

**IN THE COURT OF APPEALS OF IOWA**

No. 3-1011 / 13-0276  
Filed November 20, 2013

**THOMAS R. AVENARIUS,**  
Claimant-Appellant,

**vs.**

**EMPLOYMENT APPEAL BOARD,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Dubuque County, Michael J. Shubatt, Judge.

A former employee appeals the Employment Appeal Board's denial of unemployment benefits. **AFFIRMED.**

Steven J. Drahozal of Drahozal Law Office, P.C., Dubuque, for appellant.

Rick Autry of the Employment Appeal Board, Des Moines, for appellee.

Considered by Vogel, P.J., and Mullins and McDonald, JJ.

**VOGEL, P.J.**

Thomas Avenarius appeals the district court's denial of his petition for judicial review, which sought to reverse the decision the Employment Appeal Board (EAB) denying him unemployment benefits. Avenarius asserts on appeal the district court erred as a matter of law by affirming the EAB's decision because he was not discharged for misconduct. Because we find substantial evidence supports the EAB's decision and we do not find the decision illogical, irrational, or wholly unjustifiable, we affirm the district court's denial of Avenarius's petition for judicial review.

**I. BACKGROUND FACTS AND PROCEEDINGS.**

Avenarius worked part time for Dubuque Fire Equipment, which is owned and operated by Avenarius's niece, Maggie Blaser, and her husband, Tom. The company decided to remodel the shop in December 2008 and placed Avenarius on temporary leave because there was nowhere for him to work during the remodel. In January 2009, Maggie discovered, while doing the year-end bookkeeping, Avenarius had been using the company gas card for personal use. She calculated over \$4000 in gas purchases had been made over the past year. The usage was not caught earlier because Avenarius's daughter, Tamara, was doing the daily bookkeeping and paying the invoices without proper documentation from Avenarius. The gas card was even used by Avenarius after he was placed on temporary leave due to the remodel.

While Avenarius was still on leave, Maggie contacted him to obtain the card number and canceled the card. The Blasers also contacted the police to file charges against Avenarius but were told because it involved a family member it

would not be pursued. The Blasens then filed an action in small claims court to recover the money Avenarius spent using the gas card.

This matter came before the EAB after the Blasens protested Avenarius's claim for unemployment benefits commencing in September 2009, approximately nine months after the temporary layoff began and six months after he would have been recalled following the remodel project. The Blasens maintained that Avenarius was fired for misconduct after they discovered he had made unauthorized purchases with the gas card. They also discovered he had been working with his son-in-law since March 2009 at a competing fire extinguisher business and soliciting their customers.

After a hearing in front of an administrative law judge (ALJ), Avenarius was denied unemployment benefits. The ALJ found Avenarius's testimony—that he was authorized to use the gas card in lieu of a pay raise—was not credible. The ALJ found the improper use of the gas card constituted misappropriation of the employer's property and was misconduct as defined in unemployment insurance law. Avenarius was "in essence, terminated due to his conduct and was not returned to work by the employer as planned on March 1, 2009." The ALJ also found Avenarius was not able and available for work during the period in question due to the services he was performing for his son-in-law's company. While he did not receive compensation for his time working for this company, he was devoting time and effort to becoming employed by his son-in-law once the new company was successful enough to afford to pay him. The ALJ also found there was no evidence he was actively looking for work during the time in question.

Avenarius appealed this decision to the EAB, which adopted the ALJ's decision as its own. A rehearing request was denied.

Avenarius then filed a petition for judicial review. After a hearing the district court affirmed the EAB's decision, denying the petition. The court found substantial evidence supported the agency's finding that the employer discharged Avenarius for misconduct on or about March 1, 2009, when it did not recall Avenarius from the temporary lay-off. Because it found substantial evidence, the district court concluded the agency's decision that Avenarius committed disqualifying misconduct was not wholly unjustifiable. The district court did not consider the second issue of whether Avenarius was able and available for work because it had found against Avenarius on the issue of misconduct.

