to withdraw coverage in the event petitioner was retained in a driver's position. This letter was not included in the original record made before the hearing officer. On November 7, 1980, the appeal board issued its decision reversing the hearing officer's determination and finding petitioner was disqualified from receiving benefits. Petitioner made a timely application for rehearing to the appeal board which was denied on November 21, 1980. On December 18, 1980 petitioner filed a petition for judicial review in the Johnson County District Court. The district court affirmed the final agency action on June 1, 1981, whereupon petitioner appealed.

I. Scope of Review. Pursuant to Section 17A.20, The Code 1981, our review of this case is limited to a determination of whether the district court made errors of law when it exercised its powers of review of the agency action under Section 17A.19. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d 162, 165 (Iowa 1982); Jackson County Pub. Hosp. v. PERB, 280 N.W.2d 426, 429 (Iowa 1979); City of Davenport v. PERB, 264 N.W.2d 307, 311 (Iowa 1978). Section 17A.19 limits the district court's review to a determination of whether the agency committed any errors of law specified in Section 17A. 19(8); Foods, Inc., 318 N.W.2d at 165. Thus, to determine whether the district court properly exercised its powers of judicial review "this court applies the standards of Section 17.19(8) to agency action to determine whether this court's conclusions are the same as those of the district court. If the conclusions are the same, affirmance is in order. If they are

not, reversal may be required." Jackson County, 280 N.W.2d at 429-30. Our review is not de novo. Cook v. Iowa Dep't of Job Serv., 299 N.W.2d 698, 700-01 (Iowa 1980).

II. General Principles. Petitioner argues that the agency's determination is not supported by substantial evidence and that the district court erred in affirming that decision. We will first enumerate those general principals important to our review of this issue. Section 17A.19(8)(f) provides that the district court shall reverse or modify the agency action if such action is "unsupported by substantial evidence in the record made before the agency when the record is reviewed as a whole." Evidence is substantial if a reasonable person would find it adequate for reaching a decision. City of Davenport, 264 N.W.2d at 311. However, the possibility of drawing two inconsistent conclusions from the evidence does not prevent the administrative agency's findings from being supported by substantial evidence. Cook, 299 N.W.2d at 700; City of Davenport, 264 N.W.2d at 311. The fact that a different or opposite result may have been fully justified by the record is of no importance. Carstensen v. Board of Trustees of the Police Ret. Sys., 253 N.W.2d 560, 562 (Iowa 1977). The question is not whether there is sufficient evidence to warrant a decision the agency did not make, rather it is whether there is sufficient evidence to warrant a decision it did make. Deaver v. Armstrong Rubber Co., 170 N.W.2d 455, 464 (Iowa 1969). We regard the agency's findings as tantamount to jury findings; where the evidence presents a question which would be properly submitted to a jury, we are bound by the agency's findings even though we might arrive at a different conclusion from the evidence. Auxier v. Woodward State Hosp. School, 266 N.W.2d 139, 143 (Iowa 1978); Staads v. Board of Trustees of the Fireman's Ret. Pension Fund, 159 N.W.2d 485, 491 (Iowa 1968); see also, Ross v. Ross, 308 N.W.2d 50, 52 (Iowa 1981); Temple v. Vermeer Mfg. Co., 285 N.W.2d 157, 160 (Iowa 1979). We construe such findings broadly and liberally to support rather than defeat the agency's decision. Holmes

v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 298 (Iowa 1974). We do not pass on the credibility of the witnesses or the preponderance of the evidence. Reisner v. Board of Trustees of the Fire Ret. Sys., 203 N.W.2d 812, 815 (Iowa 1973). "Upon application for unemployment benefits, the burden of proving eligibility for those benefits is upon the individual seeking unemployment compensation. [citing cases]." Gipson v. Iowa Dep't of Job Service, 315 N.W.2d 834, 836 (Iowa App. 1981). With these principals in mind, we turn to our analysis of the instant case.

A. Evidentiary Rules. Before considering the substantial evidence issue, we must initially address two threshold questions. Petitioner argues that the agency appeal board erred in considering evidence not within the record made before the hearing officer, and improperly based its decision upon past acts of alleged misconduct. The record shows that the employer attached to its application for rehearing, before the appeal board, an exhibit consisting of a letter from its insurer which further explained the insurer's policy with regard to petitioner's driving record. Petitioner argues that receipt of this evidence by the appeal board violates agency rules governing the appeal. We agree. 370 I.A.C. § 6.4-(1)(g) provides in pertinent part:

(1) An application to present new or additional evidence shall be in writing and shall be filed with the appeal board within ten days after the date of mailing of notice to the parties that an appeal has been filed.

