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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

New Freedom Center, Inc., Petitioner/Appellant, v. Job Service North Dakota and James L. Maurer, Respondents/Appellees.	**Supreme Ct. No. 20190405** **District Court No. 08-2019-CV-01450** **ORAL ARGUMENT REQUESTED**

APPEAL FROM THE DISTRICT COURT
JUDGMENT DATED OCTOBER 25, 2019
BURLEIGH COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE THOMAS J. SCHNEIDER

BRIEF OF APPELLEE JOB SERVICE NORTH DAKOTA

State of North Dakota
Wayne Stenehjem
Attorney General

By: Michael Pitcher
Assistant Attorney General
State Bar ID No. 06369
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email mtpitcher@nd.gov

Attorneys for Appellee Job Service North Dakota.

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STATEMENT OF ISSUES

[¶1] Whether a reasoning mind could have reasonably determined that NFC failed in its burden to show Maurer engaged in misconduct disqualifying him from unemployment benefits.

[¶2] Whether NFC waived its argument regarding the discovery of pornography on Maurer's computer as a ground for misconduct when it chose not to terminate Maurer's employment on that basis, and by failing to specify the issue in its Petition for Judicial Review.

[¶3] Whether the appeals referee failed disclose improper ex parte communications with Maurer.

STATEMENT OF CASE

[¶4] New Freedom Center, Inc., (NFC) appeals the decision of Job Service North Dakota (Job Service) allowing unemployment benefits to James L. Maurer (Maurer). NFC appeals because Job Service determined Maurer was discharged for reasons not constituting misconduct under N.D.C.C. § 52-06-02(2).

[¶5] Maurer was terminated by NFC on January 24, 2019. Appellant's Appendix (App.) 66. He subsequently filed a claim for unemployment benefits with Job Service. Based upon the initial information provided Job Service, Job Service determined that Maurer was discharged from his employment but the information was insufficient to establish misconduct. Certificate of Record (C.R.) 37. NFC appealed this decision and an appeals referee conducted a hearing on March 27, 2019. C.R. 46. Josh Olson, owner and CEO of NFC represented the employer at the hearing. App. 6. Acting as witnesses on behalf of the employer were Josh

Olson, Jackie Binstock, Susie Bartasch, Mike Jones, Megan Williams, Miranda Combs, James Knopik, and John Perdue. Id. Maurer represented himself at the hearing and had no other witnesses. Id. On April 5, 2019, the appeals referee issued a decision finding that Maurer was discharged from his employment with NFC for reasons that did not constitute misconduct, and therefore Maurer was entitled to benefits. App. 91-96.

[¶6] NFC appealed the referee's decision to Job Service acting as the "Bureau." C.R. 101. The Bureau affirmed the referee's determination that Maurer's actions did not constitute disqualifying misconduct. C.R. 102-03. On May 10, 2019, NFC filed a Petition for Judicial Review with the Burleigh County District Court. App. 97.

[¶7] On October 21, 2019, Judge Thomas J. Schneider affirmed Job Service's decision concluding "there is evidence in this record from which a reasoning mind could reasonably find, as the hearing officer did, that James L. Maurer's conduct did not rise to the level of misconduct." App. 107. Judgment was entered on October 25, 2019. App. 109. Notice of Entry of Judgment was entered on October 29, 2019. App. 110. NFC appealed from the Judgment to this Court. App. 111-12. Job Service asks this Court to affirm the judgment of the Burleigh County District Court and the Bureau's decision finding Maurer eligible for unemployment insurance benefits.

REQUEST FOR ORAL ARGUMENT

[¶8] Job Service requests the Court schedule oral argument in this case under N.D.R.App.P. 28(h). The question on appeal is whether the greater weight of the

evidence supports the referee's findings of fact after the employer and employee provided significant and substantial conflicting testimony and evidence regarding the reasons for the claimant's separation from employment. This appeal also involves a question of whether evidence not relied on by the employer to terminate employment may still be used in determining whether the employee committed disqualifying misconduct. On this issue, there is also a question of whether the employer waived the issue by not raising it at the hearing or in its Petition for Judicial Review. Oral argument would be helpful in the Court's review of the District Court's decision and the Bureau's decision.

STATEMENT OF FACTS

[¶9] Maurer began working for NFC on November 23, 2012. App. 67. He was employed as a Licensed Addiction Counselor, performing bio-social assessments for people required by court order or those needing evaluations for other reasons, such as for residential admissions. App. 8-9. Maurer was a salaried employee and generally worked the 9 a.m. to 5 p.m. shift Monday through Friday. App. 8. Maurer was terminated from his job by NFC on January 24, 2019 after being on probation since January 10, 2019. C.R. 123; App. 67.

[¶10] On January 10, 2019, a multidisciplinary staff (MDS) meeting was held, which was attended by Maurer, his supervisor James Knopik, and coworkers Jackie Binstock, Shannon Jurber, Miranda Combs, and Mike Jones. App. 10. Following the MDS meeting, Josh Olson (Olson), CEO and owner of NFC, placed Maurer on probation for a period of two weeks beginning January 11, 2019 through January 24, 2019. App. 9. The reason for doing so was because:

> [D]uring this meeting James Maurer made a reference to ammunition, gun … something smells like gunpowder. Someone needs to be shot and he also said something … to the effect of don't worry about me you will never … I'll never get caught. I cleaned … I clean everything up with bleach.

