IN THE COURT OF APPEALS OF IOWA

No. 2-469 / 11-1715
Filed October 3, 2012

TERRY CHRISTIANSEN,
Petitioner-Appellant,

vs.

EMPLOYMENT APPEAL BOARD,
IOWA WORKFORCE DEVELOPMENT,
AND WEST BRANCH COMMUNITY
SCHOOL DISTRICT,
Respondents-Appellees.

Appeal from the Iowa District Court for Johnson County, Douglas S. Russell, Judge.

An unemployment claimant appeals the denial of benefits. **AFFIRMED.**

Michael J. Pitton and Sarah C. Brandt of Pitton Law, P.C., Iowa City, for appellant.

Lars G. Anderson of Holland and Anderson, L.L.P., Iowa City, for appellee West Branch Community School District.

Rick Autry of Iowa Employment Appeal Board, Des Moines, for appellee Iowa Employment Appeal Board and Iowa Workforce Development.

Heard by Vogel, P.J., and Danilson and Mullins, JJ.

VOGEL, P.J.

This appeal arises from the denial of unemployment benefits to petitioner-appellant, Terry Christiansen, by the respondents-appellees, Employment Appeal Board (EAB), Iowa Workforce Development (IWD), and the West Branch Community School District (School District). Christiansen sought unemployment benefits after he was terminated from his position as a middle school teacher, coach, and bus driver by the school district. We affirm.

I. Background Facts and Proceedings

On Friday, September 19, 2008, Christiansen held football practice for the middle school team at the high school football field. After the practice ended, Christiansen was to drive the students back to the middle school. Christiansen was on the bus waiting for a few students to finish showering when several students in the back rows of the bus began to use their water bottles to squirt water at each other. Christiansen was in the driver's seat in the front of the bus. He yelled at the students to quit squirting water but as the activity continued, Christiansen walked part way down the aisle and repeated his request. As Christiansen turned around to return to the front of the bus, he thought a student—M.K.—raised his middle finger at him in an obscene gesture.

What happened next is highly disputed, but on review we take as true the agency's fact findings unless those fact findings are "not supported by substantial evidence in the record before the court when that record is reviewed as a whole." Iowa Code § 17A.19(10)(f) (2009); *Meyer v. IBP*, 710 N.W.2d 213, 218 (Iowa 2006). After seeing the obscene gesture, Christiansen turned again and went to the student he thought was responsible. Christiansen grabbed M.K. by the

upper, right arm and propelled him towards the front of the bus. Christiansen told M.K. to get off the bus. M.K. complied, and then called his grandmother for a ride.

That evening, at the high school football game, M.K. told his mother of the incident, who in turn informed Sara Oswald, the middle school principal. Officer Ben Isbell of the West Branch police department was asked to investigate the matter and did so by examining M.K.'s arm and taking photographs later that evening. These photographs showed redness and bruising in the muscular area between the elbow and the shoulder.

M.K.'s parents initiated a student abuse complaint with the School District on September 24, 2008, and Principal Oswald conducted the mandatory investigation (Level I investigation) related to that complaint. Many of the students on the bus were interviewed and Principal Oswald determined that the complaint was well founded. These interviews were video recorded and later transcribed. A further investigation (Level II investigation) was conducted by the West Branch Police Department and in a supplemental report dated October 15, 2008, Officer Isbell concluded that physical abuse did occur.

Christiansen was suspended with pay on October 3, 2008. The superintendent of schools, Craig Artist, recommended Christiansen's contracts be terminated. A hearing was conducted in front of the West Branch Community School Board, on February 9, 2009, in which the School Board decided to terminate Christiansen's employment contracts for misconduct from the September 19, 2008 incident. Christiansen did not appeal this decision.

Christiansen filed for unemployment benefits on March 22, 2009, and the IWD originally allowed benefits in a decision issued April 13, 2009. Superintendent Artist filed a timely notice of appeal and sent a letter to the Appeals Section of the IWD in accord with that notice. Christiansen responded with a motion to dismiss the appeal alleging that only a duly authorized officer of the School Board could act on the School District's behalf. A hearing commenced on January 26, 2010, was continued, and reconvened on March 11, 2010. Included in that record was the jury verdict of "not guilty" to the criminal charge against Christiansen for simple assault stemming from the same incident. On April 27, 2010, finding the School District satisfied its burden to prove misconduct, Administrative Law Judge (ALJ) Seeck reversed the April 13, 2009 IWD decision. Christiansen was ordered to repay the overpayment of benefits already received.

