

IN THE COURT OF APPEALS OF IOWA

No. 3-201 / 92-1538

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GERALDINE R. WILSON,

Appellant,

vs.

EMPLOYMENT APPEAL BOARD and  
INDIAN HILLS CARE CENTER,

Appellees.

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Appeal from the Iowa District Court for Woodbury  
County, Dewey J. Gaul, Judge.

The petitioner appeals from a district court decision  
affirming the agency's refusal to award her unemployment  
benefits on the ground she was discharged for misconduct.

**REVERSED AND REMANDED.**

Joseph G. Basque of Legal Services of Iowa, Sioux City,  
for appellant.

Shelley A. Horak of Baron, Sar, Goodwin, Gill, Lohr &  
Horak, Sioux City, for appellee Indian Hills Care Center.

William C. Whitten, Des Moines, for appellee Employment  
Appeal Board.

Heard by Schlegel, P.J., and Sackett, J., and Keefe,  
S.J.\*

\*Senior judge from the 1st Judicial District serving on  
this court by order of the Iowa Supreme Court.

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KEEFE, S.J.

Plaintiff Geraldine R. Wilson has been a licensed practical nurse (LPN) for more than thirty years. She began employment with Indian Hills Care Center, a nursing home in Sioux City, on November 20, 1990. She usually worked a shift from 2:30 p.m. to 11:00 p.m.

On November 8, 1991, when Wilson reported for her shift, the director of nursing, Paula Law, spoke to her about missing a patient's medications on November 2, 3, and 4. Wilson received a written warning and was told that if she missed another medication she would be terminated.

Wilson then saw that only two LPNs and two aides were scheduled to work in the nursing home that evening. The nursing home had between 180 to 200 patients. Wilson was the LPN responsible for one side of the nursing home, which contained about 100 patients. About twelve of these patients were in D-Hall, which was the skilled unit. Wilson's duties in D-Hall including tube feeding, giving insulin shots, changing colostomy bags, changing dressings, and giving medications.

Wilson believed there were not enough employees on her shift to allow her to fulfill her duties as a nurse. In particular, she was worried that due to the great number of patients under her care she would miss a medication and thus be discharged. In addition, Wilson believed that if she was discharged for missing a patient's medication, she could lose her nurse's license.

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Wilson took her concerns to Jeanne Broderson, the assistant director of nursing. Broderson told her she could refuse her work assignment if she thought it would jeopardize her license, but that she needed to discuss the situation with Paula Law.

Wilson then went back to Paula Law's office and told her she would need some help to work D-Hall and the rest of her side of the building. Paula Law stated that if Wilson refused to work she would be terminated. Wilson replied, "Well, I guess you'll have to terminate me because I can't work it with the threat of missing another medication." Paula Law then gave Wilson her discharge papers and told her to leave the building.

Wilson filed a claim for unemployment benefits. A job service representative denied her benefits on the ground she had been discharged for misconduct. Wilson appealed.

A hearing was held before an administrative law judge (ALJ) on January 21, 1992. The employer's representative, Patrick O'Day, stated that under the company's written employment policies, the refusal of a job assignment was grounds for immediate discharge. Paula Law stated that the nursing home scheduled enough nurses to work November 8, 1991, to meet State nursing guidelines. However, she did not know how many patients were in the nursing home that day.

Wilson testified that when she went to Paula Law's office she did not intend to refuse her work assignment,

but she wanted Paula Law to bring in additional employees for that shift. Wilson stated she was afraid she would lose her nursing license if she worked under the short staff conditions that evening. At that time, day shift personnel were available in the home who could have helped out.

Wilson also presented the testimony of Karen Lehrkamp. Lehrkamp testified that Indian Hills was short staffed when she worked there in July and August 1991. She testified the facility was so short staffed the nursing assistants would wake some patients at 2 a.m., fix their beds, dress them, and then just place them on top of their beds, so that the nursing assistants could just get them up in the morning. Lehrkamp was presently employed at a local hospital. The ALJ would not allow her to testify concerning the condition of patients she saw at the hospital who had come from Indian Hills.

The ALJ concluded Wilson was discharged from her employment for refusing her assigned work and that this constituted misconduct. The ALJ affirmed the decision of the job service representative denying Wilson's claim for unemployment benefits.

Wilson filed an application to present additional evidence. She pointed out that the employer's written employment policy had not been admitted into evidence. O'Day had read the relevant provision into the record. Wilson claimed that upon examining the written policy, she

discovered O'Day had misrepresented the contents of the written policy. Wilson stated that under the actual company policy, an individual who refuses a job assignment is to be immediately suspended without pay subject to an investigation, not fired.