App. 9, line (l.) 23 – 10, l. 3. Olson acknowledged that he did not personally overhear these statements as he was not in attendance at the meeting, but that the employer's hearing witnesses would corroborate these statements. App. 10.

[¶11] James Knopik (Knopik), testified he could not recall any specific comments made about ammunition, gunpowder, needing to be shot, or cleaning with bleach at the meeting. C.R. 151. Knopik, however, did recall having a conversation at an MDS meeting with Maurer about going to the gun range which he believed was likely the January 10, 2019 meeting. CR. 152. Mike Jones (Jones) testified as follows:

> What I recall is that [Maurer] indicated that do you smell that? It was questioned what he was talking about, smells like gunpowder. I asked him if he was shooting last night and he said that it's not a problem because he normally cleans … cleans [his hands or the gun] with bleach. That's what I recall. That's to the best of my recollection.

C.R. 171, lines (ll.) 6-13. When asked by the appeals referee if he viewed the statements made by Maurer at the MDS meeting as a threat, Jones stated he did not. App. 41.

[¶12] Miranda Combs (Combs) testified "I remember someone asking do you smell gunpowder and that's the only thing I recall from that meeting." C.R. 174, ll. 3-4. Jackie Binstock (Binstock) testified as follows:

> It was mentioned by [Maurer] … someone was reporting on their client and he asked a couple times so everybody heard. He goes, does anybody smell anything? And Mike directly asked what do you

> … no, we don't smell anything, what are you smelling and he said gunpowder. I smell gunpowder in the air. And everyone at that time was like well, we don't smell anything. But then the conversation went to something about loving to shoot his gun, was shooting his gun, but don't worry I clean up with bleach or I clean things, the fingerprints don't stay, something to that effect.

App. 42, ll. 5-11.

[¶13] Maurer acknowledged making reference to smelling gunpowder and that nobody else smelled it. App. 54. Maurer went on to explain:

> There began to be some bantering back and forth with Ms. Shannon Weaver and Mr. James Knopik. It was banter about were you shooting last night, dah, dah, dah. Yeah I washed my hands so they … James said, is it a smell on your hands? I said, no I washed my hands. I made no reference to bleach, I made no reference to fingerprints.

App. 56, ll. 13-17. Maurer denied making any reference to bringing a weapon into work, denied making any threats, and said he was certain he did not refer to bleach because he gets adverse reactions from bleach. App. 54-55.

[¶14] After being informed of Maurer's comments Olson placed Maurer on probation within one hour of the MDS meeting. App. 10. Maurer was informed the reason for probation was due to his job performance and for creating a hostile work environment. App. 67. Maurer acknowledged being told that an investigation into his work performance would be completed and that he could face termination. App. 67, 78. Maurer also acknowledged being informed not to report to work during his period of probation. App. 53, 67, 78. NFC documented this information in a letter which it provided to Maurer. App. 78.

[¶15] Olson testified that when he placed Maurer on probation he instructed him that he could pick up his personal belongings, the next morning, January 11, 2019

at 10 a.m. App. 28. Olson subsequently learned that Maurer had returned to the facility on the evening of January 10, 2019, which Olson considered to be a breach of the conditions of probation. App. 71, 83. Olson believed Maurer had entered the facility so he could destroy any evidence of wrong doing, but acknowledged he had no evidence to support this assertion. App. 28. In contrast Maurer testified he had no recollection of Olson designating a time the next day for him to get his personal belongings, and only recalled being given permission by Olson to collect his things. App. 53. Maurer testified that after being informed he was on probation he went home, reread the probation letter, discussed it with his wife, and decided to return that evening to collect his belongings because it would be less disruptive to the business than if he went in during his regular working hours. Id.

[¶16] Besides the supposed alarming statements Maurer allegedly made at the January 10, 2019 MDS meeting, Olson also asserted that Maurer had created a hostile working environment over the last couple weeks by making inappropriate comments about lesbians, gays, and by using racial slurs and foul language. App. 12, 76, 85. Olson claimed that employee Megan Williams had overheard Maurer "once [make] a reference to a Native American" as "that potato nosed Indian is dumber than a bag of hammers that … smells like urine needs to get his paperwork sent to blah blah blah." App. 12. Olson also indicated that Maurer made comments about lesbians and gays. Id. Olson noted he was unaware of Maurer making such comments until after Maurer was put on probation. App. 12-13. Megan Williams, however, contradicted Olson by indicating that she did not hear Maurer ever say anything about Indians or lesbians. App. 33.

[¶17] Correspondingly, Susie Bartasch was asked if Maurer had ever made reference about “Indians, dumb as hammers” and she responded: “I didn’t hear dumb as hammers. But I heard him call them FBI, which stands for F-ing big Indian”. App. 36. Likewise, Jackie Binstock (Binstock) was asked if she was aware of racial slurs, or comments about lesbians or gays made by Maurer and she responded: “I recall a situation regarding a Native American, yes.” App. 47. Binstock explained that approximately a year before, Maurer had said something along the lines of “that ugly Indian is ready.” Id.

[¶18] Lastly, Olson also indicated that Maurer was placed on probation because of poor job performance. App. 12. Olson defined this poor work performance as low numbers of assessments being conducted by Maurer and Maurer’s unwillingness to perform evaluations when a client was late for the appointment. App. 12; C.R. 129-32.