Christiansen appealed this decision to the EAB on May 12, 2010.[1] Christiansen filed an application to present additional evidence, including portions of the transcript from his criminal trial, which he claimed would undermine the evidence upon which ALJ Seeck based her findings; the School Board resisted.[2] The EAB in a two-to-one decision affirmed and adopted ALJ Seeck's findings of fact and conclusions of law. The dissent opined that the

[1] Christiansen filed a new claim effective March 21, 2010. The parties stipulated before Administrative Law Judge Hendricksmeyer that the separation had previously been adjudicated and to the employer's liability and claimant's eligibility for benefits in his second benefit year. Any reference in this opinion to the Administrative Law Judge decision will be in regards to ALJ Seeck's April 27, 2010 decision.

[2] While we find no ruling on the issue, Christensen argues on appeal that the ALJ's "total disregard of the criminal trial transcript is evidenced by the fact that she did not refer to it even once in her decision. . . ."

record failed to establish by a preponderance of the evidence that Christiansen grabbed the student and caused the bruises on his arm.

Christiansen filed a petition for judicial review on September 3, 2010. The district court affirmed the EAB's findings in their entirety on September 26, 2011. Christiansen appeals.

II. Standard of Review

When reviewing a district court decision on the validity of agency action, we determine whether the district court correctly applied the law. *Auen v. Alcoholic Beverages Div.* 679 N.W.2d 586, 589 (Iowa 2004). Under Iowa code section 17A.19(10), our standard of review depends on the aspect of the agency's decision that forms the basis of the petition for judicial review. *Burton v*. *Hilltop Care Ctr.*, 813 N.W.2d 250, 256 (Iowa 2012). In doing so, we apply the standards of section 17A.19(10) to the agency action to determine whether our conclusions are the same as those of the district court. *Rooney v*. *Emp't Appeal Bd*., 448 N.W.2d 313, 315 (Iowa 1989). If our conclusions are the same, we must affirm; if not, we reverse. *Iowa Fed'n of Labor v*. *Dep't of Job Serv*., 427 N.W.2d 443, 445 (Iowa 1988). "The district court, as well as this court, is 'bound by the [agency's] factual findings if they are supported by substantial evidence in the record.'" *IBP*, *Inc*. *v*. *Harpole*, 621 N.W.2d 410, 414 (Iowa 2001) (quoting *Bergen v*. *Iowa Veterans Home*, 577 N.W.2d 629, 630 (Iowa 1998)). To overturn an agency's findings, the decision made would need to be unreasonable or the result of an abuse of discretion. *Stephenson v*. *Furnas Elec*. *Co*., 522 N.W.2d 828, 831 (Iowa 1994).

III. Exhaustion of Administrative Remedies

Before we address Christiansen's issues, we find it helpful to address the School District's assertion that we can affirm the EAB's decision on an alternate ground—that Christiansen failed to exhaust his administrative remedies by not appealing the termination of his contracts, after the School Board found he had committed misconduct. Iowa Code §§ 279.17,18. Christiansen responds that Iowa law does not require employees to exhaust their administrative remedies for wrongful termination to be eligible for unemployment benefits. While these positions were asserted below, the district court found the issue to be moot after affirming the EAB's decision on different grounds. Both Christiansen and the School District briefed the issue on appeal; the EAB did not.

All administrative remedies must be exhausted before an aggrieved party is entitled to judicial review of an administrative decision. Iowa Code § 17A.19(1); *Continental Tel. Co. v. Colton*, 348 N.W.2d 623, 626 (Iowa 1984). However, two conditions must be met before we apply this doctrine: an adequate administrative remedy must exist for the claimed wrong, and the governing statutes must expressly or impliedly require the remedy to be exhausted before allowing judicial review. *Riley v. Boxa*, 542 N.W.2d 519, 521 (Iowa 1996).

