

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO  
CIVIL DIVISION

MELISSA FRICKE,

CASE NO.: 2010 CV 09574

Plaintiff(s),

JUDGE MARY WISEMAN

-vs-

CITY OF DAYTON et al,

**DECISION, ORDER AND ENTRY  
AFFIRMING THE DECISION OF THE  
CITY OF DAYTON CIVIL SERVICE  
BOARD**

Defendant(s).

**FINAL APPEALABLE ORDER**

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MELISSA Y FRICKE,

CASE NO.: 2011 CV 00565

Plaintiff(s),

JUDGE MARY WISEMAN

-vs-

OHIO DEPARTMENT OF JOB AND FAMILY  
SERVICES et al,

**DECISION, ORDER AND ENTRY  
AFFIRMING THE DECISION OF THE  
OHIO UNEMPLOYMENT  
COMPENSATION REVIEW  
COMMISSION**

Defendant(s).

**FINAL APPEALABLE ORDER**

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This matter is before the Court on two administrative appeals filed by Appellant Melissa Fricke ("Fricke"). Fricke challenges the decisions of the City of Dayton Civil Service Board ("Board") in case number 2010-CV-09574 and the Ohio Unemployment Compensation Review Commission ("Commission") in case 2011-CV-00565<sup>1</sup>. The Court consolidated the appeals in an order dated June 23, 2011 because both agency decisions relate to the termination of Fricke's employment as a paramedic with the Dayton Fire Department ("DFD") and involve the same question: whether Fricke's termination was supported by the

administrative record. Based on the following law and analysis, both administrative decisions are AFFIRMED.

As an initial matter, on June 16, 2011 Appellee, Director, Ohio Department of Job and Family Services ("ODJFS") filed a *Motion to Strike Exhibits Not Contained in the Certified Record* ("Motion to Strike") in case 2011-CV-00565. ODJFS challenges the use of three documents not contained in the Commission's certified record. *Motion to Strike* at pg. 1. Specifically, ODJFS challenges Fricke's use of two documents: (1) an undated letter from James E. Cox, President of Dayton Fire Fighters' Local 136 and; (2) the written transcript of Fricke's hearing before Director of Fire Services Herbert C. Redden ("Chief Redden"), dated March 31, 2010. *Id.* at 2. Appellee City of Dayton ("City") also challenges Fricke's use of the documents in her *Brief of Appellant* (2010-CV-09574) and requests that this Court not consider either document during review. *Appellee's Brief* at pg. 4-5, October 2, 2011 (2010-CV-09574). Additionally, ODJFS challenges the use of Exhibit A, an order on appeal issued by the Board, attached to the City's *Appellee's Brief* filed May 4, 2011 in case 2011-CV-00565. *Id.*

Pursuant to Ohio Civ.R. 12(F), upon the motion of either party or on its own accord, the court may strike from any pleading any insufficient claim or defense or any redundant, immaterial, impertinent, or scandalous matter.

As to Exhibit A, this Court dismissed the City from case 2011-CV-00565 on February 28, 2011 based on a finding that Fricke could not state a claim against the City (a municipality) in her appeal from a decision of the Commission (a state agency). Accordingly, the Court finds that Exhibit A, as well as the City's appellee brief, should be stricken from the record in case 2011-CV-00565 because the City was no longer a party to the action when the documents were filed. It follows that ODJFS's Motion to Strike is GRANTED as it pertains to Exhibit A.

Regarding the letter from James E. Cox and the transcript of the March 31, 2010 hearing, the Court orders the documents stricken from the record of both cases: 2010-CV-9574 and 2011-CV-00565. Pursuant to O.R.C. § 119.12, the statute controlling Fricke's appeal from the Board's decision, "the court is confined to the record as certified to it by the agency." The documents in question are not part of the certified record

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<sup>1</sup> Fricke brought case 2011-CV-00565 *pro se* and included the City of Dayton as a Defendant-Appellee. On February

submitted to this Court by the Board in 2010-CV-09574. Likewise, the documents are not part of the certified record submitted by the Commission in case 2011-CV-00565 either. Fricke's appeal from the Commission's decision is governed by O.R.C. § 4141.282. Pursuant to O.R.C. § 4141.282(H) the "court shall hear the appeal on the certified record provided by the commission." Because the letter from James E. Cox and the transcript of the March 31, 2010 hearing are not part of either certified record, the Court cannot consider either document on appeal. Accordingly, ODJFS's Motion to Strike is GRANTED as it relates to the letter from James E. Cox and the transcript of the hearing on March 31, 2010. Furthermore, the Court will not consider either document while reviewing the agency decisions.