[¶19] According to Maurer, until he was placed on probation, he had not been informed of any issues or concerns with his work performance. App. 55, 59, 67. Maurer’s yearly performance reviews were positive. C.R. 2. To support this claim Maurer had requested a subpoena from Job Service to direct NFC to produce his Employee Performance Reviews for the hearing. C.R. 47, 77-79. Although Job Service was initially informed that NFC would not be producing Maurer’s performance reviews, Maurer’s most recent evaluation had been provided to him and he forwarded it to Job Service on the date of the administrative hearing. C.R. 92-94. This evaluation was performed by Maurer’s supervisor, Knopik, on January 10, 2019 prior to Maurer being placed on probation. C.R. 2; App. 21-22; C.R. 149.

It showed no concerns and rated Maurer as performing "excellent" in 10 of 12 categories with the other two categories noting his performance was "good." C.R. 2, 92. Maurer also indicated that during late 2018, particularly over the holiday season, the number of scheduled assessments assigned to him had decreased. App. 59. He explained that he never refused assessments and conducted all that were assigned to him by the main office. App. 52, 58. Maurer also testified that whenever a client would show up late for an appointment it was not his decision whether to go forward with the assessment, but he would ask his supervisor whether the client should be seen or not. App. 52.

[¶20] Maurer acknowledged being verbally warned in the past about his use of profanity but stated that he had been making a conscientious effort to improve. App. 56. But Maurer testified he had never been warned about his work performance. Id. Maurer admitted to use of the term "FBI", which means "fucking big Indian", but was never warned about it. Id. Maurer also acknowledged hitting a co-worker on the head "with rolled up … papers … in a joking manner" or a humorous way, and the co-worker never indicated they did not understand it to be in a joking manner. App. 57. Maurer denied using racial slurs or making comments about lesbians or gays. App. 56.

[¶21] During Maurer's probation, NFC checked Maurer's computer and discovered pornography on Maurer's computer. App. 19. The employer admitted, however, that this information was not used as a basis for Maurer's termination as the decision to terminate him had already been made. App. 50. Maurer testified the computer he was using was an old computer that had been used by a number

of people before him. App. 60. While on probation the employer also discovered that Maurer had been using the computer to play games, such as Candy Crush. App. 20, 75. The employer learned that others, including Maurer's supervisor had witnessed Maurer playing computer games. C.R. 165, 171. Maurer did not deny playing computer games on down time, but indicated his supervisor knew about it and was not unsatisfied with his work. App. 58, 90. No evidence was produced showing Maurer was warned that playing computer games was grounds for discipline and Olson candidly admitted that there was no policy against it. C.R. 138, ll. 16-18.

[¶22] Following the probationary period, NFC terminated Maurer's employment and provided notice to Maurer by letter. App. 29, 79. The reasons given by NFC for Maurer's termination was because his work performance was deemed unsatisfactory, he had created a hostile work environment, and because he violated the terms of his probation. App. 9.

STANDARD OF REVIEW

[¶23] A determination of an administrative agency is presumed to be correct. Matter of BKU Enters., Inc. v. Job Serv. N.D., 513 N.W.2d 382, 384 (N.D. 1994); Turnbow v. Job Serv. N.D., 479 N.W.2d 827, 828 (N.D. 1992). An agency is afforded a "reasonable range of informed discretion in the interpretation and application of its own rules." In re Stone Creek Channel Improvements, 424 N.W.2d 894, 900 (N.D. 1988). This Court's review of Job Service decisions is governed by N.D.C.C. § 28-32-46, which requires the Court to review an appeal from the determination of an administrative agency based only on the record filed

with the Court. Section 28-32-46, N.D.C.C. requires the Court to affirm an administrative agency decision unless one of the enumerated factors listed in the section is present.

[¶24] This Court explained the standard courts must follow when reviewing administrative agency decisions:

> "(1) [W]e do not make independent findings of fact or substitute our judgment for that of the agency, but determine only whether a reasoning mind could have reasonably determined that the factual conclusions were supported by the weight of the evidence; (2) we exercise restraint when we review administrative agency findings; (3) it is not the function of the judiciary to act as a super board when reviewing administrative agency determinations; and (4) we will not substitute our judgment for that of qualified experts in the administrative agencies."

Sonterre v. Job Serv. N.D., 379 N.W.2d 281, 283-84 (N.D. 1985) (citations omitted). In fact, under N.D.C.C. § 52-06-27, "the finding of the bureau as to the facts, if supported by evidence and in the absence of fraud, is conclusive and the review by the court must be confined to questions of law."

LAW AND ARGUMENT

I. New Freedom Center failed to demonstrate Maurer was discharged for misconduct.

[¶25] The primary issue is whether Maurer was discharged for misconduct in connection with his employment. Holiday Inn v. Job Serv. N.D., 514 N.W.2d 374, 376 (N.D. 1994). NFC has the burden to establish by a preponderance of the evidence that Maurer's actions constitute misconduct which results in a disqualification from benefits. Schadler v. Job Serv. N.D., 361 N.W.2d 254, 257 (N.D. 1985). Misconduct which would be grounds for dismissal is not necessarily grounds for disqualification from unemployment compensation benefits. See

Steele v. Job Serv. N.D., 445 N.W.2d 635, 642 (N.D. 1989); Perske v. Job Serv. N.D., 336 N.W.2d 146, 148 (N.D. 1983).

[¶26] The term "misconduct" is not defined in the North Dakota unemployment compensation statutes. The North Dakota Supreme Court has adopted the following definitions of misconduct:

> [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.

Perske, 336 N.W.2d at 148-49 (quoting Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636, 640 (1941)).