The School District's argument fails the first of these two conditions. The claimed wrong here is not the School Board's termination of Christensen's contracts, but the agency's denial of post-termination unemployment benefits. That is, misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits. Iowa Code § 96.5(2); *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

Misconduct to warrant denial of benefits must be deliberate, intentional, or culpable. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552, 554 (Iowa Ct. App. 1986). Teachers' contracts may be terminated for "just cause" or by mutual agreement. Iowa Code § 279.27. "Just cause" is that conduct of a teacher or coach that directly or indirectly significantly and adversely affects what must be the ultimate goal of the school, the high quality education of the school's students. *Lundblad v. Sheldon Cmty. Sch. Dist.*, 528 N.W.2d 593, 596 (Iowa 1995).

This separation of administrative actions is supported by Iowa case law. In accepting the Restatement (Second) of Judgments section 83, our supreme court allowed two independent state administrative tribunals to operate simultaneously in adjudicating different claims based on the same facts. *In re Kjos*, 346 N.W.2d 25, 28-29 (Iowa 1984) (finding no issue preclusion regarding a misconduct termination under chapter 400, civil service commission, and chapter 96, unemployment compensation, noting the standards are different and neither is totally subsumed in the other). This case follows this same principle. The termination of Christiansen's employment contracts and the denial of unemployment benefits were separate determinations, by separate entities. Therefore Christiansen was not required to exhaust his administrative remedies regarding the propriety of the termination of his contracts with the School District to challenge the propriety of the denial of unemployment benefits by the agency.

IV. Authority of Superintendent to Appeal IWD Decision

Christiansen claims the appeal to the ALJ of the IWD's original decision granting unemployment benefits was not properly commenced as Superintendent

Artist initiated the appeal rather than the School District though a duly authorized officer of the School Board. When an agency is interpreting laws within its vested authority, we may only disturb the interpretation if it is "irrational, illogical, or wholly unjustifiable." Iowa Code § 17A.19(10)(*l)*; *Burton*, 813 N.W.2d at 256. When the agency is interpreting laws in which it has not been clearly vested within its authority to interpret, then the reviewing court does not need to give such deference and must reverse the agency's interpretation if it is erroneous. Iowa Code § 17A.19(10)(c); *Burton*, 813 N.W.2d at 256.

The district court concluded that Iowa Administrative rule 871-24.8(3) and Iowa Code section 279.20, read together, provide that the superintendent is the executive officer of the school board and that executive officers may submit a protest of benefits awarded to an employee and appear on behalf of a school board. The School District and the EAB agree with this interpretation. Christiansen, however, urges us to take a different approach.

Christiansen cites Iowa Code section 291.1 as authority for the proposition that Superintendent Artist lacked authority to appeal the IWD decision because "the president of the board of directors shall . . . appear in behalf of the corporation in all actions by or against it . . . ." Iowa Code § 291.1. The School District responded by arguing the term "actions" does not include administrative proceedings such as this.

Our Iowa case law recognizes that the word "action" is a term of art and applies to proceedings in court. *See Dean v*. *Iowa-Des Moines Nat*. *Bank & Trust Co*., 218 N.W. 714, 715 (Iowa 1938) (comparing an "action" from a "cause" and finding "an action is a proceeding in court"). Our supreme court has declined

to narrow the definition of "action" to preclude agency proceedings. *See Fisher Controls Int'l Inc*. *v*. *Marrone*, 524 N.W.2d 148, 149-50 (Iowa 1994) (finding the phrase "any legal action" covers "a formal proceeding in any forum in which a party is entitled to seek the relief being asked under authority of the state. Pursuing a claim before an administrative agency empowered to grant the relief requested satisfied this test"). Under this reasoning, "all actions" should include administrative proceedings in which the agency is empowered to grant the relief requested.

While Christiansen is correct that administrative action is an "action" under the meaning of Iowa Code section 291.1, this does not preclude the administrative agency from having jurisdiction over the parties and matter before it. This section governs who acts on behalf of the school. It has no effect on the agency's power to hear cases. The agency will entertain cases based on the jurisdiction granted by its own rules and statutes.