### I. Statement of Facts and Procedure

The following facts are pertinent to both appeals. Fricke was employed as a firefighter paramedic with the DFD from February 2006 until her termination in April 2010. *Tr. of Rec. Ex. 7 (10-CV-09574), Civ. Serv. Bd. Tr.* ("Bd. Tr.") 29:20-22; 47:18-20; 48:6-8, Nov. 4, 2010. On January 15, 2010, Fricke was late for roll call at 7:00 A.M. *Id.* 10:9-17. Firefighter John Syx called Fricke to inform her that she was late for roll call and needed to call Captain Joseph Meyers ("Captain Meyers"), the temporary captain for Fricke's company on January 15, 2010, as soon as possible. *Id.* 49:23-50:24. At 7:05 A.M. Fricke contacted Captain Meyers and explained that she believed it was her earned day off ("EDO"), at which point Captain Meyers reminded Fricke that she had traded EDOs with another firefighter and was supposed to be at work. *Id.* 11:8-19; 51:2-6. According to Captain Meyers, Fricke affirmatively stated that she would be at work as soon as possible. *Id.* 11:15-12:2. However, Fricke contends that she told Captain Meyers she would *try* to make it in as soon as possible. *Id.* 51:4-10. Fricke did not report to work on January 15<sup>th</sup> and Captain Meyers was unable to contact Fricke again that day despite repeated attempts at 10:00 A.M., 4:00 P.M. and 8:00 P.M.<sup>2</sup> *Id.* 12:3-25.

After speaking with Captain Meyers, Fricke tried to obtain childcare for her nine year old son who was home from school that day on suspension. *Id.* 51:14-52:23. Fricke was unable to find childcare for her son and did not want to leave him home alone. *Id.* 52:24-53:10. Fricke was already late for work and did not

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28, 2011 the Court dismissed the City of Dayton via an *Entry Granting Defendant's Motion to Dismiss*.

<sup>2</sup> Captain Meyers attempted to contact Fricke after finding out that Fricke had called off sick while on trade. *Unemployment Comp. Review Comm'n Tr. 1, Ex. A.*

want to be absent without leave, so she called and informed dispatch that she would not be at work that day.

*Id.* 53:12-16. Fricke called dispatch at 7:09 A.M.; the conversation with dispatch was as follows:

Dispatcher: Dispatch.

Fricke: Hi this is Fricke.

Dispatcher: Hey.

Fricke: Apparently uh I had traded EDOs but uh I'm not going to make it in today.<sup>3</sup>

Dispatcher: Okay does your officer know?

Fricke: I just talked to him on the phone.

Dispatcher: Okay (inaudible) do I just put you off on sick?

Fricke: Yes.<sup>4</sup>

Dispatcher: Alrighty, alright thank you.

Fricke: Thank you.

Dispatcher: Bye, bye.

Fricke: Bye.

*Tr. of Rec. Ex. 11* (2011-CV-00565), *Unemployment Comp. Review Comm'n Tr. 2*<sup>5</sup> 10:22-11:8, Nov. 5, 2010.

Additionally, DFD policy requires all employees to contact their supervisor by 5:00 P.M. after calling off sick to notify the supervisor of the employee's situation and indicate when the employee intends to return to work. *Comm'n Tr. 1* 22:19-25. Fricke failed to contact Captain Meyers after calling off to notify him that she would not be at work. *Id.*

On January 18, 2010, Fricke's next scheduled work day, Captain Meyers asked Fricke if she had the necessary medical certification for her sick leave on January 15<sup>th</sup>. *Bd. Tr.* 13:4-14:4. Fricke responded that she did not have a medical certification form because she was not sick, she had a childcare issue. *Id.* 13:4-14:4. Fricke was required to have medical certification for her sick leave under DFD policy because she had seven instances of sick leave within a twelve (12) month period prior to her call off in January. *Id.* 21:8-14, and *Comm'n Tr. 1* 15:20-23; 16:8-20; 18:8-17; 19:7-13.

<sup>3</sup> The hearing exhibits: *Bd. Tr. Ex. 6* and *Comm'n Tr. Ex. F*, have the words "uh I had traded EDOs but uh" were transposed as inaudible. However, the parties agreed that the omitted language was "I had traded EDOs." *Bd. Tr.* 87:20-25; *Comm'n Tr. 2* 10:10-19. For ease of use and accuracy, the Court will utilize the language as transcribed into the record before the Commission.

<sup>4</sup> In the actual recording of Fricke's call to dispatch she responds "Yes." However, the written transcription of the call used at both the Board (*Bd. Tr. Ex. 6*) and Commission (*Comm'n Tr. Ex. F*) hearings says "Yeah."

<sup>5</sup> The hearing before the Unemployment Compensation Review Commission took place over two days: October 21, 2010 (hereinafter "Comm'n Tr. 1") and November 5, 2010 (hereinafter "Comm'n Tr. 2").

As a result of Fricke's conduct on the 15<sup>th</sup> the following charges and specifications were issued against her on February 5, 2010:

**CHARGE I**

**Rule 13, Section 2(A):**

Absence without leave or failure to return from leave.

**SPECIFICATION I**

On or about January 15, 2010, you were absent without leave.

**CHARGE II**

**Rule 13, Section 2(B):**

Conduct unbecoming an employee in the public service;

and/or

**Rule 13, Section 2(I):**

Violation of any enacted or promulgated statute, ordinance, rule, policy, regulation, or other law.

