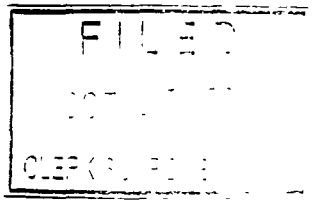
IN THE COURT OF APPEALS OF IOWA

No. 9-095 / 98-0358
Filed October 15, 1999



ANTHONY CATALDO,

Appellant,

vs.

IOWA EMPLOYMENT APPEAL BOARD, and IOWA DEPARTMENT OF EDUCATION,

Appellees.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

Appellant appeals the district court's ruling on judicial review affirming the appeal board's decision that he engaged in misconduct disqualifying him from receiving unemployment benefits. **AFFIRMED.**

Martha Fagg, Law Office of Martha Fagg, Des Moines, for appellant.

Richard R. Ramsey, Des Moines, for appellees.

Considered by Huitink, P.J., Streit, J., and Habhab, S.J.*

* Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

HABHAB, S.J.

The petitioner-appellant, Anthony Cataldo, appeals the district court's ruling on judicial review which affirmed the agency's decision Cataldo engaged in misconduct disqualifying him from receiving unemployment benefits. He claims the district court erred in determining the hearsay evidence provided by the respondent employer constituted substantial evidence supporting a misconduct finding and in determining the employer did not have a duty to produce better evidence at the administrative hearing. We affirm the district court.

Background. Anthony Cataldo was employed as a social security disability examiner by the Iowa Department of Education from September 1993 until his termination for misconduct in December 1996. His position involved processing disability claims for the Social Security Administration. Although Cataldo could determine whether a claimant was entitled to disability benefits, he did not make the final determination on the benefit claim.

From September 24, 1996, through October 14, 1996, Cataldo had telephone contact with a female disability claimant for the purpose of processing her claim. The claimant had a personality disorder which Cataldo asserts made her difficult to deal with. During this period, Cataldo made thirty calls to the claimant from his work station. The department indicated only three to five calls would be the normal practice in processing a claim.

After her disability claim was denied, the claimant called the department to report Cataldo had harassed her during his telephone contact with her. The claimant asserted at least one call had been sexually explicit and that Cataldo had sent his picture to her. The department conducted an investigation which included interviews with the claimant and her income maintenance worker. The claimant and maintenance worker gave their approval to interview notes reporting on Cataldo's allegedly harassing conduct. Cataldo admitted sending a picture and a letter to the claimant but subsequently denied this action. As a result of the investigation, the department terminated Cataldo's employment for misconduct, for misusing the telephone privileges, and for threatening coworkers.

Agency proceedings. Cataldo filed a claim for unemployment benefits which the Job Services Division of the Iowa Department of Employment Services initially granted. The Department of Education appealed the decision resulting in contested case proceedings before an administrative law judge. The department relied on hearsay evidence from its investigation supporting its claim that Cataldo made harassing phone calls and thus engaged in misconduct disqualifying him from receiving unemployment benefits. The department did not introduce the interview notes or an alleged letter by an income maintenance worker. The department also did not introduce any sworn statements by the claimant or the income maintenance worker and the claimant did not testify at the hearing. At the hearing, Cataldo testified he did not engage in the alleged harassment and also revealed contents from the claimant's

file regarding her history of legal trouble in an attempt to impeach her. The administrative law judge reversed the award of unemployment benefits. The judge determined Cataldo engaged in harassment after determining the hearsay evidence provided by the department was more credible than Cataldo's testimony. The judge based this conclusion on the number and length of the calls Cataldo made to the client. The Employment Appeal Board affirmed the administrative law judge's decision.

District court review. Cataldo filed a petition for judicial review challenging the Board's decision. Cataldo challenged the giving of more weight to the department's hearsay evidence than to his direct testimony. He asserted the action should be remanded for consideration of additional evidence and no substantial evidence supported the Board's decision.

The district court affirmed the Board's decision that Cataldo engaged in misconduct disqualifying him from receiving unemployment benefits. The court determined it was not improper to give more weight to the department's hearsay evidence than Cataldo's sworn testimony. The court concluded the department was not required to present better evidence and the administrative law judge was not required to employ a negative inference from the department's failure to produce such evidence. The court denied Cataldo's application for leave to present additional evidence before the Board. The court determined there was substantial evidence supporting the Board's finding Cataldo engaged in misconduct. Cataldo appeals.