The EAB did not join the School District in resisting Christiansen's argument that an administrative action is not an "action" but rather, in addition to advocating for the district court's finding, provides us with an alternative theory: that the statutory provision is merely directory rather than mandatory so a presumed flaw in who initiated the appeal would not mandate dismissal. If authority to interpret specific terms in a statute has been clearly vested with an agency, then "we must defer to the agency's interpretation and may only reverse if the interpretation is 'irrational, illogical, or wholly unjustifiable.'" *Evercom Sys*., *Inc*. *v*. *Iowa Utilities Bd*., 805 N.W.2d 758, 762 (Iowa 2011) (quoting Iowa Code § 17A.19(10)(*l*)). However, if the legislature has not clearly vested authority to

interpret the provision of law with the agency, then the court must disregard any interpretation by the agency that it finds erroneous. Iowa Code § 17A.19(10)(c).

Under the EAB's proposed theory, even assuming Artist as superintendent did not have authority to file the appeal, the agency has interpreted its statute to find that a technical flaw in the protest does not cause prejudice and it was not error to proceed. *See Obrecht v*. *Cerro Gordo Cnty*. *Zoning Bd*. *of Adjustment*, 494 N.W.2d 701, 703 (Iowa 1993) (finding signature by wrong person on form not sufficient to defeat substantial compliance); *see also Brown v*. *John Deere Waterloo Tractor Works*, 423 N.W.2d 193, 194 (Iowa 1998) (holding substantial compliance means the reasonable objectives of statute have been served). Without resting our opinion on this theory, we find this argument persuasive as the lax requirements regarding initiating agency appeals show this provision may be permissive and the failure to perform will therefore not affect the validity of subsequent proceedings unless prejudice is shown. *See State v*. *Grimes*, 569 N.W.2d 378, 381 (Iowa 1997) ("To decide whether [a] statutory provision is mandatory or directory, we look to the purpose the legislature intended it to serve. If the duty imposed by the provision is essential to the main objective of the whole statute, the provision is mandatory and failure to perform the duty will invalidate subsequent proceedings under the statute."). A provision is not mandatory when "the act is performed, but not in the time or in the precise mode indicated, [and] it will be sufficient, if that which is done accomplished the substantial purposes of the statute." *Hawkeye Lumber Co v*. *Bd*. *of Review,* 143 N.W. 563, 565 (1913).

The administrative rules are very broad regarding the signature on the protest. The rules provide that both a notice of separation and a protest are to be signed by a representative of the employer, including the executive officer. Iowa Admin. Code r. 871-24.8(3)(b). An unsigned protest will be returned to the employing unit for signature, but this will not invalidate the protest. Iowa Admin. Code r. 871-24.8(3)(c). "If the employing unit has filed a timely report of facts that might adversely affect the individual's benefit rights, the report shall be considered as a protest to the payment of benefits" triggering the duty of the agency to determine benefit rights. Iowa Admin Code r. 871-24.8(2). Even the withdrawal of a protest does not affect the agency's responsibility to determine a claimant's right to benefits based on the information provided. *Kehde v*. *Iowa Dep't of Job Serv*., 318 N.W.2d 202, 206 (Iowa 1982).

In this regulatory context, it is clear that the signature requirement is only intended to assure that the information provided is authentic and reliable. It is not a mandatory provision essential to the main objective of the statute. *See Grimes*, 569 N.W.2d at 381. The regulations do not even require dismissal if the signature is lacking. Since there would be no prejudice from the lack of an authorized signature, there was no error to proceed even assuming a technical flaw in the protest has been proved.

While this theory of the EAB is more persuasive than Christiansen's, we are able to affirm on the district court's reasoning, that Iowa Administrative Rule 871-24.8(3) and Iowa Code section 279.20, read together, provide the superintendent the authority to submit a protest of awarded benefits. The Iowa Administrative Code provides:

> A notice of separation, and any paper response by an employing unit or its authorized agent to a notice of the filing of an initial claim or a request for wage and separation information, shall be executed by the employing unit on the form provided by the department under the signature of an individual proprietor, a partner, *an executive officer*, a department manager or other responsible employee who handles employee information, or who has direct knowledge of the reasons for the individual's separation from employment or by completing the computerized form designated by the department.