[¶27] In Hulse v. Job Serv. N.D., 492 N.W.2d 604 (N.D. 1992), the Supreme Court shed additional insight into the meaning of "misconduct." The court explained that the disqualification provisions of N.D.C.C. § 52-06-02 should be narrowly, but reasonably, construed. Id. at 607. Thus, to constitute misconduct, the claimant's actions must come within the clear meaning of the language contained in the definition of "misconduct." Id. at 607-08. Accordingly, a claimant is not disqualified absent evidence of culpability rising to the level of a willful or wanton disregard of the employer's interest, wrongful intent or evil design, or an intentional and substantial disregard of the employer's interest or the employee's own duties and

obligations. Id. at 608. Termination for misconduct is "an exception to this state's remedial unemployment compensation laws," and will be narrowly construed in favor of awarding benefits. Id. at 607.

[¶28] Misconduct is a mixed question of fact and law. See Steele, 445 N.W.2d at 642; Marion v. Job Serv. N.D., 476 N.W.2d 609, 612 (N.D. 1991); Medcenter One v. Job Serv. N.D., 410 N.W.2d 521, 524 (N.D. 1987). In Blueshield v. Job Serv. N.D. et al., this Court stated: "While there are occasions, because of the clarity of the particular facts and indisputability of the inferences drawn from those facts, when we can determine that a particular conduct does or does not constitute 'misconduct' as a matter of law, ordinarily the determination of whether or not particular conduct is 'misconduct' is a question of fact." 392 N.W.2d 70, 73 (N.D. 1986) (citation omitted). The determination of whether conduct is misconduct "depends upon the facts and circumstances of each individual case and such is subject to the judgment of Job Service and its expertise." Id. For Job Service's decision to be affirmed, the evidence must support the agency's findings of fact, which must support the agency's conclusion regarding misconduct. Medcenter One, 410 N.W.2d at 524. The record in this case contains sufficient evidence supporting Job Service's conclusion that Maurer's conduct, though perhaps grounds for termination, was not misconduct that would deny Maurer unemployment benefits.

[¶29] The referee made the following findings of fact:

> The claimant began working for the employer on November 17, 2012, as a full-time license addiction counselor. The claimants job duties were, in part, to complete evaluations and assessments.

On January 10, 2019, during a multi-disciplinary staff meeting the claimant engaged in conversation with other co-workers regarding his past time activity of shooting. A witness directly involved in the conversation testified that he thought a statement made by the claimant during the conversation was odd but not of any threat.

Following the meeting the employer became aware of the conversation. As a result of the conversation the claimant was placed onto probation from January 11, 2019, thru January 24, 2019, and was informed that an investigation into his work performance would be completed. The claimant was also made aware that he could report to the office the following morning to retrieve his personal effects.

Additionally, on January 10, 2019, performance evaluations were complete[d] by the boss that was leaving, he completed one for the claimant. The former boss was in attendance and stated his reasoning for doing so was because he was leaving and performance evaluations would be due in the next two or three months. The employer asserts the former boss and the claimant were friends, and this relationship would affect the validity of, specifically, the claimant's evaluation.

While on probation, later that evening on January 10, 2019, the claimant came into the office and retrieved his personal effects. The claimant did so as he thought it would be less disruptive to the staff and business to do so after hours. The employer asserts that it was his belief he was trying to conceal something. Additionally, findings were made on the claimant's computer of which were not used in the decision to terminate the claimant from employment. The claimant asserts the findings were invalid as the computer had not always belonged to him.

In addition to findings while on probation the employer asserts the claimant would make racial slurs regarding individuals reporting for assessments and or evaluations. The claimant acknowledges that he did make one racial slur, and uses terms but that no one brought them to his attention. In addition, the claimant had at one point hit a co-worker on the head with rolled paper. The claimant contends it was done in a joking manner.

The employer contends that there were prior warnings but was not able to provide dates for the prior warnings and or specifics.

The claimant was terminated from employment on January 24, 2019, as a result of work performance of which the employer contends was

> unsatisfactory, that the claimant created a hostile work environment, and violated the terms of probation.

App. 92-93.

[¶30] In determining whether NFC showed that Maurer's actions rose to the level of misconduct concluded, the referee concluded:

> After reviewing the facts of the record, the employers reasoning for terminating the claimant's employment does not amount to misconduct. Stated another way, the employer did not provide sufficient information to conclude that the reason the claimant was terminated, ie: creating a hostile work environment, unsatisfactory work performance, and violation of terms probation amounted to misconduct.

App. 94. The referee went on to expound how she came to this conclusion noting that the employer failed to show claimant created a hostile work environment, unsatisfactory work performance, or a violation of the terms of his probation. App. 95. While the referee did not condone the claimant's use of hitting a co-worker with rolled up paper or the use of racial slurs, the referee determined those were isolated instances and that it was not established as an ongoing issue. Id. More particularly, it was not established that the claimant had been warned and that he continued the behavior despite warning. Id.

[¶31] The referee's findings of fact are not against the greater weight of the evidence and her conclusions are sound. Simply put, NFC did not meet its burden to show Maurer's actions were an intentional or a willful disregard of the employer's interest and therefore it failed to show Maurer committed disqualifying misconduct.

