STATE OF MICHIGAN

COURT OF APPEALS

SHIRLEY NEAL,

Plaintiff-Appellee/Cross-Appellee,

v

LIGHT CORPORATION,

Defendant-Appellant,

and

MICHIGAN EMPLOYMENT SECURITY COMMISSION,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
December 1, 1998

No. 202007
Muskegon Circuit Court
LC No. 96-335076 AE

Before: Whitbeck, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Defendants appeal by leave granted a circuit court order reversing the decision of the Michigan Employment Security Board of Review (the "Board of Review") that plaintiff was not entitled to unemployment benefits because she was discharged for "misconduct" within the meaning of the Michigan Employment Security Act (the "MESA"), MCL 421.29(1)(b); MSA 17.531(1)(b). We reverse.

I. Basic Facts And Procedural History

A. The Alleged Misconduct

Defendant Light Corporation ("Light") employed plaintiff Shirley J. Neal from December 5, 1988, until November 4, 1994, at which time Light discharged her for misconduct. The day before her discharge, plaintiff's supervisor asked plaintiff to shut down her foaming machine, the position in which she performed the majority of her work, and assist the others in packing because they were shorthanded in that department. Plaintiff refused to do so and, although her supervisor repeated the

work order several more times, plaintiff still refused to comply. While it is unclear precisely when plaintiff indicated that she could not perform the work because of pain and discomfort in her arms and elbow,[1] it is undisputed that at some point plaintiff stated that the reason for her refusal was related to a medical condition. It is undisputed that plaintiff's physician diagnosed plaintiff with carpal tunnel syndrome earlier that year and placed her on a medical restriction until about two weeks prior to her discharge. It is also undisputed, however, that Light submitted a medical report dated November 16, 1994, indicating that plaintiff was able to work with no restrictions.

Following her refusal to accept the packing assignment,[2] plaintiff's supervisor sent her home for the day. Light held a review meeting the following morning to discuss plaintiff's conduct. At the review meeting, plaintiff explained to her supervisor and the human resource manager that she had refused to comply with the work order because of a medical condition. Following the review meeting, Light discharged plaintiff for misconduct.

B. The Denial Of Unemployment Benefits

Light subsequently contested the payment of unemployment benefits to plaintiff on the basis that she was disqualified because she was terminated for misconduct within the meaning of the statute. Defendant Michigan Employment Security Commission (the "MESC") denied unemployment benefits in its determination of the claim and again on redetermination.

C. Plaintiff's Administrative Appeal

Plaintiff appealed the denial of benefits in accordance with MESC administrative procedures and a hearing was held on this appeal in January of 1995 in the Muskegon office of the MESC before an administrative law judge (the "ALJ"). In February of 1995, the ALJ issued his findings of fact, conclusions of law and reasons in support (the "ALJ's Decision"). Interestingly, while the ALJ did note the conflicting testimony concerning whether plaintiff raised the issue of her medical condition before or after her suspension, he did not make a specific credibility determination. Rather, he stated that, "There are no third party witnesses presented by the parties, and the referee finds it difficult to resolve the credibility issue presented by this conflicting testimony."[3] The ALJ went on to resolve this apparent dilemma by stating:

> The referee is of the opinion, however, that even if the claimant did not raise the health issue until the point that she was suspended, the appropriate response on the part of the employer was not to follow through with the suspension, but to again refer the claimant to medical services to determine whether there was merit to her contentions that her wrists and elbows were so aggravated as to preclude her from performing the packing duties.

The ALJ found that the misconduct disqualification imposed against plaintiff was not supported by a preponderance of evidence on the record. The ALJ concluded by stating:

> Although the employer is apparently convinced that the claimant arrived at work with a resolve not to be reassigned to the packing area, the employer has presented no competent witness testimony in this regard.[4] What is confirmed on the record is that the claimant clearly does have legitimate and well established medical problems with her wrists and elbows, and it is not unreasonable to conclude that these problems might preclude the claimant from performing responsibilities as a packer.
>
> While the Referee would agree that there is no evidentiary support for the claimant's contentions that the employer has other motives for her discharge,[5] the Referee does believe that the claimant's refusal of the work assignment does not constitute misconduct on her part.