Scope of review. In reviewing a decision of a district court rendered in its appellate capacity pursuant to section 17A.19, we apply the standards of section 17A.19(8) to the agency action to determine whether our conclusions are the same as those of the district court. *Jackson County Pub. Hosp. v. Public Employment Relations Bd.*, 280 N.W.2d 426, 429-30 (Iowa 1979). The findings of an administrative tribunal will be upheld if supported by "substantial evidence in the record made before the agency when that record is viewed as a whole." Iowa Code § 17A.19(8)(f). We give deference to agency findings of fact. *Cerro Gordo County Care Facility v. Iowa Civil Rights Comm'n*, 401 N.W.2d 192, 196 (Iowa 1987). We must not reassess the weight of the evidence because the weight of the evidence remains within the agency's exclusive domain. *Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 234 (Iowa 1996); *Burns v. Board of Nursing*, 495 N.W.2d 698, 699 (Iowa 1993). However, we will set aside agency findings if the record clearly shows the agency decision unjustified. *Sierra v. Employment Appeal Bd.*, 508 N.W.2d 719, 720 (Iowa 1993).

Analysis. Cataldo first claims the district court erred in finding substantial evidence supported the agency finding of misconduct. He argues the court incorrectly affirmed the agency finding which was based solely on hearsay evidence presented by the employer, claiming hearsay cannot, as a matter of law, constitute substantial evidence. Cataldo cites *Schmitz v. Iowa Dept. of Human Services*, 461 N.W.2d 603 (Iowa App. 1990) in which we reversed the district court when the agency decision

was based solely on hearsay evidence. Cataldo's argument goes beyond our decision in *Schmitz:*

> If the record is composed solely of hearsay evidence, we must examine the evidence closely in light of the entire record. Again, we believe we must evaluate the quantity and quality of the evidence to see whether it rises to necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. . . .
>
> We must be particularly wary of substituting our own judgment for that of the agency. As has been said many times, we will uphold the findings of fact even though we might draw a different inference from those facts. . . .
>
> We are not, by this holding, placing a new or different burden on the agency to seek out and present a great quantity of evidence, live or documentary. We are sensitive to the great cost in time and resources that such a demand would create. We seek, first and foremost, to ensure a minimum level of fairness to persons called before an administrative tribunal.

Schmitz, 461 N.W.2d at 607-08 (Citations omitted).

The Board is not bound by technical rules of evidence and may base its decision on evidence which would be inadmissible in a jury trial. *May Const. v. Wooldridge*, 386 N.W.2d 139, 141 (Iowa App. 1986). Hearsay evidence, generally, is admissible at administrative hearings. *Gaskey v. Iowa Dept. of Transp., Motor Vehicle Div.*, 537 N.W.2d 695, 698 (Iowa 1995); *McConnell v. Iowa Dept. of Job Service*, 327 N.W.2d 234, 237 (Iowa 1982). Even if one party offers only hearsay evidence, the Board assesses the weight of the evidence and may, as in this case, find hearsay more credible than other direct or circumstantial evidence. The statutory standard is that agency decisions must be "based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious

affairs." Iowa Code § 17A.14(1). We conclude substantial evidence, albeit hearsay, supports the Board's decision and, consequently, affirm the district court on this issue.

Cataldo also claims the court erred in not determining the employer had a duty to present better evidence. He cites *Crosser v. Iowa Dept. of Public Safety*, 240 N.W.2d 682 (Iowa 1976) as providing for a negative inference to be drawn if a party does not produce the best evidence it can. The district court evaluated Cataldo's claim that a negative inference was required because the employer did not present the best evidence and determined the inference is discretionary. We agree. The plain language of *Crosser* states the inference is discretionary:

> [T]he trial court was referring to the inference which arises where, without satisfactory explanation, relevant evidence within the control of a party whose interests would naturally call for its production is not produced. In such circumstances it *may* be inferred the evidence would be unfavorable.

Id. at 684 (Emphasis added).

The district court also examined the exceptions to the rule in *Crosser*, that no presumption arises when the witness is equally available to either party or when the testimony would merely be cumulative. *Prestype Inc. v. Carr*, 248 N.W.2d 111, 120 (Iowa 1976) (citing *State v. Thomas*, 162 N.W.2d 724, 727 (Iowa 1968).

Cataldo had equal access to the witnesses through discovery and subpoenas. He could have called them. He could have offered files from his employer. Cataldo has not demonstrated the witnesses' testimony or the employer's files would have revealed information which would not be cumulative. We conclude, as did the district

court, the negative inference is discretionary and, in any event, both exceptions to the inference apply under the circumstances of this case. Therefore, we affirm the district court on this issue.

For the reasons set forth, we hold the district court did not err in determining substantial evidence supported the Board's decision and in concluding no negative inference was required under the circumstances of this case. Accordingly, we affirm.

AFFIRMED.

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