II. Job Service's findings of fact are supported by a preponderance of the evidence.

[¶32] At the outset, it is important to note that Job Service resolves conflicting

testimony and determines credibility of witnesses. See Lovgren v. Job Serv. N.D., 515 N.W.2d 143, 145 (N.D. 1994); see also Otto v. Job Serv. N.D., 390 N.W.2d 550, 553 (N.D. 1986) (Vande Walle, J., concurring). "If confronted with disputed facts, [courts] defer to Job Service's factual conclusions and ascertain only whether a reasoning mind could have reasonably determined the factual conclusions were proven by a preponderance of the evidence." Johnson v. Job Serv. N.D., 1999 ND 42, ¶ 12, 590 N.W.2d 877. This Court's role is not to make independent findings of fact or substitute its judgment for that of Job Service. See Sonterre, 379 N.W.2d at 283.

[¶33] NFC identified three grounds for Maurer's termination, namely "it had been deemed that his work performance was unsatisfactory. He created a hostile work environment. And that he violated the terms of his probation." App. 9. NFC asserts that its testimony is more credible than the testimony of Maurer. Rather than review Job Service's decision, NFC is requesting that the court usurp Job Service's fact finding responsibility and make independent findings of fact or substitute its judgment for that of Job Service. But it is the role of Job Service, not the Court, to determine credibility of witnesses. Lovgren, 515 N.W.2d at 145; Otto, 390 N.W.2d at 553. This Court should decline NFC's request that it act as a super administrative agency and make its own independent findings of fact.

A. Unsatisfactory work performance.

[¶34] Job Service found no evidence to support NFC's claim that Maurer's work had been unsatisfactory. App. 95. While NFC alleged that the numbers of assessments being completed by Maurer was low over the few months before his

termination, the employer provided only conclusory statements with no specifics, other than explaining one situation where Maurer would not conduct an assessment for a client who showed up 15 minutes late for the appointment. App. 14-15; C.R. 131. Maurer, on the other hand, testified that the employer was responsible for assigning the assessments to him and that he completed all that were assigned. App. 52, 58. Maurer's direct supervisor (Knopik) testified he did not notice the number of assessments Maurer was doing were decreasing. C.R. 149-50. He also explained that Maurer was not in a position to control the assignments. App. 30. Knopik said he was satisfied with Maurer's work performance. Id. Based upon this testimony, a reasonable person could reasonably find, as the referee did, that NFC had not showed Maurer's work performance to be unsatisfactory.

B. Hostile work environment.

[¶35] Job Service found that the employer had not established it's allegation that Maurer created a hostile working environment at the MDS meeting where guns and shooting was the matter of conversation. App. 95. Although they could not agree precisely on the comments Maurer made at the meeting, NFC's witnesses did not testify that Maurer's comments were threatening. See infra ¶¶ 10-13. In fact they testified to the opposite. App. 41. Maurer testified his comments were part of a casual conversation and no threats were made. App. 54-55. Therefore, a reasoning mind reasonably could have easily found, as the referee did, that "[i]t was not established through first hand testimony that the conversation was in any way a threat on behalf of the claimant, at most just a topic of conversation

regarding past times after work hours." App. 95.

[¶36] NFC, however, claims it presented "credible, unrefuted evidence that Maurer had used racial slurs, assaulted two employees, was hostile to coworkers . . . ." Appellant's Br. ¶ 32. NFC's argument is incorrect.

[¶37] While it is undisputed that Maurer had used the term "FBI" which meant "F-ing Big Indian", the employer did not show that Maurer was "directing" or using this term at the clientele as the employer contends. It was only shown that Maurer used this reference which was overheard by his coworkers, but no co-workers expressed concern. App. 36, 56. Further, no evidence was put forth showing that NFC had warned Maurer that his use of the term FBI was inappropriate and would result in discipline. Generally, the act of misconduct means "the deliberate and willful violations of a reasonable rule or policy of the employment unit governing the individual's behavior in performance of his work, provided such violation has harmed the employing unit or other employees or had been repeated by the individual despite warning or other explicit instruction from the employing unit." Williams v. Dep't of Employment Sec., 52 N.E.3d 414, 425 (Ill. App. Ct. 2016). Here, NFC provided no evidence that Maurer's isolated use of the term FBI had harmed the business. And, because Maurer had not been warned that his use of the term FBI was inappropriate and unwelcomed by the employer, it cannot be said to be grounds alone for misconduct. This is in fact what the referee concluded. See App. 95 (referee stating, "It is noted that it would be another situation had the claimant been placed on notice, and or it was established that it was an ongoing issue of which he was aware of was an issue but continued despite warnings, of

which had not occurred in this case.).

[¶38] Similarly, NFC's claim that the referee ignored testimony about Maurer striking two fellow employees is misplaced both factually and legally. Maurer acknowledged that at one time he had hit co-worker Megan Williams (Williams) over the head with rolled up paper in a joking manner. App. 57. Williams testified that she felt that Maurer was "slightly aggressive" when he hit her on the head with the papers and that "I don't know if that was meant in jest." App. 32. While her perception and description of the event may not have been as benign as Maurer's description, it is uncontested that Williams did not report this to the employer at the time of its occurrence. Further, she certainly did not describe Maurer's conduct as mean or abusive. Thus, this Court should not reject the referee's credibility determination stating "the claimants reasoning as it was a joke is accepted as credible. That is he was joking, and it was never brought to his attention that his actions were not accepted as appropriate." App. 95.

