IN THE COURT OF APPEALS OF IOWA

No. 1-168 / 10-1598
Filed March 30, 2011

RUSSELL R. KEPHART,
Petitioner-Appellant,

vs.

EMPLOYMENT APPEAL BOARD,
Respondent-Appellee.

Appeal from the Iowa District Court for Mitchell County, Bryan H. McKinley, Judge.

Petitioner appeals the district court's decision affirming the Employment Appeal Board's denial of unemployment insurance benefits. **AFFIRMED.**

Dylan J. Thomas, Mason City, for appellant.

Richard Autry, for appellee Employment Appeal Board.

Considered by Vogel, P.J., and Doyle and Tabor, JJ.

DOYLE, J.

Russell Kephart worked as a bartender for Staff Motel, L.L.C., which is owned and operated by Donna Hinderks. On November 30, 2008, Kephart filed a claim seeking unemployment benefits, claiming he had been temporarily laid off from his employment with the motel. The employer disputed his claim, asserting Kephart was still employed as a part-time employee and that Kephart's "[h]ours were cut due to documented failure to do his duties." Iowa Workforce Development (IWD) denied Kephart's claim in January 2009. Kephart appealed.

Following a hearing before an administrative law judge (ALJ) in August 2009, the ALJ entered his decision awarding Kephart benefits. The ALJ found the employer failed to establish that Kephart was discharged for an act of misconduct because the act for which Kephart was discharged was too stale.

Thereafter, the employer filed its notice of appeal. The employer's notice set forth facts concerning Kephart's termination, including facts not set forth at the original hearing before the ALJ. Specifically, the notice asserted a more recent incident for Kephart's discharge not previously raised by the employer, along with an affidavit from the employer as to the incident.

On October 30, 2009, the Employment Appeal Board (EAB) issued its decision remanding the case back to the ALJ. The EAB found the record of the hearing before the ALJ to be incomplete, noting several questions it found to be unanswered that prohibited it from ruling on the appeal.

A rehearing before the ALJ was held on December 11, 2009. Kephart did not respond to the hearing notice and did not participate. Thereafter, the ALJ entered his decision again awarding Kephart benefits. The ALJ found Hinderks

gave contradictory evidence at the second hearing and her testimony was not credible.

The employer appealed the decision again to the EAB. On February 26, 2010, the majority of the EAB, with one member dissenting, issued its decision reversing the ALJ. The EAB found Hinderks to be credible and further found the employer established that Kephart's employment had been terminated for his misconduct.

Kephart then filed a petition for judicial review. He asserted he was denied the reasonable opportunity for a fair hearing pursuant to Iowa Code section 96.6(3) (2009). Additionally, Kephart asserted the EAB's decision to remand was in error, Kephart was denied the opportunity to participate in the rehearing and was not given an opportunity to rebut the employer's new testimony, and the EAB's decision was not supported by substantial evidence.

On August 26, 2010, the district court entered its opinion affirming the EAB's decision. The district court found the EAB did not abuse its discretion in remanding for further evidence, noting that the EAB is given the authority on its own motion to take additional evidence pursuant to Iowa Code section 10A.601(4).[1] Additionally, the district court found Kephart had not preserved error on his claim of lack of notice of the hearing because Kephart failed to advise the EAB that he did not receive notice of the second hearing both prior to

[1] The district court cited *Crescent Chevrolet v. Iowa Department of Job Service*, 429 N.W.2d 148, 150 (Iowa 1988), which states:

> [T]he appeal board, in order to comply with its statutory duty "to hear and decide contested cases under chapter[] . . . 96 . . . ," Iowa Code § 10A.601(1) (1981), is given the authority to "on its own motion . . . direct the taking of additional evidence. . . ."

the Board's appeal ruling and subsequent thereto. Finally, the court found the weight of evidence remained within the agency's exclusive domain and it could not reassess the agency's credibility findings, citing *Hy-Vee, Inc. v. Employment Appeal Board*, 710 N.W.2d 1, 3 (Iowa 2005), and *Burns v. Board of Nursing*, 495 N.W.2d 698, 699 (Iowa 1993). The court concluded that, in reviewing the evidence which the agency board believed, the EAB's decision was supported by substantial evidence. Kephart now appeals.

Iowa Code Chapter 17A, the Administrative Procedure Act, governs our review of claims concerning unemployment benefits. *Titan Tire Corp. v. Emp't Appeal Bd.*, 641 N.W.2d 752, 754 (Iowa 2002). "On appeal from judgment entered on judicial review of agency action, our review is limited to the correction of errors at law." *Gaffney v. Dep't of Emp't Serv.*, 540 N.W.2d 430, 433 (Iowa 1995). We review the district court's decision by applying the standards of section 17A.19 to agency action to determine if our conclusions are the same as those reached by the district court. *University of Iowa Hosps. & Clinics v. Waters*, 674 N.W.2d 92, 95 (Iowa 2004). We are bound by the agency's findings of fact if those findings are supported by substantial evidence when the record is reviewed as a whole. *Sharp v. Emp't Appeal Bd.*, 479 N.W.2d 280, 282 (Iowa 1991). Furthermore, our supreme court has refused to give an elevated status to the credibility findings of the ALJ when those findings were not adopted by the agency. *See Iowa State Fairgrounds Sec. v. Iowa Civil Rights Comm'n*, 322 N.W.2d 293, 294-95 (Iowa 1982).

Upon our review of the entire record, we agree with the district court's reasoning and application of the law. The shackles that confine our judicial

review of this administrative action prohibit us from re-weighing the evidence. We are obliged to broadly and liberally apply the agency's findings to uphold rather than defeat the agency's action. Acutely mindful of these constraints, we cannot say as a matter of law that the EAB's final decision is not supported by substantial evidence. We adopt the district court's reasoning as our own and for all the reasons stated therein, we affirm on all issues. *See* Iowa Ct. R. 21.29 (*b*), (*d*), (*e*).

AFFIRMED.