**SPECIFICATION I**

On or about January 18, 2010, it was discovered that you called into dispatch a false claim of sick leave. This is a direct violation of City of Dayton's Fire Department Rules and Regulations Conduct of Members, Section 3, paragraphs 10 and/or paragraph 11, and/or Section 3[sic]<sup>6</sup>, paragraph 3, which state in pertinent parts:

**Section 3 – CONDUCT OF MEMBERS**

10. A member of the Department of Fire shall not deceive or evade any law, ordinance, rule, regulation or order.

and/or

11. A member shall not make a false official report or statement.

and/or

**Section 5 – RESPONSIBILITIES AND DUTIES**

3. A member of the Department of Fire shall perform all duties assigned to him by rule, regulation, schedule, or order to the best of that member's ability.

<sup>6</sup> The proper citation is Section 5, paragraph 3.

*Bd. Tr. Ex. 1; Comm'n Tr. 1 Ex. D.* A hearing was held before Chief Redden, and on April 22, 2010 Chief Redden issued an opinion finding Fricke guilty of the charges and specifications issued against her and discharging Fricke from her position with the DFD. *Bd. Tr. Ex. 2; Comm'n Tr. 1 Ex. D.*

#### **A. Civil Service Board<sup>7</sup>**

Fricke appealed her termination to the Board and a hearing was held regarding the matter on October 27, 2010. Chief Redden and Captain Meyers testified at the hearing on behalf of the City and DFD. Captain Thomas R. Harker, Fricke's normal supervising officer, and Captain Tim Rose both testified for Fricke and Fricke also testified on her own behalf.

Captain Meyers testified about the events of January 15<sup>th</sup> and 18<sup>th</sup>, 2010. *Bd. Tr. 9:7-17:17.* The crux of Captain Meyers' testimony was that he believed Fricke would report to work on the 15<sup>th</sup> because Fricke told him that she would be in as soon as possible. *Id. 11:5-12:2; 15:20-16:2.* Captain Meyers also testified that Fricke never stated to him that she was sick or that she was having childcare issues on January 15<sup>th</sup>. *Id. 16:3-17:2.* According to Captain Meyers, the only reason he knew of for Fricke's absence was that Fricke believed she was off that day. *Id. 17:13-17.*

Chief Redden testified regarding his decision to terminate Fricke based on the events of January 15<sup>th</sup>. *Id. 17:23-35:16.* According to Chief Redden, his decision to terminate Fricke was based primarily on Fricke's falsification of City documents or records. *Id. 19:15-16.* Chief Redden's finding of falsification was based on several factors. First, Chief Redden relied upon Fricke telling Captain Meyers that she would be in as soon as possible, and then calling off sick to dispatch within a couple of minutes. *Id. 19:20-20:8.* Second, Chief Redden concluded that Fricke advised dispatch that Captain Meyers knew she would not be at work "when, in fact, the supervisor did not know the situation. [Captain Meyers] was under the understanding that [Fricke] was in route or coming in that morning." *Id. 20:9-14.* Third, Fricke had an opportunity to inform Captain Meyers of any possible childcare issues when she talked to him that morning and failed to do so. *Id. 19:16-19.* Finally, Chief Redden was critical of Fricke's failure to respond to Captain

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<sup>7</sup> The Court notes that the Transcript of Record for case 2010-CV-9574 available electronically through the Court's clerkweb system is incomplete. Specifically, exhibits 1-11 of Exhibit 7(Civil Service Board Hearing Transcript), Exhibit 8 (Findings of Fact and Recommendation of Hearing Officer), Exhibit 9 (Order of Appeal) and Exhibit 10 (Notice of Appeal and Praecepte). The omitted documents are in the physical file in the clerk's office and the Court has notified the clerk's office of the omitted portions of the record. Additionally, the Court contacted the parties to insure

Meyers' subsequent attempts to contact her on January 15<sup>th</sup>. *Id.* 20:16-19. In Chief Redden's opinion, if Fricke had responded to one of Captain Meyers numerous phone calls, "[she] would have had ample time to discuss her situation or what was presented to her at that point in time." *Id.* 20:19-21. Chief Redden also stated that any DFD employee who is found to have engaged in falsification will be terminated based on City policy. *Id.* at 22:8-18. The policy regarding falsification was established in a September 21, 2005 memo from the acting city manager entitled "Falsification of City Records." *Id.* at Ex. 11 (hereinafter "Falsification Memo").

Additionally, Chief Redden testified that a second violation of DFD policy occurred when Fricke failed to contact Captain Meyers by 5:00 P.M. on January 15<sup>th</sup>. *Id.* 20:22-24. DFD's policy requires any employee who calls off sick to notify his or her supervisor of the employee's convalescent location or telephone number, and to provide a status update as to whether the employee will be in on his or her next duty day. *Id.* at 20:24-21:4.

Chief Redden concluded, based on his opinion of Fricke's credibility and her version of events from the hearing before him, that Fricke knew she was calling off sick when she was not sick. *Id.* at 22:17-25. On cross examination, Chief Redden admitted that Fricke never affirmatively stated to dispatch that she was sick, but responded "yeah" when the dispatcher asked Fricke if she wanted to be "put off as sick." *Id.* at 23:19-24:7; 27:15-21.