[¶39] The other incident allegedly happened well over a year before Maurer's termination as testified to by Susie Bartasch, who allegedly saw on video camera Maurer bopping another coworker on the top of the head. C.R. 166-68. However, the alleged victim did not testify nor did the victim report the incident. Further, NFC testified that Maurer's termination was due to conduct occurring over the last several weeks of his employment. App. 15, 78. Certainly it was not improper for the referee to ignore this information when the employer testified that it was relying on Maurer's conduct over the last few weeks to terminate his employment. This is

especially true where the employer did not know of and had not disciplined Maurer for the previous incident.

C. Violation of the terms of probation.

[¶40] NFC alleges Maurer committed misconduct by violating the terms of his probation when he entered the facility after being put on probation. NFC argues Maurer entered its facility the evening of January 10, 2019, after he was put on probation, knowing he was not supposed to be there. Appellant's Br. ¶ 35; C.R. 18, 26. Maurer testified he went to collect his personal belonging which he had been given permission to do. App. 53. While Olson testified he had set up a time on January 11, 2019, for Maurer to retrieve his belongings, Maurer did not recall this discussion, and it is undisputed that the probation letter given to Maurer did not mention this. C.R. 19; App. 28. In fact, the probation letter only barred Maurer from "reporting to work during normal scheduled hours" from "January 11, 2019 to January 24, 2019." C.R. 19. Therefore, Maurer was not in violation of any written terms provided to him when he went to collect his personal belonging after his normal work hours on January 10, 2019.

[¶41] On these facts, the referee determined "the claimants reasoning for doing so is understandable. Albeit he did not do as instructed it is reasoned the claimant made a good faith error in judgment." C.R. 99. While NFC alleges evidence in the record shows a deliberate violation, the referee chose to accept the testimony of Maurer which is her prerogative as she was in the best position to judge the credibility of the witnesses.

III. Job Service did not err by failing to consider testimony related to pornography found on Maurer's computer when New Freedom Center unequivocally indicated that it was not a reason for Maurer's termination.

[¶42] NFC argues that Job Service's legal conclusion not to consider the pornography found on the Maurer's computer in determining misconduct was error, asserting the bureau misapplied concepts related to "after-acquired evidence" of wrongdoing. Appellant's Br. ¶¶ 37-40. NFC's argument is meritless.

[¶43] There are several reasons why NFC cannot be afforded relief on this ground. First, NFC did not raise the matter before Job Service as a ground for a finding of misconduct.

[¶44] It is uncontested that NFC provided testimony via Olson that when it had a technologist look at Maurer's computer during Maurer's probation pornography was discovered on the computer. App. 17. However, it is also undisputed that Olson made it absolutely clear that the pornography did not play any role in his determination to terminate Maurer's employment. C.R. 183. In that regard, the following dialogue occurred between the referee and Olson:

> MS. DUTCHUK: Now, Mr. Olson, in your original testimony you had also indicated that what was found on the claimant's computer … and you chose that … you stated that you didn't really want to get into it. Now, is it … why don't you want to get into that because that seems like a pretty significant finding [f]or an employee? I mean, does that not matter as much as the rest?
>
> MR. OLSON: I think it could be damning to the point that it could destroy a marriage. It can destroy a person's name. It could probably end upon in prison and I would like him to deny it also.
>
> MS. DUTCHUK: What do you mean you would like him to deny it?
>
> MR. OLSON: I would like him to deny that porn is not on his … on his computer and then I can come back and say yes it is, perjury. I

didn't have the time. I had nine people already called, we're going into two hours here. I … I … I thought I had enough … I still think I do.

MS. DUTCHUK: Okay. So Mr. Olson, aside from you wanting to trap the claimant in a perjury type situation why don't we stick to the purpose of today's hearing and that is to determine why the claimant was separated from employment and whether that separation should have allowed benefits. So was the finding … and I understand it could be damaging to the plaintiff somebody's career, marriage, and/or any other circumstances. But I mean, did it play a factor in his separation from employment? And I don't want you to hold back testimony because you want to find the claimant in an attempt to perjurize him.

So to answer my question, did it play a factor in his separation from employment?

MR. OLSON: No.

MS. DUTCHUK: So you … so you finding pornography of what you could describe as ponytails and braces on a employee's computer and that doesn't factor into the separation from employment whatsoever?

MR. OLSON: He was already separated from employment. What I find two weeks from now is not going to play … is not going to have … is not going to have a basis.

MS. DUTCHUK: Well, Mr. Olson, you said that you found it during his probationary period.

MR. OLSON: Yes, yes, I did. When I … when I took my computer back.

MS. DUTCHUK: So what you found on his computer regarding pornography during his probationary period did not factor in your decision to terminate the claimant's employment, is that correct?

MR. OLSON: No. The decision was already made.

C.R. 183, l. 1 – C.R. 184, l. 12.

[¶45] This Court has stated "[i]t is well settled that one of the guidelines for an appeal on any issue or contention is that the issue on appeal was adequately

raised in the lower court." Williams Cty Soc. Servs. Bd. v. Falcon, 367 N.W.2d 170, 176 (N.D. 1985). See also Skjonsby Truck Line Inc. v. Elkin, 325 N.W.2d 271, 275 (N.D. 1982) (general rule "also applies to consideration of issues on appeal from administrative agency proceedings."); Christenson v. Job Serv. N.D., 399 N.W.2d 300 (N.D. 1987) (declining to consider claimant's argument that she resigned in the face of certain discharge because she did not raise the matter before Job Service as a ground upon which she was claiming unemployment benefits).