D. Light's Appeal To The Board Of Review

Light appealed the ALJ's Decision to the Board of Review and, in April of 1996, the Board of Review reversed that Decision, thereby denying unemployment benefits to plaintiff. The Board of Review determined (the "Board of Review's Decision") that the evidence did not establish that plaintiff had a medical restriction at the time of her discharge because she was given a written medical release from the physician without restrictions. Thus, the Board of Review concluded that plaintiff failed to perform a reasonable request by her employer without adequate justification. The Board of Review reasoned that if plaintiff required further medical treatment, she should have notified her supervisor immediately and not waited until she was discharged to raise the issue. In May of 1996, plaintiff submitted a request for rehearing before the Board of Review that the Board of Review denied.

E. Plaintiff's Appeal To The Circuit Court

In July of 1996, plaintiff appealed the Board of Review's Decision as of right to the Muskegon Circuit Court. After a hearing, the circuit court reversed the Board of Review's Decision. The circuit court determined (the "Circuit Court's Decision") that the ALJ was the finder of fact and applied the substantial evidence test to the ALJ's Decision. The circuit court stated that there was clear and uncontradicted evidence of plaintiff's medical condition and the allegations of plaintiff's use of profanity and disruption at work were not corroborated by the evidence. The circuit court thus held that plaintiff was not discharged from employment because of misconduct under § 29(1)(b) of the MESA, and that she was entitled to unemployment benefits. The circuit court issued a written order consistent with this ruling in March of 1997. Light filed an application for leave to appeal from the Circuit Court's Decision, that this Court granted in July of 1997. The MESC filed a cross-appeal against plaintiff within 21 days of this Court's order granting leave. Both Light and the MESC filed briefs with this Court, and the MESC made oral argument, but plaintiff did not file a brief nor did she request oral argument.

II. Standard Of Review

A. Review Of The ALJ's Decision By The Board Of Review

The MESA sets out the process by which the Board of Review reviews the findings of facts and decisions of one of its referees:

> The board of review, on the basis of evidence previously submitted and additional evidence as it requires, shall affirm, modify, set aside, or reverse the findings of fact and decision of the referee or a denial by the referee of a motion for rehearing or reopening. [MCL 421.34; MSA 17.536]

While this provision does not contain an express standard of review for the Board of Review to use in reviewing the findings of a referee, two points are nonetheless clear: (1) that such review is "beyond de novo" in that the MESA permits the Board of Review to take and consider evidence that was not presented to the referee and (2) that the MESA does not require the Board of Review to give any particular measure of formal deference to the factual findings of the referee.[6]

This does not mean, however, that as a practical matter the Board of Review should completely disregard the findings of fact of one of its referees. A fairly close analogy can be drawn to the proceedings of the Michigan Employment Relations Commission ("MERC").[7] In *MERC v Detroit Symphony Orchestra, Inc*, 393 Mich 116, 127; 223 NW2d 283 (1974) the Michigan Supreme Court asked rhetorically whether it was to ignore "the determination as to credibility of the only decision-maker to hear testimony firsthand and, in effect, credit the contrary determination of the [MERC]." The Court answered its own question rather tersely: "We think not." *Id*. This Court expressed similar concerns in *Detroit v Detroit Fire Fighters Ass'n, Local 344, IAFF*, 204 Mich App 541, 554; 517 NW2d 240 (1994):

> As in *Detroit Symphony Orchestra (DSO)*, we are wary of the MERC's act of disturbing the finding of fact by the referee, even though it was clearly supported by the record. See *DSO, supra*, at 126. Like our Supreme Court in *DSO*, we are persuaded that the MERC did not give due deference to the review conducted by the referee, in particular with respect to the finding of credibility.[8]

We find it significant, however, that both of these decisions place considerable emphasis upon the persuasiveness of the referee's findings *as to credibility*. Viewed logically, this of course makes eminent good sense; the referee hears the live testimony and is in a far better position than the reviewing agency to make sound determinations as to witness credibility. In the matter before us, however, the ALJ *avoided* making a determination as to witness credibility. Rather, he found, apparently as a matter of law, that even if plaintiff did not raise the health issue until the point that she was suspended, the proper response of the employer was to refer plaintiff "to medical services to determine whether there was merit to her contentions that her wrists and elbows were so aggravated as to preclude her from performing the packing duties." This is not a credibility determination. Rather, this is an expression of the ALJ's view of sound social policy. The Board of Review was certainly well within its authority, even with the cautionary language of *Detroit Symphony Orchestra* and *Detroit Fire Fighters Ass'n* in mind, to review this determination de novo.