On Fricke's behalf, Captain Thomas R. Harker ("Harker") testified that during the five years he was Fricke's Captain, he could not recall her ever failing to report for work. *Id.* at 37:6-38:17. Harker also testified that he was Fricke's regular Captain, but on January 15<sup>th</sup> he was on leave following surgery. *Id.* at 38:22-39:6. In addition to Harker, Captain Tim Rose ("Rose") testified regarding so called "emergency vacation leave." *Id.* at 40:16-46:17. According to Rose, emergency vacation leave is only used when an employee needs time off under emergency circumstances. *Id.* at 41:2-3. Rose noted that emergency vacation leave, when approved, goes through the district chief. *Id.* at 41:21-25. Rose also stated that emergency vacation leave is normally granted after a member of the DFD has contacted the department and explained the situation he or she was facing that required emergency leave. *Id.* at 42:17-21. Moreover, Rose testified

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that the appellate briefs were submitted on a complete record. Both parties stated that they had the omitted documents, and used the documents when drafting their briefs.

that “[e]mergency vacation leave isn’t in writing. It’s frowned upon to use it. The only time you use it is if it’s an actual emergency.” *Id.* at 44:16-19.

Fricke’s testimony on her behalf before the Board did not challenge the chain of events established by Captain Meyers’ and Chief Redden’s testimony. Rather, Fricke attempted to explain the unique circumstances that existed on January 15<sup>th</sup> and clarify several of the comments she made that day. *See generally Id.* at 46:24-86:18. To begin, Fricke testified regarding forgetting the EDO trade, her son’s suspension from school and her inability to find a babysitter. *Id.* at 49:23-53:14. Fricke then testified regarding her conversation with Captain Meyers and her call to dispatch. *Id.* 50:25-51:16; 53:20-54:24. As it relates to her conversation with Captain Meyers, Fricke testified that she specifically recalls telling Captain Meyers “that I would try to be in as soon as possible”, not that she would definitely be in that day, because she still had to arrange childcare before reporting to work. *Id.*

In regards to Fricke’s conversation with dispatch, Fricke stated that when the dispatcher asked “does your officer know?” she believed the dispatcher was referring to the fact that she “was late for roll call, that I messed up the trade.” *Id.*; 63:10-19. Fricke admits that Captain Meyers did not know that she was calling in sick and would not be reporting to work that day. *Id.* at 50:20-23. Additionally, Fricke contends that she never intentionally suggested that the dispatcher put her on sick leave. *Id.* at 54:14-16. Instead, Fricke asserts that she did not know what type of leave to request and believed that standard protocol was to be placed on sick leave, and then the record would be corrected to reflect the appropriate type of leave. *Id.* at 54:18-24; 77:11-19. Fricke also stated that “I didn’t try to insinuate that I was sick...I just kind of was led by the dispatcher and went along with it.” *Id.* at 78:1-9. Essentially, Fricke argued that she was not guilty of the charges issued against her because she did not intentionally mislead anyone or falsify any documents.

The Board affirmed Fricke’s termination finding that she was absent without leave and guilty of conduct unbecoming an employee in the public service for violating departmental rules prohibiting deceit or behavior constituting evasion of the rules. *Tr. of Rec. Ex. 8 (10-CV-09574)*. The Board determined that Fricke “created a misunderstanding of the facts by assenting to [the] dispatcher’s characterization of her absence as being one related to illness.” *Id.* In its opinion, the Board noted that while Fricke did not affirmatively request sick leave, she could have objected to being placed on sick leave. *Id.* Additionally, the Board was critical of Fricke’s failure to communicate the particulars of her situation to anyone at DFD, even



though she had numerous chances to clarify the situation with Captain Meyers. *Id.* Rather, Fricke chose to say nothing to Captain Meyers or dispatch about childcare issues and created additional confusion by telling Captain Meyers that she “would be in as soon as possible.” *Id.* As far as Captain Meyers knew, Fricke was sick on January 15<sup>th</sup>, an assumption he worked under for three days. *Id.*

The Board also found that Fricke did little to correct the record despite her belief that “standard procedure in this type of case was to go on sick leave and ‘it gets corrected [later].” *Id.* Additionally, the Board was skeptical of Fricke’s “vague recollection of her whereabouts and her failure to answer the telephone on the day in question....” *Id.* The Board also noted that Fricke did not comply with DFD policy by failing to notify the DFD of her convalescent location. *Id.* In summary, the Board noted that “it appears from the evidence that [Fricke] pursued [the sickness excuse] as long as she could, i.e. until she was asked for a medical certificate by the Captain.” *Id.*

Fricke filed a timely notice of appeal to this Court challenging the Board’s decision to uphold her termination. *See Notice of Administrative Appeal*, December 8, 2010. Fricke argues that the Board’s decision is not supported by reliable, probative and substantial evidence and is contrary to law. *See generally, Brief of Appellant.* Fricke’s sole assignment of error before this Court is that the Board “erred in determining that the City of Dayton established the allegations in the Charges and Specification against Fricke by a preponderance of the evidence.” *Id.* at 2. According to Fricke, there are no facts or evidence “that actually establish her intent to deceive or purposefully mislead the City of Dayton.” *Id.* at 1. Fricke asserts that on the morning of January 15<sup>th</sup>, determining what type of leave to request was secondary to her son’s school suspension and disciplinary issues. *Id.* at 6. Fricke further contends that the Board’s decision “turns on [an] unfair presumption: ‘[Fricke] created a misunderstanding by assenting to the dispatcher’s characterization of her absence as being related to illness.’” *Id.* at 7.