Iowa Admin. Code r. 871-24.8(3)(b) (emphasis added). It is clear that this rule is within IWD's authority to interpret. *See Office of Consumer Advocate v. Iowa Utils. Bd.*, 744 N.W.2d 640, 643 (Iowa 2008) (holding the rules an agency promulgates represent the agency's interpretation of the statutes the agency is assigned to administer). Iowa Code section 279.20(1) provides "[t]he superintendent shall be the executive officer of the board and have such powers and duties as may be prescribed by rules adopted by the board or by law. . . ."

By the statute, Superintendent Artist was the executive officer of the School Board. *See* Iowa Code § 279.20(1). By administrative rule, executive officers may file protests. *See* Iowa Admin. Code r. 871-24.8(3)(b).

As discussed above, Christiansen argues Iowa Code section 291.1 is binding and prevents this outcome. Rejecting this, the administrative law judge found "[t]here is nothing in the language used in this statute that would require the president of the board of directors to personally sign or appear on behalf of the employer in an appeal of an award of unemployment benefits to a former employee."

Superintendent Artist testified that he had the full authority of the School Board, operating as its chief executive officer, to initiate an appeal, as the day-to-day administration of the School District had been properly designated to him.

The School District agrees and asserts that interpreting section 291.1 as proposed by Christiansen "makes no logical sense" because it forecloses the volunteer school boards across the state from delegating day-to-day administration to the very person—the superintendent—hired to carry on those duties. It also imposes a formidable time constraint on a school board, if the superintendent could not quickly and timely file such an appeal. Iowa Code section 96.6 gives only ten days to file a protest from an IWD decision. A school board must comply with the public notice procedures contained in the Iowa Open Meetings Act when holding any meeting defined by the act. Iowa Code § 21.4. If Christiansen's interpretation was to be accepted, within a ten day period, a school board would need to receive a claim, give proper notice to the public, hold a special meeting, and vote before a protest could be filed. *Id.*; *see also id.* § 279.2 (providing for special meetings of a school board). We agree this is an impractical outcome. We do not construe a statute in such a way that would produce impractical or absurd results. *Gardin v*. *Long Beach Mortg*. *Co*., 661 N.W.2d 193, 197 (Iowa 2003).

In his reply brief, Christiansen states, "Appealing Workforce Development's decision to grant benefits is an action in which the board president must represent the school board at the board's direction unless the board has adopted a rule giving the superintendent the authority to initiate an appeal. The record contains no evidence of such a rule." *See* Iowa Code § 279.20(1) (limiting superintendents to those "powers and duties as may be prescribed by rules adopted by the board or by law"). We agree with Christiansen that the record does not contain a delegation of specific duties to be

carried out by the superintendent. However, Superintendent Artist testified that while the School Board never expressly gave him the authority to appeal a grant of unemployment benefits he had done so several times in the past. With no statutory prohibition against the superintendent's exercise of authority, we agree with the district court that the appeal was properly filed by Superintendent Artist as the executive officer of the School Board. *Compare Ne. Cmty*. *Educ*. *Ass'n v*. *Ne. Cmty*. *Sch. Dist*., 402 N.W.2d 765, 769 (Iowa 1987) (finding that based on the Iowa Code and the school district's adopted rules implementing the code, the superintendent had only the power to recommend suspension, only the school board has the power to suspend) *with* Iowa Code § 279.20(1) (providing that superintendents have the powers and duties delegated by the school board or by law, which has been interpreted to include the day-to-day operations of the school).

V. Motion to Continue

Christiansen next argues the ALJ erroneously continued the January 26, 2010 hearing when the employer could not sustain its burden of proof. A decision by an ALJ to grant a continuance is a discretionary one and is reviewed for an abuse of discretion. *State ex rel*. *Miller v*. *New Womyn*, 679 N.W.2d 593, 595 (Iowa 2004). "Rulings on continuance motions are left to the discretion of the [adjudicator] and are presumed to be correct. A party challenging such a ruling carries a heavy burden." *Id.* Christiansen's argument that the continuance was granted because the School District was not able to proceed on the evidence is an over simplification of the ALJ's findings. The ALJ wanted additional time to consider all the legal arguments raised.