B. Review Of The Board Of Review's Decision By The Circuit Court

MCL 421.38; MSA 17.540 governs judicial review of an order or decision made by the Board of Review and provides in pertinent part:

> (1) The circuit court . . . may review questions of fact and law on the record made before the referee and the board of review involved in the final order or decision of the board, and may make further orders in respect to that order or decision as justice may require, but the court may reverse an order or decision only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record.
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> * * *
>
> (4) The decision of the circuit court may be appealed in the manner provided by the laws of this state for appeals from the circuit court.

The competent, material and substantial evidence standard has its basis in Const 1963, art 6, § 28, that provides:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.[9]

The Michigan Supreme Court carefully examined the constitutional basis for the competent, material and substantial evidence standard in *Detroit Symphony Orchestra, supra*, and concluded:

> The cross-fire of debate at the Constitutional Convention imports meaning to the "substantial evidence" standard in Michigan jurisprudence. What the drafters of the Constitution intended was a thorough judicial review of administrative decision, a review which considers the whole record—that is, both sides of the record—not just those portions of the record supporting the findings of the administrative agency. Although such a review does not attain the status of *de novo* review, it necessarily entails a degree of qualitative and quantitative evaluation of evidence considered by an agency. Such review must be undertaken with considerable sensitivity in order that the courts accord due deference to administrative expertise and not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views. Cognizant of these concerns, the courts must walk the

> tightrope of duty which requires judges to provide the prescribed meaningful review. [*Detroit Symphony Orchestra, supra* at 124.]

There is a sizable body of law that adds considerable gloss to the competent, material and substantial evidence standard. Here, the following three principles are particularly significant. First, as noted in *Detroit Symphony Orchestra, supra,* a reviewing court is not to displace the agency's choice between two reasonably differing viewpoints. Second, substantial evidence is that which a reasonable mind would accept as adequate to support a decision. *In re Payne*, 444 Mich 679, 692, 298; 514 NW2d 121 (1994). See also *Ron's Last Chance, Inc v Liquor Control Comm*, 124 Mich App 179, 182; 333 NW2d 502 (1983). While it is more than a scintilla of evidence, it may be less than a preponderance of the evidence. *Id.* See also *Soto v Director of the Mich Dep't of Social Services*, 73 Mich App 263, 271; 251 NW2d 292 (1977), citing *Ginsburg v Richardson*, 436 F2d 1146 (CA 3, 1971). Third, where there is sufficient evidence to support the agency's findings, a reviewing court must not substitute its discretion for that of the agency, even if the court would have reached a different result. *Black v Dep't of Social Services*, 195 Mich App 27, 30; 489 NW2d 493 (1992); see also *THM, Ltd v Comm'r of Ins*, 176 Mich App 772, 776; 440 NW2d 85 (1989). Indeed, it is irrelevant whether alternative findings could have been supported by the evidence, because deference must be afforded to the agency's findings of fact. *Payne, supra* at 692, 698.

It is apparent to us that the circuit court violated each of these principles. As a preliminary matter, we note that the circuit court was apparently of the belief that it was to apply the competent, material and substantial evidence standard to the ALJ's Decision, not the Board of Review's Decision. This is not supported by the provisions of MCL 421.38; MSA 17.540. While the statutory language allows the circuit court to review questions of law and fact on the record made before the referee and the Board of Review, the circuit court may reverse the order or decision of the Board of Review "only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record." The "order or decision" referred to in the final clause is clearly the order or decision of the Board of Review, not the "decision" of (as distinct from the record made before) the referee.