The Employment Appeal Board affirmed the ALJ's decision. Wilson then filed an application for a rehearing due to the Board's failure to address her application to present additional evidence. The Board concluded Wilson had not shown sufficient good cause for granting a rehearing.

Wilson filed a petition for judicial review. The district court affirmed the Employment Appeal Board. The court concluded the question of whether Wilson validly refused to accept her job assignment was a question of fact. The court found there was substantial evidence in the record to support the Board's decision. Wilson now appeals.

This court's review of an agency finding is at law and not de novo. Ray v. Iowa Dep't of Job Serv., 398 N.W.2d 191, 193 (Iowa App. 1986). The agency decision is final if supported by substantial evidence and contains correct conclusions of law. Heatherly v. Iowa Dep't of Job Serv., 397 N.W.2d 670, 670 (Iowa 1987).

The standards this court applies are set out in Iowa Code section 17A.19(8). The reviewer court shall grant appropriate relief if substantial rights of appellant have

been prejudiced because the action of the agency violated constitutional or statutory provisions, exceeded its statutory authority or violated its own rules, or was made upon unlawful procedure or otherwise affected by errors of law. Aluminum Co. of Am. v. Employment Appeal Bd., 449 N.W.2d 391, 393 (Iowa 1989). In addition, we must determine whether the agency's conclusion was supported by substantial evidence when the record is viewed as a whole, or is arbitrary, capricious or characterized by abuse or unwarranted use of discretion. Id. at 393-394.

The main question this court must ask is not whether the evidence might support a different finding, but whether there is substantial evidence to support the finding by the agency. Henry v. Iowa Dep't of Job Serv., 391 N.W.2d 731, 734 (Iowa App. 1986). If the evidence is not in dispute or when reasonable minds might disagree about the conclusions to be drawn from the evidence, the court is bound to accept the agency's findings. Harlan v. Iowa Dep't of Job Serv., 250 N.W.2d 192, 193 (Iowa 1984).

We must grant appropriate deference to the agency expertise and broadly and liberally apply their findings in order to uphold rather than defeat the decision. Ward v. Iowa Dep't of Transp., 304 N.W.2d 236, 237 (Iowa 1981). The agency's factual findings are binding on appeal unless a contrary result is demanded as a matter of law. Norland v. Iowa Dep't of Job Serv., 412 N.W.2d 904, 908 (Iowa 1987).

Generally, we review final agency action, which in this case is the decision of the Employment Appeal Board. However, here the Board incorporated the decision of the ALJ as its decision. Therefore, we review the decision of the ALJ as if it were final agency action.

The evidence is in dispute, but a review of the record shows that the ALJ decision is not supported by some of the testimony he relied upon. He found that claimant was assigned to D-Hall, a skilled unit, and that four persons were assigned to that unit. The record shows that she was assigned to one-half of the home which included D-Hall. The portion of the nursing home to which claimant was assigned included about one hundred patients, twelve of which needed skilled help and intensive care.

The ALJ found claimant did not attempt to withdraw her demand for extra help when told she would be terminated if she did not work that evening. The record shows she had no opportunity to withdraw her demand but was terminated at once.

Further, the ALJ found the home had properly staffed D-Hall. There is nothing to support this finding in the record. Claimant testified the hall was not properly staffed. Paula Law testified that, in her opinion, the staff present was adequate for the whole nursing home. She never testified concerning the staffing of D-Hall.

All of these erroneous factual findings were material to support the ALJ determination of legal consequences.

Claimant brought her concerns for proper care of her patients and her personal concern for her license to the attention of management. For this she received an ultimatum, "work or be fired."

Claimant had an obligation under Iowa Administrative Code chapter 655 to properly perform nursing care. Paula Law further testified there was a State requirement to have 2.2 hours of care for each patient per shift. If we assume that there were two LPNs, two nurses' aides, and one RN (the record is not clear one was present) there would not approach 2.2 hours of care per patient.

Paula Law also testified that the personnel manual required firing of an employee who refused an assignment. In fact, the manual provided for a suspension, an investigation, and a hearing on the employee's future employment. Here the ALJ abused his discretion in not allowing the manual into evidence after the hearing. Iowa Code § 17A.19(8)(g).

This matter must be returned to the ALJ so a fair and impartial hearing can be held. This will allow all parties to fully present their evidence.

For purposes of the new hearing, we agree that Karen Lehrkamp should not be allowed to testify concerning her observations of patients in the hospital after they left Indian Hills. There was no proper showing that she had either the expertise or knowledge of health practices to render an opinion.

We reverse and remand for a new hearing by the  
Employment Appeal Board.

REVERSED AND REMANDED.