FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

396

BILLY G. PARNELL,

Appellant,

vs.

IOWA DEPARTMENT OF JOB SERVICE and PITTSBURGH-DES MOINES STEEL COMPANY,

Appellee.

Filed September 29, 1981

1-196
2-65404

Appeal from Polk District Court - Richard Strickler, Judge.

Complainant appeals from a district court order affirming an Iowa Department of Job Service ruling adverse to him. REVERSED.

Linda S. Pettit and Francisco Colon, Jr., Des Moines, for appellant.

Walter F. Maley and Blair H. Dewey for Iowa Department of Job Service.

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

PER CURIAM

Complainant appeals from a district court order affirming an Iowa Department of Job Service ruling adverse to him. He alleges that the appeal board exceeded its statutory authority by reversing the claims deputy and hearing officer's decisions finding that deliberate misconduct by the claimant had not been established, and that the agency decision is not supported by substantial evidence in the record as a whole. We reverse on the second ground raised.

Claimant Billy G. Parnell worked as a painter-blaster for Pittsburgh-Des Moines Steel Company for almost a year and a half. During his employment he had difficulties with absence from work which resulted in two warnings being issued to him. Absences were not counted against him if in excess of three days and excused by a doctor. On Thursday, August 9, 1979, Parnell, although ill, attempted to go to work but had car trouble, which he reported to his employer. He remained at home, his wife reported him sick, and he went to his doctor on Monday, August 13. The doctor gave him a prescription and a written excuse allowing him to return to work August 14. But Parnell, feeling better, attempted to return to work August 13 (his shift started at 4 p.m.). Upon his arrival he was terminated for excessive absences without excuse. He returned August 14 with the doctor's excuse, but the company refused to accept it.

The company resisted Parnell's claim for unemployment benefits on the grounds of misconduct because of his absence without excuse. On September 18, 1979, a claims deputy ruled there was no deliberate misconduct proven. After the company appealed, and after another hearing, a hearing officer affirmed the no misconduct ruling October 8, 1979. The company again appealed, and the appeal board reversed November 16, 1979, finding from the record before it that Parnell was not a credible witness and that he had been absent excessively. On December 13, 1979, the board denied a rehearing, and Parnell's appeal to district court resulted in affirmance of the appeal board's decision. This appeal followed.

I. Parnell's first claim of error is that the appeal board, in reversing the hearing officer's decision without the taking of new evidence and without hearing testimony, acted in excess of statutory authority. Parnell concedes that the board has the statutory power to affirm, modify, or set aside any decision of a hearing officer on the basis of evidence previously submitted. § 96.6(5), The Code. His claim of error rests upon section 17A.15(2), The Code, which states:

> When the agency did not preside at the reception of evidence in a contested case, the presiding officer shall make a proposed decision. Findings of fact shall be prepared by the officer presiding at the reception of the evidence in a contested case unless the officer becomes unavailable to the agency. If the officer is unavailable, the findings of fact may be prepared by another person qualified to be a presiding officer who has read the record, unless demeanor of witnesses is a substantial factor. If demeanor is a substantial factor and the presiding officer is unavailable, the portions of the hearing involving demeanor shall be heard again or the case shall be dismissed.

The claimant maintains that, since the appeal board found he was not a credible witness and because the board did not personally take testimony, it is without authority to rule on credibility. We do not believe this section applies to appeal board review, but rather is designed to delineate procedures to be followed by lower hearing levels within the agency and methods for determining findings of fact and conclusions of law. The appeal board has the power and the authority to pass on both factual findings and legal conclusions based solely on the record before it. Furthermore, in the situation here, the board could find a witness incredible from the record alone since demeanor is but one aspect of credibility. The appeal board did not exceed its statutory authority.

II. Parnell also asserts that the appeal board's decision finding misconduct on his part is not supported by substantial evidence. A reviewing court may affirm, remand, reverse, modify, or grant any other appropriate relief from agency action when substantial rights of a claimant have been prejudiced because agency action in a contested case is unsupported by substantial evidence in the record made before the agency when the record is viewed as a whole. § 17A.19(8)(f), The Code. "But such a review 'must take into account whatever in the record fairly detracts from its weight' and requires consideration of 'the record in its entirely . . . including the body of evidence opposed to the Board's view.'" City of Des Moines v. Public Employment Relations Board, 264 N.W.2d 324, 330 (Iowa 1978) (dissenting opinion) citing Universal Camera Corporation v. NLRB, 340 U.S. 474, 488, 71 S. Ct. 456, 464-65, 95 L. Ed. 456, 467-68 (1951). Review is at law, not de novo, but the entire record must be considered in determining whether the challenged finding has sufficient support. City of Davenport v. Public Employment Relations Board, 264 N.W.2d 307, 311 (Iowa 1978). Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. Id. citing Grant v. Fritz, 201 N.W.2d 188, 197 (Iowa 1972).

Applying these principles to the record as a whole, we find there is a lack of substantial evidence to support the appeal board's finding of misconduct on the part of

Parnell with the resultant denial of benefits to him. The agency attempts to make much of the fact that absenteeism had been chronic with the claimant, and this incident was but the final one of a continuing problem. "While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct 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." I.A.C. § 370-4.32(8). The record as a whole supports a finding that Parnell had a medical excuse for the period of absence which resulted in his discharge. Because this absence was excused, it cannot either individually or cumulatively[1] make his discharge one for misconduct. Since the agency's finding of misconduct is not supported by substantial evidence, we reverse the agency's decision and order such unemployment benefits as Parnell is entitled to as of the original finding by the claims deputy, so long as he was otherwise eligible at the time to receive them.

REVERSED.

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[1] Without counting this absence as unexcused, the employer's work rule on cumulative unexcused absences is not violated.