With respect to the first principle, the circuit court appeared to pick and choose between the contradictory testimony of the parties, rather than evaluating whether there was competent, material and substantial evidence to support the Board of Review's Decision. In so doing, the circuit court displaced the Board of Review's choice between two reasonably differing viewpoints. With respect to the second principle, while finding that the allegations of plaintiff's use of vulgarity was not corroborated by the evidence and that there was clear and uncontradicted evidence of plaintiff's medical condition, the circuit court made no finding as to the quantum of the evidence supporting the Board of Review's basic holdings that plaintiff failed to perform a reasonable request by her employer and that this failure was without adequate justification. Thus, we have no finding by the circuit court as to whether there was evidence that a reasonable mind would accept as adequate to support these holdings or as to whether there was more than a scintilla of such evidence. Perhaps as a result, the circuit court substituted its discretion for that of the Board of Review, thereby violating the third principle.

C. Review By This Court

The question of the proper scope of review by appellate courts of lower court decisions that are themselves appeals from agency decisions has been a particularly troubling one in Michigan jurisprudence. In 1993, Professor Don LeDuc stated the question as follows:

> Michigan has yet to discuss adequately the role of the courts in review of agency fact-finding. Most of the cases deal simply with the appropriate test to apply to the findings of agencies and ignore the related issue of the interrelationship of the courts in their review of the facts. The question is whether each succeeding reviewing court should apply the same standard of review to the agency fact-finding or should instead limit their review to the decisions of the previous court. [LeDuc, Michigan Administrative Law, § 949, ch 9, pp 67-68.][10]

In *Detroit Fire Fighters Ass'n, supra* at 551, n, 10, this Court associated itself in principle with Professor LeDuc's comments but held itself to be bound by the Supreme Court's interpretation of the statutory review of an Act 312 arbitration panel's decision. In *Boyd v Civil Service Comm*, 220 Mich App 226, 234, n, 4; 559 NW2d 342 (1996), however, this Court noted that the Supreme Court has not addressed the relationship of higher and lower courts in the context of reviewing administrative agency decisions pursuant to Const 1963, art 6, § 28 where the initial court employs the substantial evidence standard rather than conducting review de novo. This Court went on to hold:

> We agree with Professor LeDuc's sensible comments regarding this seemingly intractable issue. Application of the *Universal Camera* [*Corp v NLRB*, 340 US 474; 71 S Ct 456; 95 L Ed 456 (1951)] standard will preserve scarce judicial resources, enhance the role of this Court as an intermediate appellate court, and discourage unnecessary appeals. We find further support for adoption of the clear-error standard in our Supreme Court's recent amendment of MCR 7.203(A)(1) to provide for appeals by leave granted, rather than as of right, of judgments of lower courts that have reviewed agency action. While the amendment may have had several objectives, one clear import was to return primary review of agency fact finding to the court of direct review. We therefore hold that when reviewing a lower court's review of agency action this Court must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings. This latter standard is indistinguishable from the clearly erroneous standard of review that has been widely adopted in Michigan jurisprudence. As defined in numerous other contexts, a finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made. [*Boyd, supra* at 234-235.][11]

Here, as we have held above, the circuit court misapprehended, and therefore failed to apply, the competent, material and substantial evidence standard. We are left with the definite and firm conviction that a mistake has been made and that the Circuit Court's Decision was clearly erroneous as a matter of

law. Because the circuit court failed to apply the competent, material and substantial evidence standard to the Board of Review's Decision, we are constrained to do so. As set out below, when we apply the correct standard, we find that there was competent, material and substantial evidence to support that decision.

III. Unemployment Compensation And Employee Misconduct

A. Provisions Of The MESA

Individuals who are involuntarily unemployed are generally entitled to unemployment benefits as long as the individual establishes eligibility under the MESA, MCL 421.28; MSA 17.530. However, under certain circumstances, an individual may be denied payment of benefits even if the requirements under § 28 of the MESA are satisfied. The circumstances under which an employee is disqualified for benefits are defined in § 29(1)(b) of the MESA, which provided in pertinent part at the time of plaintiff's discharge:

> (1) An individual is disqualified for benefits if he or she:
>
> (b) Was discharged for misconduct connected with the individual's work or for intoxication while at work unless the discharge was subsequently reduced to a disciplinary layoff or suspension.[12]

B. The Meaning Of "Misconduct"

The Michigan Supreme Court has defined "misconduct" in the following manner:

> The term 'misconduct' . . . is limited to conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or 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 his 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. [*Carter v Employment Security Comm*, 364 Mich 538, 541; 111 NW2d 817 (1961).][13]

See also *Parks v MESC*, 427 Mich 224; 398 NW2d 275 (1986) [failure to abide by residency requirements is a willful disregard of employer's interest and is "work connected"; failure to pay union service fee was "work connected" misconduct and the willful disregard of the employer's interest was not excused by a "good faith" dispute concerning the union's ability to collect the fees.]