Avenarius now appeals, claiming the EAB should have awarded him unemployment benefits because he was not discharged for misconduct and he was able and available for work. He claims he was laid off due to the remodel and the employer should not be able to use after-acquired information about the misappropriated gas card to assert he was discharged for misconduct. See Iowa Admin. Code r. 871-24.32(8) ("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 termination of employment must be based on a current act."). He claims he was never informed by the employer that he was being discharged and to deny him unemployment benefits now is a due process violation.

## II. STANDARD OF REVIEW.

In an appeal from a petition for judicial review, our task is to apply the Iowa Administrative Procedures Act in Iowa Code section 17A.19(10) (2009) to see if our conclusions are the same as the district court. *City of Des Moines v. Emp't Appeal Bd.*, 722 N.W.2d 183, 189 (Iowa 2006). If they are we affirm; otherwise, we reverse. *Gaborit v. Emp't Appeal Bd.*, 743 N.W.2d 554, 556 (Iowa Ct. App. 2007). Avenarius fails to articulate precisely what his claim is on appeal and fails to articulate the standard of review he seeks under section 17A.19(10). See *Jacobson Transp. Co. v. Harris*, 778 N.W.2d 192, 196 (Iowa 2010) (“Because of the widely varying standards of review [under section 17A.19(10)], it is ‘essential for counsel to search for and pinpoint the precise claim of error on appeal.’”). However, we interpret his brief to be an attack on the agency’s factual finding that he committed misconduct and the ultimate conclusion that the misconduct disqualifies him from receiving unemployment benefits.

Under Iowa Code section 17A.19(10)(f), we review an agency’s factual findings to see if they are supported by substantial evidence. However, the ultimate conclusion reached by the agency is only reviewed to determine whether the application of law to facts is “irrational, illogical, or wholly unjustifiable.” See Iowa Code § 17A.19(10)(m).

## III. ANALYSIS.

As did the district court, we find substantial evidence to support the agency’s factual findings that Avenarius committed misconduct. The employer testified the gas card was initially given to Avenarius to use only in the event he needed to travel to a customer due to an emergency. Avenarius’s job did not

normally involve travel but was instead confined to servicing fire extinguishers in the shop. The ALJ found the employer's testimony on this point to be credible and found Avenarius's testimony—that the gas card was given in lieu of a pay raise for him to use for his personal vehicles—not credible. We give deference to the credibility determinations of the agency. *Broadlawns Med. Ctr. v. Sanders*, 792 N.W.2d 302, 306 (Iowa 2010). Our task is to determine whether the evidence supports the agency's findings, not whether the evidence could support a different finding. *Id.* The evidence here supports the conclusion that Avenarius committed misconduct when he used the company gas card without authorization.

We also find the conclusion that the misconduct disqualifies him from receiving benefits is not irrational, illogical, or wholly unjustifiable. See Iowa Code § 17A.19(10)(m). While he was on temporary lay-off when the unauthorized usage of the gas card was discovered, this fact does not make his termination based on after-acquired information. The employer did not, as Avenarius claims, save up past acts of misconduct and spring them on him when he was on temporary lay-off. It was not until the temporary lay-off that the employer became aware of the misconduct. Avenarius was then terminated when the employer discovered what they considered to be theft of company property. Maggie Blaser contacted Avenarius to obtain the card number and canceled the card. She reported the theft to police, and Tom Blaser confronted Avenarius about the money. While it was never officially communicated to Avenarius that he was terminated, the employer did not call him back from his temporary lay-off on the previously appointed date. The only reason he was not

called back was because of the misconduct discovered during the lay-off. We do not find the agency's conclusion that Avenarius was terminated for misconduct, which disqualifies him for unemployment benefits, to be irrational, illogical, or wholly unjustifiable. See Iowa Code § 17A.19(10)(m).

Because we affirm the agency's decision based on the issue of misconduct, we, like the district court, do not need to address the second issue raised—whether Avenarius was able and available for work. We affirm the district court's denial of Avenarius's petition for judicial review.

**AFFIRMED.**