The EAB and the district court both affirmed the ALJ's determination that there was good cause to continue the hearing due to the unavailability of witnesses. "In passing on the merits of good cause, the decision maker has wide discretion in its determination and its ruling will not be disturbed on review absent abuse of discretion." *Purethane*, *Inc*. *v*. *Iowa State Bd*. *of Tax Review*, 498 N.W.2d 706, 771 (Iowa 1993). Christiansen was given extra time to prepare for the second hearing and has demonstrated no due process violation or prejudice because of the continuation. We agree with the district court, the ALJ did not abuse its discretion in continuing the January 26, 2010 hearing.

VI. "Safe Harbor" for Disciplinary Measures

Christiansen next contends that the so called "safe harbor" provisions in Iowa Code section 280.21 and Iowa Administrative Code rule 281-103.4 afford him express statutory immunity over the claimed misconduct and therefore his motion to dismiss should have been granted. This "safe harbor" grants a school employee "immunity from any civil or criminal liability" when physical contact is reasonable under the circumstances and involves certain enumerated circumstances. Iowa Code § 280.21(2). While Christiansen asserted this defense to both the ALJ and the EAB, neither entity directly addressed the applicability of this statute. The district court, after setting out the "safe-harbor" provisions, found there was substantial evidence from Christiansen's own testimony that, though he thought a student was being disrespectful, he did not need to "use reasonable force and/or contact on M.K." to address the situation.

If section 280.21 was applicable, the district court's reasoning would be accurate; however, we agree with the School District and the EAB and find that

this section is not applicable to the case at hand. The statute states that it grants immunity to a school employee from "any civil or criminal liability which might otherwise be incurred or imposed" stemming from physical contact with a student under a variety of circumstances. Christiansen is impermissibly attempting to use a statute intended to be a shield, as a sword. He cannot point to any liability he will be subject to because of his request for unemployment benefits. On appeal he claims that the repayment of wrongfully paid benefits is a liability. This argument, however, is disingenuous. The repayment is restitution for what he already received, not damages for wrongfully touching a child. After repayment of benefits, Christiansen ends up with the same amount of money he had before applying for benefits, interest is not even charged. In essence, Christiansen received an interest free loan and must repay that loan, he cannot claim that this is a "liability" to warrant application of section 280.21.

Because a plain reading of the statute reveals its intent—protection from civil or criminal liability under certain circumstances—is wholly unrelated to the securing of unemployment benefits, we do not utilize statutory construction principles. *See Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 15 (Iowa 2010). Therefore, in this administrative proceeding, a plain reading of the statute demonstrates the safe harbor immunity of section 280.21 was not available to Christiansen as a defense.[3]

[3] We also disagree with Christiansen's argument that the burden and standard set forth in Iowa Code section 280.21(3) should have been applied in the agency proceeding. Section 280.21(3) provides in pertinent part that "to prevail in a civil action alleging a violation of this section the party that brought the action shall prove the violation by clear and convincing evidence." This is heightened from the "substantial evidence" showing that is necessary for a misconduct finding in front of the agency. *See Billingsley v. Iowa Dep't of Job. Serv.*, 338 N.W.2d 538, 540 (Iowa Ct. App. 1983). Additionally, while not

VII. Termination for Misconduct—Substantial Evidence

Christiansen claims the decision of the IWD and the EAB finding that the employer established misconduct was not supported by substantial evidence. If an agency has been clearly vested with the authority to make factual findings on a particular issue, then a reviewing court can only disturb those factual findings if they are "not supported by substantial evidence in the record before the court when that record is reviewed as a whole." Iowa Code § 17A.19(10)(f); *Burton,* 813 N.W.2d at 256. This review is limited to the findings that were actually made by the agency and not other findings that the agency could have made. *Meyer*, 710 N.W.2d at 218.