[¶46] In this case, NFC did not raise the issue before the appeals referee in that NFC chose not to argue the pornography finding on Maurer's computer as a reason for Maurer's termination. Further, NFC did not raise the pornography issue as an error when it appealed to the bureau under N.D.C.C. § 52-06-19. See C.R. 101. Nor did NFC specify this as a ground for reversing Job Service's decision in its Petition for Judicial Review under N.D.C.C. § 52-06-21. App. 97-101. Therefore, NFC is barred from raising the argument for the first time on appeal.

[¶47] Yet, even if this Court wants to consider the discovery of pornography on Maurer's computer as a ground for misconduct it should still affirm Job Service's decision. NFC relies on the concept of "after-acquired evidence" analogized from discrimination cases to allege that Job Service should have considered the pornography found on Maurer's computer. Maurer's reliance on this concept is misplaced.

[¶48] In a similar case, involving the discovery of pornography on an employee's computer after the employee's termination, the Washington Court of Appeals

determined that the after acquired discovery of pornography was not relevant to the issue of misconduct for the purposes of awarding unemployment benefits. See David B. Vail & Associates v. Employment Sec. Dep't, 172 Wash. App. 1022, 2012 WL 6212618 at *8. In that case, the Court compared the different purposes for using after-acquired evidence in discrimination cases versus unemployment benefit cases. Id. The Court found the purposes to be different and held that the administrative agency's charge is to only consider evidence known to the employer at the time of termination when deciding whether the employee engaged in disqualifying misconduct. Id. See also Davis v. Howard O. Miller Co., 695 P.2d 1231 (Idaho 1984) (Holding employee Davis's discharge was not for reasons constituting misconduct). In Davis, the employer became aware prior to Davis's firing that Davis had not listed a prior employer whom he had quit without notice. 685 P.2d at 1232-33. The employer did not dismiss Davis for his failure to disclose the former employer on his employment application but terminated Davis's employment solely because he feared Davis would quit without notice. Id. at 1233. The court explained as follows:

> The second of Miller's asserted expectations was that Davis would have honestly completed the original employment application. Admittedly, Davis did not list a prior three to four week job. The application form requested a listing of prior employment and contained a clause informing applicants that providing false information would be grounds for dismissal. Prior to firing Davis, Miller became aware that Davis had not listed a prior employer whom he had quit without notice. If Miller had dismissed Davis on that basis, he may have had a better case before the Industrial Commission. However, the record shows that Miller fired Davis solely because he feared that Davis would quit without notice. This fear stemmed from Davis quitting a prior job without giving notice and from his recent shift change in order to look for work.

Id. at 1234-35.

[¶49] Similarly here, the appeals referee made it clear her duty was to determine why Maurer was separated from employment. She was not charged with determining all the possibilities for why Maurer could have been separated from employment, but only why he was separated by the employer. The focus was on why NFC chose to discharge Maurer from employment. Since Olson admitted that the pornography did not factor into the termination decision it was not an abuse of discretion for the referee to not consider it in her decision.

[¶50] Further, and perhaps more importantly, the fact that pornography was found on the computer by itself does not constitute misconduct. Maurer testified that the computer was not always his and that other employees used it prior to it being assigned to him. App. 60. In fact, NFC provided no evidence of when the pornographic images were viewed. In other words there was no direct evidence connecting the pornographic images to Maurer's conduct - his searching it out or viewing of it. Nor do we know if the computer was password protected and whether others at the facility would be able to use the computer. Thus, even if the Court believes the pornography should have been considered by the referee, the case would need to be remanded to Job Service for the development of the record and to give Maurer a chance to defend or respond to the employer's allegation.

IV. Job Service did not fail to disclose improper ex parte communications with Maurer prior to the hearing.

[¶51] NFC cites to one line of the transcript to argue that the appeals referee had improper ex parte communications with Maurer that were not and should have been disclosed. Appellant's Br. ¶ 44. NFC's argument is factually and legally

incorrect.

[¶52] Section 28-32-37, N.D.C.C., in pertinent part, provides:

> Ex parte communications.
>
> 1. Except as provided in subsections 2 and 4 or unless required for the disposition of ex parte matters specifically authorized by another statute, an agency head or hearing officer in an adjudicative proceeding may not communicate, directly or indirectly, regarding any issue in the proceeding, while the proceeding is pending, with any party, with any person who has a direct or indirect interest in the outcome of the proceeding, with any other person allowed to participate in the proceeding, or with any person who presided at a previous stage of the proceeding, without notice and opportunity for all parties to participate in the communication.
>
> . . .
>
> 6. Any agency head or hearing officer in an adjudicative proceeding who receives an ex parte communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications, or a memorandum stating the substance of all oral communication received, all responses made, and the identity of each person from whom the person received an ex parte oral communication, and shall advise all parties, interested persons, and other persons allowed to participate that these matters have been placed on the record. Any person desiring to rebut the ex parte communication must be allowed to do so, upon requesting the opportunity for rebuttal. A request for rebuttal must be made within ten days after notice of the communication.

(Emphasis added).