As defendants note, the definitional sentence in *Carter* is rather intricate. It is therefore helpful to break it down into its components:

> "Misconduct" . . . is limited to conduct evincing such willful or wanton disregard of an employer's interest as is found:

(1) in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or

(2) in carelessness or negligence of such degree or recurrence as:

(a) to manifest culpability, wrongful intent or evil design, or

(b) to show an intentional and substantial disregard:

(i) of the employer's interests, or

(ii) of the employee's duties and obligations to his employer.

We agree with defendants that components (1), (2)(a), (2)(b)(i) and (2)(b)(ii) set forth the actions that constitute misconduct. The issue with which the circuit court should have dealt is therefore whether was there was competent, material and substantial evidence to support a finding of misconduct, as set out in the statute and defined in *Carter*.

C. The Evidence Supporting The Board Of Review's Decision

We first note that *Carter* involved the same type of insubordination to which plaintiff's supervisor testified here: a failure to perform a work assignment, apparently otherwise valid, given by a worker's supervisor. In *Carter*, his foreman directed Carter to shovel dross (lead dust) into the furnace that Carter had been assigned to operate and Carter refused to do so. Here, plaintiff's supervisor testified that she, in what was apparently an otherwise valid work assignment, directed plaintiff to pack and plaintiff refused to do so.[14]

The Board of Review found that plaintiff did not offer a medical excuse for her refusal on three occasions to obey her supervisor's otherwise reasonable direction to pack. Substantial evidence supports this finding and to the extent that the circuit court held otherwise, it erred. Indeed, plaintiff herself testified that the first time she was ordered to pack she refused, without offering a medical excuse. We hold that the insubordination was complete after the first instance in which plaintiff refused the order to pack without offering a medical excuse and that there was *no* evidence supporting any other interpretation of the facts.[15] Because the Board of Review did not deal with the issue of plaintiff's alleged use of vulgar language and made no finding as to whether this was insubordination, we similarly decline to address it here.

Reversed and remanded for entry of an order consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Mark J. Cavanagh
/s/ Janet T. Neff

[1] Plaintiff's supervisor, Ms. Carol Hill, testified that only after she ordered plaintiff to punch-out and go home did plaintiff indicate that she could not pack due to arm pain. By contrast, plaintiff testified that when Ms. Hill instructed her to turn off her foam machine because she was going to pack, plaintiff first responded that she could not pack. Plaintiff testified that the second time Miss Hill asked her to pack, plaintiff explained that her hands hurt and she had been up all night tending to them. Plaintiff testified that the third time Ms. Hill asked her to pack, plaintiff responded that she could not pack because her hands hurt but that she would be glad to train someone else to do it. Plaintiff testified that Ms. Hill then instructed her to punch-out and go home.

[2] There is conflicting testimony concerning plaintiff's use of vulgar language during her exchanges with Ms. Hill. Ms. Hill testified that plaintiff's response to Ms. Hill's directive to report to the packing job was, "No f----g way am I going to pack." Ms. Hill also testified that plaintiff made a scene and continued to use vulgarity:

> A. She kept continuing on, F this, F that, through the whole conversation about her -- she wasn't packing.
>
> Q. And did you ask her, why aren't you going to pack?
>
> A. No, because at the moment I was trying to calm her down because she was making a scene for the way she was hollering.

Plaintiff, by contrast, denied using any vulgarity with Ms. Hill at the time of their discussion.

[3] Neither the ALJ nor the Board of Review addressed the disputed issue of whether plaintiff used vulgarities in response to Ms. Hill's work directives.