Iowa Code section 96.5(2)(a) provides:

> 2. Discharge for Misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individuals' employment:
>
> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Iowa Administrative Code defines misconduct as follows:

> "Misconduct" is defined 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. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right

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addressed by Christiansen's counsel, the same subsection of the code provides for a civil remedy with monetary damages against a party wrongfully accusing a school employee. Iowa Code § 280.21(3). If we were to accept Christiansen's argument that this section is applicable to unemployment insurance appeals, the logical extension would be that any time a teacher's contract was terminated because of allegedly inappropriate physical conduct with a student, and misconduct not found, that teacher would have a statutory remedy for monetary damages against the school in addition to receiving unemployment benefits. This is an illogical application of this law and further supports our finding that it is not applicable to unemployment benefits cases.

> to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

Iowa Admin. Code r. 871-24.32(1)(a).

In finding misconduct warranting denial of benefits, the ALJ for IWD found

> The greater weight of the credible evidence in this case is that [Christiansen] grabbed the student by the arm with enough force that the student's arm was red and bruised when viewed by a police officer two or three hours later. . . .
>
> The most credible evidence came from the testimony of Officer Isbell. . . . [h]e concluded that the claimant grabbed the student's arm with sufficient force to cause redness and bruising. . . .
>
> [Christiansen's] version of events is not credible. . . . [T]he appearance of the student's arm two or three hours after the event is consistent with having been grabbed with considerable force. . . .

The EAB adopted the ALJ's findings of fact, reasoning, and conclusions of law as its own. On judicial review, the district court found substantial evidence "in the credibility assessment the ALJ gave to the testimony offered by [Christiansen] as opposed to the credibility assessment given the testimony of M.K. and his mother; the testimony of Officer Isbell; and the student interviews conducted by Ms. Oswald."

Christiansen makes many factual assertions and cites to conflicting testimony, claiming there was not substantial evidence to prove misconduct. Christiansen asks us to reevaluate the credibility of witnesses and the weight given to their testimony, as if this were a de novo review of the evidence. However, that is not our role in appellate review of agency action. *Titan Tire*

Corp. *v*. *Emp't Appeal Bd*., 641 N.W.2d 752, 755 (Iowa 2002). Rather, we look to see if there is substantial evidence to support the agency's findings. *Id.* The agency found, "[Christiansen's] version of events is not credible." We give great deference to the credibility determinations of the agency. *Lange v*. *Iowa Dep't of Revenue*, 710 N.W.2d 242, 247 (Iowa 2006).

The ALJ found "[t]he greater weight of the credible evidence in this case is that [Christiansen] grabbed the student by the arm with enough force that the student's arm was red and bruised when viewed by a police officer two or three hours later." Christiansen testified that he asked M.K. to leave the bus because he was disappointed in him. While Christiansen testified that he believed he was acting reasonably and necessary, the ALJ specifically found others' testimony more credible. Christiansen now contends he was preventing a water fight and maintaining student safety when he touched M.K. However, his own testimony reveals the water fight was over, the disturbance quelled, and he was returning to the front of the bus when M.K. made the obscene, offensive gesture. The agency and the district court both found the credible evidence proved Christiansen, in responding to the gesture, committed misconduct, and therefore, did not act reasonably by his disregard of his employer's interest and the standards of behavior expected of him.

Christiansen also asserts that the school's internal policy on use of force justifies his action and therefore warrants it was not misconduct. However, Superintendent Artist testified there is no school district disciplinary policy that approves the type of contact Christiansen inflicted upon M.K. The IWD, the EAB, and the district court found Christiansen's actions were not reasonable. We

agree; there is substantial evidence in the record to support the agency's finding of misconduct.

As part of his attack on the weight of the evidence, Christiansen claims the agency improperly admitted testimony preserved in DVD recordings and the transcripts of those recordings. While Christiansen is correct in his argument that these records are hearsay, he is not correct in what effect this status has on the admissibility of the recordings. Christiansen claims IWD did not correctly apply the five factor test necessary when determining whether specific hearsay testimony is "the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs."[4] *Schmitz*, 461 N.W.2d at 607-608; *see also Clarke v. Iowa Dep't of Revenue & Fin.*, 644 N.W.2d 310, 320 (Iowa 2002) (holding that hearsay evidence is admissible and may constitute substantial evidence for an administrative law judge's opinion). The School District counters and the EAB asserts that the agency was allowed to consider hearsay, along with all other evidence before it, and "the only remaining issue is whether the agency weighed the evidence properly." While Christiansen argues before us that the evidence as a whole, including that which was hearsay, was "conflicting, self-interested, and often conclusory," we cannot reevaluate the agency's determination as to credibility. *Clark*, 644 N.W.2d at 315. Included in the record was the testimony of both M.K. and Christiansen. It was the agency's task to sort through the differing versions of the incident, make credibility determinations, and reach ultimate conclusions. *Titan Tire Corp.*, 641 N.W.2d at

