

IN THE COURT OF APPEALS OF IOWA

No. 7-340 / 06-2081

Filed June 27, 2007

ROGER GROVER,
Petitioner-Appellant,

vs.

EMPLOYMENT APPEAL BOARD and
CHURCHES UNITED, INC.,
Respondents-Appellees.

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

Petitioner appeals the district court's decision affirming the Employment Appeal Board's denial of unemployment benefits based on discharge for misconduct. **AFFIRMED.**

Michelle Mackel-Wiederanders, Iowa Legal Aid, Des Moines, for appellant.

Richard Autry, Employment Appeal Board, Des Moines, for appellee.

Churches United, Inc., Des Moines, pro se.

Heard by Sackett, C.J., and Vogel and Miller, JJ.

MILLER, J.**I. Background Facts and Proceedings.**

Roger Grover was employed by Churches United, Inc., an emergency homeless shelter, as a shelter assistant. Grover had a past history of abusing illegal drugs, particularly cocaine. Grover was placed on employment probation for thirty days in January 2006 because he was alone with a female client and allowed her access to the kitchen, both of which were violations of policy.

On February 10, 2006, Ken Dohmen, a staff supervisor, received an anonymous telephone call stating the caller had seen Grover and a client smoking crack on the patio of the shelter.¹ Dohmen believed the caller sounded like a staff member named Mike Courtney. When Dohmen later asked him about this, Courtney admitted he was the caller. Courtney gave a signed statement as follows: "On Feb. 4, 2006 David [] and Roger Grover were seen on the patio smoking drugs. Called Ken the staff supervisor to inform him of this."

Also on February 10, another staff member, Howard Crow Eagle, gave a written report stating a client informed him he had seen Grover smoking a crack pipe on the patio. The resident stated he was afraid to stay at the shelter if staff members were smoking crack.² The employer had a drug-free workplace policy.

Grover was discharged from his employment on February 13, 2006, for using illegal drugs on shelter property while on duty. He filed a claim for unemployment benefits. He was initially awarded unemployment insurance benefits by Iowa Workforce Development. The employer appealed that decision

¹ By February 10, 2006, Grover was no longer on probation for the January incident.

² The employer also obtained a written statement from a client about this event. The administrative law judge did not admit this statement into evidence because it was unsigned.

and a hearing was held before an administrative law judge (ALJ). Jean Brown, the executive director of Churches United, and Grover testified at the hearing.

The ALJ found Grover had engaged in misconduct by using illegal drugs at the workplace in violation of the employer's policy. The ALJ stated she "found the employer's hearsay testimony and written statements to be persuasive." In particular, the ALJ found Courtney's statement was persuasive. The ALJ concluded Grover was not entitled to unemployment benefits.

The Employment Appeal Board affirmed the ALJ and adopted the ALJ's decision. Grover filed a petition for further review, claiming the ALJ had improperly relied upon hearsay evidence. The district court found the board's decision was supported by substantial evidence. The court found:

[T]he record contains numerous hearsay statements which consistently state that Petitioner smoked drugs on the patio at his place of employment. The ALJ, and by adoption the EAB, recognized the hearsay nature of these statements yet found their consistency persuasive. This Court likewise finds that the consistency and lack of motivation to provide false information provide the "necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs."

The court affirmed the board. Grover appeals.

II. Standard of Review.

Our review is governed by the Administrative Procedure Act. Iowa Code ch. 17A (2005); *Acuity Ins. v. Foreman*, 684 N.W.2d 212, 216 (Iowa 2004). 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).

III. Merits.

Grover contends the board's decision is not supported by substantial evidence because the board inappropriately relied upon unsupported and uncorroborated hearsay evidence. We are bound by the agency's factual findings if they are supported by substantial evidence in the record as a whole. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). Evidence is substantial when a reasonable person could accept it as adequate to reach the same findings. *Asmus v. Waterloo Cmty Sch. Dist.*, 722 N.W.2d 653, 657 (Iowa 2006). The question is not whether we agree with the agency's findings, but whether there is substantial evidence in the record to support the findings made by the agency. *Meyer*, 710 N.W.2d at 218.

The standard for adequacy in contested case proceedings is governed by Iowa Code section 17A.14(1). *Foods, Inc. v. Iowa Civil Rights Comm'n*, 318 N.W.2d 162, 166 (Iowa 1982). This section provides:

Irrelevant, immaterial, or unduly repetitious evidence should be excluded. A finding shall be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial.

Iowa Code § 17A.14(1). This section specifies the standard for determining the kind of evidence necessary to prove a case. *Foods, Inc.*, 318 N.W.2d at 166.

Administrative agencies are not bound by the technical rules of evidence. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). An ALJ "may base the decision upon evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant." *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002). Hearsay evidence

is admissible at administrative hearings and may constitute substantial evidence. *Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995); *McConnell v. Iowa Dep't of Job Serv.*, 327 N.W.2d 234, 237 (Iowa 1982). On the other hand, agencies are not required to admit hearsay evidence. *May Constr. v. Wooldridge*, 386 N.W.2d 139, 141 (Iowa Ct. App. 1986).

In considering 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” we consider five factors. *Schmitz v. Iowa Dep't of Human Servs.*, 461 N.W.2d 603, 607-08 (Iowa Ct. App. 1990) (citing Iowa Code § 17A.14(1)). The factors are: (1) the nature of the hearsay, (2) the availability of better evidence, (3) the cost of acquiring better information, (4) the need for precision, and (5) the administrative policy to be fulfilled. *Id.* at 608.

The board found the hearsay evidence in this case was persuasive. The district court applied the five-factor test found in *Schmitz*, and concluded “the consistency and lack of motivation to provide false information provide the ‘necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of their serious affairs.’” We find no error in the conclusion of the board or the district court that the hearsay evidence in this case was sufficiently reliable to constitute substantial evidence to support the board’s decision.

The burden to prove misconduct is imposed on the employer. *West v. Employment Appeal Bd.*, 489 N.W.2d 731, 734 (Iowa 1992); *Roberts v. Iowa Dep't of Job Serv.*, 356 N.W.2d 218, 221 (Iowa 1984). Mere allegations of misconduct are not sufficient to result in disqualification from receiving

unemployment benefits. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 11 (Iowa 1982). In the present case, the employer presented more than mere allegations of misconduct. Brown testified Courtney stated he saw the incident, and thus, Courtney's written statement is a first-hand account stating Grover had smoked illegal drugs on the employer's premises. The consistent report related to Crow Eagle by a client supports this finding.

We conclude there is substantial evidence in the record to support the board's finding that Grover engaged in misconduct by using illegal drugs at the workplace in violation of the employer's drug-free workplace policy. We affirm the decision of the district court and the Employment Appeal Board.

AFFIRMED.