Moreover, Fricke argues that she was not absent without leave because she called dispatch and removed herself from duty. *Id.* Fricke also argues that she did not falsify any official report or record because the only official report she made related to the incident was an EDO trade request. *Id.* According to Fricke, she refused to falsify an official document or report by declining to produce a medical certification form when she was not sick, but was confronted with child care issues. *Id.* at 8.

Fricke also challenges the City's reliance on the 2005 Falsification Memo, stating that she did not falsify any official City document or record. *Id.* at 9. Rather, Fricke argues that the City's reliance on the Falsification Memo is a *post hoc* justification for her termination. *Id.*

Fricke then argues that the Board's decision is improper because the record does not contain sufficient evidence to establish common law fraud. *Id.* Specifically, Fricke argues that she "lacked the requisite mental state" for fraud when she telephoned dispatch on the day in question. *Id.*

The City responds that Fricke's termination was proper because the Board's decision was supported by reliable, probative and substantial evidence. *Appellee's Brief* at pg. 4. The City contends that Fricke was terminated for violating DFD rules regarding sick leave in accordance with the City's zero tolerance policy for falsification. *Id.* The City further argues that Fricke was terminated for (1) conduct unbecoming of an employee in the public service and/or violating an enacted or promulgated statute, ordinance, rule, policy, regulation or law, and (2) being absent without leave or failing to return from leave. *Id.* at 5. According to the City, both reasons stated for Fricke's termination are supported by the record. *Id.* at 5-8. The City asserts that Fricke violated City policy by calling off sick when she was not sick and by failing to inform Captain Meyers that she would not be reporting to work on January 15<sup>th</sup>, regardless if she intended to lie, deceive or evade the rules. *Id.* Additionally, the City argues that it has been clear regarding the zero tolerance policy it has in place for false reports or statements by employees. *Id.* The City further notes that Fricke's failure to properly notify her supervisor that she would not be reporting for duty undermines her truthfulness, as well as her reliability to the community and her co-workers. *Id.* The City concludes that Fricke violated numerous rules and policy, and therefore, her termination was justified. *Id.* at &. The City also asserts that Fricke's confusion over the proper way to handle the situation at hand is no excuse for her actions because Fricke could have called dispatch or her supervisor and explained the situation, which she chose not to do. *Id.*

The City contends that Fricke was absent without leave because, by failing to provide a medical certification, she did not obtain the requisite permission for her leave. *Id.* Without the proper leave, Fricke was absent without leave. *Id.*

Fricke counters that her termination was improper because the City failed to prove that she lied or defrauded the City. *Reply Brief of Appellant* at pg. 1. Fricke asserts that the City also failed to consider all

of the relevant facts, including mitigating factors, surrounding her conduct. *Id.* Fricke argues that to determine she was intentionally evasive or deceptive requires this Court to ignore the circumstances that surrounded her termination. *Id.* at 3.

#### **B. Unemployment Compensation Review Commission**

Collateral to Fricke's challenge to her dismissal was Fricke's attempt to receive unemployment benefits. Fricke filed an application for benefits and on June 9, 2010 a redetermination was issued by ODJFS finding that Fricke had been terminated by the City without just cause. *Tr. of Rec. Ex. 12 (2011-CV-00565), Decision of the Hearing Officer.* The City appealed the redetermination and on June 22, 2010 the case was transferred to the Commission for review. *Id.* On October 21 and November 5, 2010, Fricke's case was heard by Hearing Officer Dina R. Toyzan and testimony was provided by Chief Redden, Captain Meyers and Fricke. *Id.* The majority of the testimony was duplicative of the testimony provided by the named witnesses before the Board in terms of the salient facts: Fricke was late for roll call, Fricke had a conversation with Captain Meyers regarding the EDO trade that ended with Fricke stating she would be in as soon as possible, Fricke subsequently called dispatch and reported off sick, Fricke failed to notify Captain Meyers that she would not be reporting for duty, on January 18<sup>th</sup> Fricke admits to Captain Meyers that she was not sick, but could not obtain childcare. *See id* (reciting facts produced at the hearing). Of particular importance to the resolution of Fricke's appeal from the Commission's determination is Chief Redden's testimony regarding his reasons for terminating Fricke, Chief Redden testified as follows<sup>8</sup>:

Hearing Officer: Did you find that Ms. Fricke had falsified statements to her department supervisors?