[4] The five factors to use are "(1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precisions; and (5) the administrative policy to be fulfilled." *Schmitz v. Iowa Dep't of Human Servs.*, 461 N.W.2d 603, 608 (Iowa Ct. App. 1990)

755. Although Christiansen takes issue with those whose testimony, whether in person or recorded on the DVD, contradict his version of the events, even without the objected to evidence, substantial evidence supports the agency's conclusion.

Christiansen also claims the agency improperly considered alleged past acts of misconduct as a basis for this discharge for misconduct. The purpose of the rule mandating that the termination must be based on a current act is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises. *See Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262, 266 (Iowa Ct. App. 1984). In this case, an independent and current basis for termination existed. The IWD referenced the prior instances simply to prove this incident was not an isolated instance of poor judgment, as required by the rule. *See* Iowa Admin. Code r. 871-24.32(1)(a) ("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."). The record is clear that the ALJ used Christiansen's past acts to consider the magnitude of the current act of misconduct, but that Christiansen was terminated for a current act of misconduct—the incident involving M.K. Therefore we agree with the district court, there was substantial evidence to determine Christiansen's contracts were terminated due to a current act of misconduct. We affirm.

VIII. Conclusion

Because the "safe harbor" provisions in the Iowa Code are not applicable to Christiansen's administrative case, he cannot use them as a defense. The

agency decision, that was properly appealed by the superintendent as executive officer of the school board, is not unreasonable, arbitrary, or capricious as to warrant reversal. The facts before us on review show that the disturbance had been calmed and Christiansen did not react appropriately to a disrespectful student. The agency determination that Christiansen committed misconduct disqualifying him from receiving benefits is not an abuse of discretion, and we therefore affirm.

AFFIRMED.

Mullins, J., concurs, Danilson, J., concurs in part and dissents in part.

DANILSON, J. (concurring in part, dissenting in part).

I concur in all respects except I part ways with the majority in the conclusion that there was substantial evidence supporting the agency decision. The ALJ denied Christiansen unemployment benefits on the basis that "[h]e made a deliberate decision on September 19, 2008, to deal with a student in an inappropriate manner." To support this conclusion the ALJ stated, "The claimant had been warned on two occasions prior to September 19, 2008, that he must control his anger and not inappropriately discipline students who were disrespectful." Christiansen argues that the agency was in error to use the prior incidents as a basis to conclude "that the incident involving M.K. was deliberate." I agree.

The ALJ's and the majority's attempt to juxtapose or bootstrap repeated conduct to constitute a deliberate act is not supported by any authority. Past acts may be used to determine the magnitude of a current act, but they cannot be used to change the character of the current act. Iowa Admin. Code r. 871-24.32(8). At most, Christiansen can be described to have suffered from a common human frailty, an overreaction to what he perceived to be offensive and provocative conduct. His denial of benefits can be supported, if at all, on the basis that his prior warnings constituted "evidence of carelessness by the employee of a degree showing substantial disregard of the employer's interest." *Flesher v. Iowa Dep't of Job Serv.*, 372 N.W.2d 230, 234 (Iowa 1985) (concluding that repeated violations of security procedures and rules "depending upon the effect on the employer and employer reaction to a knowing violation, may indicate that employee actions are more than ordinary negligence and rather,

represent a substantial disregard of the employer's interests"; *cf.* Iowa Admin. Code r. 871-24.32(1)(a) (defining 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").

However, we have not been asked to uphold the agency's decision on this basis. Moreover, there was no finding by the agency that Christiansen's conduct constituted "an intentional and substantial disregard of the employer's interests," a requirement to justify denial of benefits for repeated conduct that evidences carelessness or negligence. *See* Iowa Admin. Code r. 871-24.32(1)(a). I would reverse the agency's decision for lack substantial evidence.