[4] The ALJ's reference here is to testimony by Light's Human Resource Manager, Ms. Cindy Moe, that her investigation of other persons, who were not available for the hearing, caused Light to conclude that plaintiff even prior to the start of the shift had made representations to co-workers that she was not going to be forced by Light to perform the packing duties. Plaintiff testified on this point that she informed a coworker the night before the incident that her hands hurt and she intended to wear all of her braces to work the following day

[5] The ALJ's reference here is to testimony by plaintiff that Light desired to separate her because Light is self-insured and plaintiff's husband suffered from terminal lung cancer, entailing considerable medical expenses to be borne by Light.

[6] This is in sharp contrast to, for example, the counterpart provisions of the Worker's Disability Compensation Act (the "WDCA"). Const 1963, art 6, § 28 provides in part that "[f]indings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law." Accordingly, in 1985, the Legislature enacted the latest amendments to the WDCA to provide, in pertinent part, that:

> [F]indings of fact made by a worker's compensation magistrate shall be considered conclusive by the commission if supported by competent, material, and substantial evidence on the whole record. As used in this subsection, "substantial evidence" means such evidence, considering the whole record, as a reasonable mind will accept as adequate to justify the conclusion. [MCL 418.861a(3); MSA 17.237(861a)(3).]

This language become effective on October 1, 1986. The act provides that, prior to that date, "findings of fact made by a worker's compensation magistrate shall be considered conclusive by the commission if supported by competent, material, and a preponderance of the evidence on the whole record." Consequently, the Workers' Compensation Appellate Commission (the "WCAC") has a much narrower standard of review when considering a decision of a workers' compensation magistrate.

[7] Unfair labor practice complaints are generally first heard before MERC referees or "examiners." The Public Employment Relations Act, with respect to public employers, sets out the process by which MERC reviews the findings of facts and decisions of one of its referees:

> The testimony taken by the commissioner, agent, or the commission shall be reduced to writing and filed with the commission. Thereafter the commission upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the commission is of the opinion that any person named in the complaint has engaged in or is engaging in the unfair labor practice, then it shall state its findings of fact and shall issue and cause to be served on the person an order requiring him to cease and desist from the unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this act. The order may further require the person to make reports from time to time showing the extent to which he has complied with the order. If upon the preponderance of the testimony taken the commission is not of the opinion that the person named in the complaint has engaged in or is engaging in the unfair labor practice, then the commission shall state its findings of fact and shall issue an order dismissing the complaint. No order of the commission shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if the individual was suspended or discharged for cause. If the evidence is presented before a commissioner of the commission, or before examiners thereof, the commissioner, or examiners shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the commission, and if an exception is not filed within 20 days after service thereof upon the parties, or within such further period as the commission may authorize, the recommended order shall become the order of the commission and become effective as prescribed in the order. [MCL 423.216(b); MSA 17.455(16)(b).]

There are similar provisions in the Labor Relations Act, relating to private employers. See MCL 423.23(2)(b); MSA 17.454(25)(2)(b). This approach is roughly equivalent to the process set out in

Chapter 4 of the Administrative Procedures Act that governs when an official or a majority of the officials of the agency who is or are to make a final decision have not heard a contested case or read the record. The "proposal for decision" of the ALJ, referee, examiner or hearing officer who hears the case:

> [W]ithout further proceedings, shall become the final decision of the agency in the absence of the filing of exceptions or review by action of the agency within the time provided by rule. On appeal from or review of a proposal of [sic] decision the agency, except as it may limit the issue upon notice or by rule, shall have all the powers which it would have if it had presided at the hearing. [MCL 24.281(3); MSA 3.560(181)(3).]

[8] See also *Viculin v Dep't of Civil Service*, 386 Mich 375, 406, n, 27; 192 NW2d 449 (1971); *Tompkins v Dep't of Social Services*, 97 Mich App 218, 223; 293 NW2d 771 (1980); *Timmons v Dep't of Social Services*, 89 Mich App 330, 340; 280 NW2d 515 (1979); *Union Bank & Trust Co v First Michigan Bank & Trust Co*, 44 Mich App 83, 90; 205 NW2d 54 (1972).