Chief Redden: That is correct.

Hearing Officer: Why is that a big deal in the fire department and the city of Dayton? Why do you fire somebody for cause for that?

Chief Redden: Number one we have a policy in place to address it. Number two we also have a directive that was put out by the former city manager to indicate anybody that falsified records would be terminated period. [A] lot of that was a result of individuals...claiming to be sick and were not sick. [I]n other departments there were individuals that...falsified all the time so the city manager [did] a memo to advise all department heads that this wouldn't be tolerated. Now as it relates directly to the fire department we operate on emergency services basis. If we do not know that our employee

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<sup>8</sup> For ease of use, the Court will omit words such as "uh" and "um" from the transcript testimony.

will be at work at a given time or...they were delayed and they give us an estimated time of arrival we can work around those type of situations, hold people over. We know exactly what we are, we will be able to do at any given moment the alarm should come in.

Hearing Officer: And if the employee is not truthful with you how does that affect your ability to staff and respond to the citizens needs?

Chief Redden: Well it compromises our position, greatly and, and a lot of individuals loose [sic] faith in an employees, coworkers loose [sic] faith in that employee because they are not reliable so if they are not reliable in a non-emergency situation how can you expect them to be reliable in an emergency situation.

*Comm'n Tr. 1 14:8-15:7.*

Fricke argued that the City lacked just cause to discharge her because she never implied that she was sick or falsified any documents. *Comm'n Tr. 2 16:8-12.*

The Commission reversed the ODJFS redetermination, finding that Fricke was terminated with just cause and was not eligible for unemployment benefits. *Tr. of Rec. Ex. 12.* The Commission found that Fricke "went along with personnel in the communications office and took sick leave for her shift after she had told a superior that she would be making it in to work as soon as possible. Worse yet, was that she did not then contact her supervisor to tell them that she would not be making it in to work after all." *Id.* Additionally, the Commission order Fricke to repay the unemployment benefits she received between May 8, 2010 and November 6, 2010, a total of \$10,101.00.

Fricke timely appealed the Commission decision to this Court. Fricke brought her appeal *pro se*, making arguments similar to those made in the 2010-CV-09574 appeal. Namely, Fricke contends that her termination was not appropriate because she never stated that she needed sick leave or was sick, but merely agreed to use sick leave to cover her absence. *Appellant's Brief* at pg. 21. Fricke also contends that she was not absent without leave since she was off on sick leave January 15<sup>th</sup>. *Id.* Fricke further argues that she did not mislead DFD by telling Captain Meyer that she would be in as soon as possible and then calling off sick because her intent was to be a work as soon as possible, but due to extenuating circumstances it became impossible for her to report for duty. *Id.* Fricke also argues that she should have been placed on emergency vacation. *Id.* at 22.

According to ODJFS, the Commission's decision that Fricke was terminated for just cause was not unlawful, unreasonable, or against the manifest weight of the evidence. *Brief of Appellee, Dir., Ohio Dept.*

of *Job & Family Serv.* at pg. 6. ODJFS contends that Fricke's absence on January 15<sup>th</sup> was contrary to department policy, which clearly defines sick leave as leave "for disabling illness or injury if all of an employees' injury leave has been used." *Id.* Moreover, ODJFS argues that Fricke's termination was justified because she failed to clarify the situation with Captain Meyers despite numerous opportunities to do so, leaving Captain Meyers to believe that Fricke would report for duty that day. *Id.* at 6-7. ODJFS asserts that, due to the nature of the emergency services provided by DFD, one of DFD's "strongest interests is in retaining reliable employees and establishing concrete, true reasons for work absences so that the department will be able to fully and competently respond to emergency situations." *Id.* ODJFS argues that Fricke's failure to follow established DFD policies undermined these interests and justified her termination because she "demonstrated an unreasonable disregard for [her] employer's best interest."<sup>9</sup> *Id.*

Additionally, ODJFS argues that Fricke's claim that she should have been placed on emergency vacation leave is not supported by the record. *Id.* at 8. ODJFS advances this argument by pointing out that Fricke's stance is based on the Cox letter, which is not part of the certified record. *Id.* ODJFS further argues that Fricke's confusion over what type of leave to use in "her own situation does not transform the department's unambiguous sick leave policy into an open-ended, catch-all category of leave." *Id.* Moreover, ODJFS asserts that the dispatcher did not suggest that Fricke take sick leave, as Fricke contends. *Id.* Rather, the dispatcher asked if Fricke wanted to be "put off on sick", to which Fricke responded "yes." *Id.* Either way, ODJFS contends that the dispatcher's words do not justify Fricke's failure to comply with DFD policy. *Id.* ODJFS concludes that Fricke engaged in misconduct, and therefore, there was just cause for her termination. *Id.*

## II. Law and Analysis

### A. Civil Service Board

#### 1. Standard of Review – O.R.C. §§ 119.12 & 124.34

Pursuant to O.R.C. § 124.34(B), a civil service employee who is discharged for disciplinary reasons can appeal the civil service commission's decision to the common pleas court of the county in which the commission sits under O.R.C. § 119.12. When reviewing an appeal brought under O.R.C. § 119.12, the trial court applies the following standard of review:

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<sup>9</sup> ODJFS relies on *Kiikka v. Ohio Bur. Of Emp. Services* (1985), 21 Ohio App.3d 168, 169 for support of this position. 13

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law.