[¶53] In Scott v. N.D. Workers Comp. Bur., 1998 ND 221, 587 N.W.2d 153, the court interpreted the ex parte communications statute. In Scott, the Bureau issued an order terminating a claimant's disability benefits. Id. at ¶ 4. The claimant requested and was afforded a hearing before an administrative law judge (ALJ). Id. at ¶ 5. The ALJ issued a recommended decision to reverse the order

terminating benefits. Id. After the hearing, the Bureau's outside counsel, who had participated in the hearing, consulted with the Bureau's Director of Claims and Rehabilitation ("Claims Director"). Id. at ¶ 8. The Bureau's outside counsel advised the Claims Director that the ALJ's recommended decision should be rejected and sent a proposed final decision to the Claims Director. Id. The Claims Director subsequently signed the proposed final decision. Id. The claimant had no knowledge of the communications between the Bureau's outside counsel and the Claims Director. Id.

[¶54] The court recognized that "[t]he clear intent of the statute is to prohibit ex parte contacts between the decision maker and persons who participated in the hearing or otherwise have an interest in the case." Id. at ¶ 10. The court explained that neither adversary should be allowed to engage in an ex parte communication **"concerning the merits of the case"** with those responsible for the decision. Id. at ¶ 12 (citing Camero v. United States, 375 F.2d 777, 780-81 (Ct. Cl. 1967)).

[¶55] In this case, at the start of the March 27, 2019, administrative hearing and following the identification of the parties, witnesses, and exhibits the appeals referee stated as follows:

> Thank you. Exhibits 1 through 6 are received into the record. Now, before we begin by taking testimony and since it is a misconduct issue that means I'll begin with the employer first. But before we proceed to testimony I just wanted to state prior to starting the hearing recording I did have a few conversations with Mr. Maurer and it's my understanding that Mr. Maurer had submitted a subpoena request for some additional documents of which the employer chose not to submit to Job Service North Dakota.
>
> Although he does contend that he just found the one document this morning. But he states that he has not yet sent them into Job service North Dakota. And it doesn't appear that there's any intent to do so. . . . .

App. 7. It is apparent from this comment that there was no communication "concerning the merits of the matter." The referee simply received contact from Maurer regarding a subpoena for records from NFC so he could offer additional documentary evidence at the hearing. Since Maurer is not an attorney he had to go through the referee to have a subpoena issued. See N.D.Admin.Code § 27-03-06-03(5); see also C.R. 47, 77-79 (Maurer making a written request to Job Service for a subpoena for records from NFC). After Maurer made this request Job Service contacted NFC requesting the documentation and asked the employer to comply in writing to the referee). C.R. 80. NFC responded to the referee by asserting that Maurer's requested documentation had already been provided as part of "Exhibit 3 on NFC Letterhead [C.R. 66] written by John Perdue, CDT Supervisor." C.R. 81-83, 84-91.

[¶56] Evidently Maurer contacted the referee prior to the hearing to follow-up on his subpoena request, and the referee had it placed on the record that Maurer had contacted her about the subpoena and that NFC chose not to submit the documents to Job Service. See App. 7. Maurer acknowledged finding one of the requested documents the morning of the hearing but he had not sent it to the referee. Id. In contrast to Appellant's assertion, this disclosure by the referee at the start of the administrative hearing was the referee's description on the record of the substance of the communication she had with Maurer as required under N.D.C.C. § 28-32-37(6). Id.

[¶57] Further, and perhaps more importantly, the record shows that NFC did not object to the communication or request the opportunity to rebut the communication

or the referee's placement of the communication on the record at any time during the hearing, or within ten days after the referee's notice of the communication, as required by the statute. Therefore, NFC's objection is untimely and need not be considered by the Court.

CONCLUSION

[¶58] Job Service respectfully requests this Court affirm the judgment of the Burleigh County District Court and the its decision finding Maurer was discharged from employment with NFC for reasons not amounting to misconduct.

Dated this 12th day of March, 2020.

State of North Dakota
Wayne Stenehjem
Attorney General

By: /s/ Michael Pitcher

Michael Pitcher
Assistant Attorney General
State Bar ID No. 06369
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email mtpitcher@nd.gov

Attorneys for Appellee Job Service North Dakota.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

New Freedom Center, Inc., Petitioner/Appellant, v. Job Service North Dakota and James L. Maurer, Respondents/Appellees.	**Supreme Ct. No. 20190405** **District Court No. 08-2019-CV-01450** **CERTIFICATE OF COMPLIANCE**

[¶1] The undersigned certifies pursuant to N.D. R. App. P. 32(a)(8)(A), that the Brief of Appellee Job Service North Dakota contains 28 pages.

[¶2] This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 word processing software in Arial 12 point font.

Dated this 12th day of March, 2020.

State of North Dakota
Wayne Stenehjem
Attorney General

By: /s/ Michael Pitcher

Michael Pitcher
Assistant Attorney General
State Bar ID No. 06369
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email mtpitcher@nd.gov

Attorneys for Appellee Job Service North Dakota.

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New Freedom Center, Inc., Petitioner/Appellant, v. Job Service North Dakota and James L. Maurer, Respondents/Appellees.	**Supreme Ct. No. 20190405** **District Court No. 08-2019-CV-01450** **CERTIFICATE OF SERVICE**

[¶1] I hereby certify that on March 12, 2020, the following documents: **BRIEF OF APPELLEE JOB SERVICE NORTH DAKOTA and CERTIFICATE OF COMPLIANCE** were filed through electronic filing and served upon Monte Rogneby at mrogneby@vogellaw.com.

State of North Dakota
Wayne Stenehjem
Attorney General

By: /s/ Michael Pitcher
Michael Pitcher
Assistant Attorney General
State Bar ID No. 06369
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email mtpitcher@nd.gov

Attorneys for Appellee Job Service North Dakota.