[9] The "default" standard of judicial review (i.e. the standard that is applicable in the absence of a different scope of review in the constitution or a specific statute) is contained in § 106 of the Administrative Procedures Act:

> (1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of any agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:
>
> (a) In violation of the constitution or a statute.
>
> (b) In excess of the statutory authority or jurisdiction of the agency.
>
> (c) Made upon unlawful procedure resulting in material prejudice to a party.
>
> (d) *Not supported by competent, material and substantial evidence on the whole record.*
>
> (e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.
>
> (f) Affected by other substantial and material error of law. [MCL 24.306(1); MSA 3.560(206)(1); emphasis supplied].

Quite clearly, this default standard is substantially broader than the standard contained in MCL 421.38; MSA 17.540. Equally clearly, it is the narrower standard in MCL 421.38; MSA 17.540 that is applicable in this case.

[10] See also LeDuc, *Michigan Administrative Law, October Term, 1991-92*, 10 Cooley L R 511, 589 (1993):

> While there clearly is precedent for the court's embracing of the approach [i.e. of the appellate court applying the same standard of judicial review as the circuit court], this wasteful practice is ill-advised since it is not conducive to good management of increasingly scarce judicial resources, undermines the judicial review function of the circuit courts, and encourages appeals. It should be stopped. The court of appeals should review the actions of the circuit court under the clearly erroneous standard, just as it would any other judgment of the circuit court, rather than review the agency action directly.

[11] See also *Kovach v Henry Ford Hospital*, 207 Mich App 107; 523 NW2d 800 (1994) in which this Court, relying on *Holden v Ford Motor Co*, 439 Mich 257, 268-269; 484 NW2d 227 (1992), stated that on review of WCAC decisions, the court must "determine that the WCAC did not grossly misapply the substantial evidence standard . . ." As Professor LeDuc comments:

> Since this standard of judicial review is not stated in the underlying statute, but is the result of judicial doctrine, it demonstrates that the courts can restrict the use of the substantial evidence test to the first review (here the WCAC review of the magistrate's findings of fact) and limit the scope of appellate judicial enquiry [sic] into administrative fact-finding to a review of the reviewer's action. [LeDuc, Michigan Administrative Law, *supra*, 1998 cum supp at p 162.]

[12] For present purposes, the current version of § 29(1)(b) of the MESA, MCL 421,29(1)(b); MSA 17.531(1)(b), is substantively the same.

[13] As the Supreme Court noted, this definition of misconduct was originally drafted by the Wisconsin Supreme Court in *Boynton Cab Coy v Neubeck*, 237 Wis 249, 259-260; 296 NW 636 (1941).

[14] See also *American Bag & Paper Co v Unemployment Compensation Bd of Review*, 184 Pa Super 292, 296; 132 A2d 765 (1957):

> In the instant case the claimant committed two willful acts, each of which would have constituted willful misconduct within the meaning of the act and certainly together constitute the kind of misconduct contemplated by the law. Despite her prior good record, the claimant did defy her supervisor and put her judgment above that of her employer and then when called to task by her superior, abused her superior with vulgar and unprintable language.
>
> * * *
>
> The disobedience of the order to start up her machine was a deliberate violation of employer's rules and of itself a disregard of employer's interest. If each employee could take it upon himself to decide when and how his work should be done, anarchy

> would result and the function of any industrial establishment would be impeded. By her own testimony an established procedure was available for making complaints about the operation of the machine. She put her own judgment above that of her superior and under these circumstances the employer is justified in taking a prompt and firm stand.

[15] We do not find the reasoning of the panel in *Washington v Amway Grand Plaza*, 135 Mich App 652, 658; 354 NW2d 299 (1984) to be persuasive. There, the Court held that an employee's failure to report to work on time would only constitute misconduct if the employee was without good cause for doing so. This holding appears to fly in the face of the holding in *Parks*, *supra* at 239-240 (Brickley, J., joined by Williams, C.J. and Archer, J.), 266-267 (Cavanagh, J., concurring with Justice Brickley's decision in *Parks*), that the employee's "good faith" did not excuse her intentional misconduct. Nor are we persuaded that the type of de minimus transgressions that occurred in *Raxmus v Kirkhof Transformer*, 137 Mich App 311, 316-317; 357 NW2d 683 (1984) were involved here.