*See also Thurman v. Ohio Dept. of Insurance*, Greene App. No. 2008-CA-81, 2009-Ohio-5034, ¶10. On appeal, the trial court must decide if the administrative body's decision was "supported by reliable, probative, and substantial evidence and in accordance with law." *Spitznagel v. State Bd. of Edn.* (2010), 126 Ohio St.3d 174, 2010-Ohio-2715, 931 N.E.2d 1061, ¶14 (quoting O.R.C. § 119.12).

The Ohio Supreme Court has defined reliable, probative and substantial evidence as: "(1) 'Reliable' evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) 'Probative' evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) 'Substantial' evidence is evidence with some weight; it must have importance and value." *Bartchy v. State Bd. of Edn.* (2008), 120 Ohio St.3d 205, 2008-Ohio-4826, 897 N.E.2d 1096, ¶39 (quoting *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St. 3d 570, 571, 589 N.E.2d 1303).

O.R.C. § 119.12 requires the trial court to make two inquiries: "a hybrid factual/legal inquiry and a purely legal inquiry." *Id.* at ¶37. When conducting the first inquiry, the trial court gives "deference to the agency's resolution of evidentiary conflicts, but 'the findings of the agency are by no means conclusive.'" *Id.* (citing *Ohio Historical Soc. V. State Emp. Relations Bd.* (1993), 66 Ohio St.3d 466, 470-471, 1993-Ohio-182, 613 N.E.2d 591). If, when appraising the evidence, the trial court determines that legally significant reasons exist for discrediting certain evidence that the administrative body relied on when making its determination, "the court may reverse, vacate or modify the administrative order." *Id.* Accordingly, reviewing courts are to presume that the agency's findings are correct unless the findings are "internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable." *Id.* Essentially, the trial court should not upset the agency's determination unless evidence that the agency relied in making its decision can be discredited. In the second step of the inquiry, the trial court must construe the law on its own. *Id.*

## 2. Analysis

Here, the Court finds that the Board's decision was supported by reliable, probative and substantial evidence, and that there is no legally significant reason to discredit the evidence relied on by the Board. The Board found that Fricke was absent without leave because her absence was unauthorized and was wrongfully attributed to being sick, an impression she helped create. *Tr. of Rec. Ex. 8 (10-CV-09574)*. Therefore, the Board found that Fricke "never had proper leave to cover the absence." *Id.* The evidence relied upon by the Board to reach this conclusion, with the exception of a single reference to Captain Meyers' testimony, came from Fricke's own testimony before the Board. Specifically, the Board noted that Fricke assented to being placed on sick leave when she was not sick. *Id.* (citing *Bd. Tr.* 54). The Board was skeptical of Fricke's assertion that she was not sure how to handle the situation she faced, but then never attempted to gain clarification from anyone at DFD. *Id.* (citing *Bd. Tr.* 64). Moreover, the Board was highly critical of Fricke's conduct after she called off sick to dispatch. *Id.* Namely, Fricke's statement "that she thought that the standard procedure in this type of case was to go on sick leave and 'it gets corrected.'" *Id.* (citing *Bd. Tr.* 77). But, the Board noted that Fricke "did little to correct the record." *Id.* Instead, the Board found that Fricke's "recollection of her whereabouts and her failure to answer the telephone on the day in question leave substantial doubt as to her interest in having the facts emerge." *Id.* All of these conclusions were based on the Board's opinion of Fricke's own testimony.

Beyond the evidence cited to by the Board, the record contains reliable, probative and substantial evidence to support the Board's decision. Captain Meyers testified that Fricke never expressed to him any childcare or health issues. In fact, as far as Captain Meyers knew, Fricke was late for work due to a mix-up regarding EDOs and was on her way in. Additionally, Captain Meyers attempted to contact Fricke numerous times on January 15<sup>th</sup> to no avail.

Chief Redden testified that, in his opinion, Fricke knew she was calling off sick when she was not sick. Additionally, Chief Redden testified that Fricke had falsified City records by requesting sick leave when she was not sick and by telling the dispatcher that her supervisor was aware of the situation, when Captain Meyers was only aware that Fricke was late for roll-call. As Chief Redden stated, Fricke "was truthful in the sense that she had talked to her supervisor, but the content of her conversation was not the same as reporting off sick." *Bd. Tr.* 26:22-25. Chief Redden also testified that Fricke violated DFD policy

by not contacting Captain Meyers by 5:00 P.M. on January 15<sup>th</sup> to provide her convalescent location and a status report regarding her ability to work the next duty day. Moreover, Fricke violated DFD policy by not providing a medical certification for her sick leave, which she was required to provide for having seven occurrences of sick leave within a twelve month period.