(2) An application to present new or additional evidence shall state the nature of the evidence, the materiality of such evidence, and the reasons why such evidence was not introduced at the hearing before the hearing officer. No such evidence shall be considered by the appeal board unless the board has ordered it admitted.

(3) Whenever the appeal board, . . . orders the taking of new or additional evidence, the matter must be remanded to a hearing officer for that purpose. The issues at such hearing shall be limited to those issues designated by the appeal board. The appeal board shall notify each of the parties at least ten days before the date of the hearing

specifying the place and time of the hearing. However, if only documentary evidence is to be admitted, a copy of the evidence shall be mailed by the appeal board to each of the parties. Ten days shall be given the parties to rebut such evidence.

The record reveals that no application to present new or additional evidence before the appeal board was made. Nor was there any appropriate order entered by the appeal board admitting such evidence. Further, there is no evidence that petitioner was given an opportunity to rebut this additional evidence. Procedural due process requires that petitioner have an opportunity to confront and cross-examine an adverse witness. Carr v. Iowa Employment Security Comm., 256 N.W.2d 211, 216 (Iowa 1977). We thus conclude that such additional evidence was not properly before the board. However, we conclude, for reasons set forth later in this opinion, that petitioner was not prejudiced and reversal is not required on this ground.

Petitioner also argues that the agency improperly based its finding of misconduct upon petitioner's past acts. We find no merit to this argument. 370 I.A.C. § 4.32-(8) states:

Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for conduct cannot be based on such past act or acts. It must be based on a current act, as past acts are condoned by subsequent or continued employment.

We conclude that the acts relied upon by the board cannot be characterized as past acts within the meaning of this rule. The rule clearly indicates that it is not the timing of the act that is important but the condoning of the act by the employer which governs our analysis. We find no such condonation under the circumstances of this case. The record reveals that respondent was apprised of petitioner's unlawful conduct some months after the series of offenses were committed. This interim does not evidence condonation by the employer. On the contrary, upon learning of the violations and after assessing the consequences, the employer immediately terminated petitioner's employment. We thus find no illegality in the agency's action on this ground.

B. Substantial Evidence. Upon our review of the record, we find substantial evidence to support the agency's determination. 370 I.A.C. § 4.32-(1)(a) 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." It is clear to us that when an employee's violations of the laws of the road bear directly upon his ability to work for his employer, such violations support a finding of misconduct. See Cook, 299 N.W.2d at 702. The evidence in the instant case supports the reasonable inference that petitioner jeopardized the employer's insurance coverage. The April 17, 1980 communication from the employer's insurance agent clearly indicates that continued coverage of petitioner as a driver was unlikely. The opening paragraph of that letter stated "[a]lto insurance companies periodically obtain state driving records of drivers of insured vehicles to determine insurability." The letter concluded by stating the insurance company's desire to have petitioner placed in a position other than driving respondent's vehicles. The employer testified before the hearing officer that he believed the insurance company required a change in petitioner's employment in order to continue coverage. In light of the initial statement in the insurer's communication, we believe the employer entertained a reasonable interpretation of the insurance company's position. On this record alone, we find substantial evidence for a determination that petitioner's misconduct bore directly and adversely on his ability to work for his employer.

Further, we do not believe that the fact the insurer's communication contained inaccurate information concerning suspension of petitioner's license is material to resolution of this case. While petitioner's license had not yet been suspended, that suspension was stayed by order of the I.D.O.T. pending a hearing on the matter. Subsequent to that hearing, his license was in fact suspended as of June 2, 1980. The fact remains that petitioner had repeatedly violated the laws of the road and was under threat of suspension. The clear import of the insurance agent's letter was that the employer's "insurability" was dependent upon the

"driving record" of its drivers and not on the mere fact of revocation of their licenses. Cf. Cook, 299 N.W.2d at 702.

Finally, having found substantial evidence in the record before the hearing officer to support a finding of misconduct, we do not believe that the fact additional evidence was improperly submitted to the appeal board constitutes reversible error. Agency receipt of an ex parte communication, alone, does not require reversal of the agency action when the record otherwise contains sufficient competent evidence. Cf. Carr, 256 N.W.2d at 216. In light of the record made before the hearing officer, it is our opinion that petitioner was not prejudiced by the agency's failure to follow the applicable evidentiary rules. We thus affirm the district court's decision.

AFFIRMED.