The Board clearly decided that Chief Redden's and Captain Meyers' testimony outweighed the evidence produced by Fricke, a factual determination to which this Court must give deference. Moreover, the evidence provided by Chief Redden and Captain Meyers is reliable, probative and substantial. The evidence goes to the issue in question and provides value. Fricke has not produced any evidence affecting the dependability of the evidence used by the Board, but argues that the evidence should be interpreted differently. The simple fact that the evidence was used by the Board to draw a conclusion adverse to Fricke's theory of the case does not make it unreliable.

Fricke argues that the Board's decision is based on an "unfair presumption" that she created a misunderstanding by assenting to being placed on sick leave. However, "unfair presumption" is not the standard for this Court to reverse the Board. Rather, the Board must have made an improper inference. In this case, the Board's conclusion that Fricke created a misunderstanding by assenting to being placed on sick leave is not improper. The Board heard evidence that Fricke was required to provide medical certification for *any* sick leave she requested due to the number of sick leave requests she had in the preceding twelve months. It follows that Fricke may not have known what type of leave to request, but should have been exceedingly cautious about requesting sick leave. The Board also heard Fricke repeatedly testify that she did not know what to do under the circumstances, yet Fricke never asked what to do nor tried to learn what the proper procedure was. Additionally, Fricke passed up numerous opportunities to explain her situation to Captain Meyers and figure out what she should do under the circumstances. It is abundantly clear from the hearing transcript and the Board's decision that the Board was highly critical of Fricke's failure to communicate with her supervisors and members of the DFD on January 15<sup>th</sup>. In light of those facts, the Court cannot say that the Board improperly inferred that Fricke aided in creating a misunderstanding regarding her absence.

The Court also finds that Fricke's argument regarding "emergency vacation" lacks merit. Fricke's own witness Captain Rose testified that the use of emergency vacation leave is frowned upon by DFD and is



reserved for true emergencies. While Fricke's situation may have constituted a true emergency, her own witness indicated that emergency vacation is not something one just calls in and requests, but requires a dialogue with the employee's supervisor and the district chief, a dialogue that Fricke failed to have on January 15<sup>th</sup> despite numerous attempts by Captain Meyers to reach her. Fricke never told anyone at the fire department that she had childcare issues related to her son's suspension on January 15<sup>th</sup>. How could Captain Meyers determine that Fricke needed emergency vacation when all she had told him was that she forgot she traded EDOs and believed January 15<sup>th</sup> was her day off? In fact, according to Fricke, she thought information regarding her son's suspension "was irrelevant" to her conversation with Captain Meyers and dispatch. *Bd. Tr.* 61:12-16; 62:21-25. Moreover, Fricke did not know emergency vacation leave existed on January 15<sup>th</sup>. Therefore, Fricke's numerous assertions that "[i]n hindsight" or "without the intrusions of everyday life" she would have been able to request the proper leave are unavailing.

Fricke's argument that the record lacks sufficient evidence to establish common law fraud is also unpersuasive. The City did not have to prove, and the Board did not have to find, that Fricke had committed common law fraud. Rather, the City had to prove and the Board had to find that Fricke was absent without leave, or that she engaged in conduct unbecoming of a public servant, or violated any statute, rule, ordinance, policy or regulation. In this case, the Board found that Fricke was absent without leave because her sick leave was unauthorized due to a false impression of illness that Fricke created. Additionally, the Board found that as a result of Fricke's call to dispatch public records were falsified, which constituted conduct unbecoming of a public servant. Neither of those charges or specifications require a showing of fraud.

As to Fricke's argument that the Board failed to properly consider the relevant evidence, including mitigating factors, the Court cannot engage in such an inquiry. The mitigating evidence Fricke has pointed to, including her son's suspension, forgetting the EDO trade, not being able to obtain childcare, and lack of knowledge regarding leave requests under the circumstances, were all presented to the Board. The Board's resolution of such evidentiary conflicts is given deference by this Court. The fact that the Board found the aggravating factors outweighed the mitigating factors is a determination that this Court cannot review absent a showing that some evidence the Board relied on lacks credibility. Fricke has not made such a showing.

Accordingly, the Court finds that the Board's decision to affirm Fricke's termination is supported by reliable, probative and substantial evidence. Furthermore, the Court has found no reason to doubt the

credibility of the evidence the Board relied on in making its decision. Therefore, the Board's decision is AFFIRMED.

## **B. Unemployment Compensation Review Commission**

### **1. Just Cause Termination – O.R.C. § 4141.29**

A discharged employee is eligible for unemployment benefits so long as the employee did not “quit work without just cause” or get “discharged for just cause....” *O.R.C. § 4141.29(D)(2)(a)*; *see also Tzangas, Plakas & Mannos v. Administrator, Ohio Bureau of Employment Servs.* (1995), 73 Ohio St.3d 694, 697, 195-Ohio-206, 653 N.E.2d 1207. Under O.R.C. § 4141 *et seq* the claimant has the burden of proving entitlement to unemployment compensation benefits, including the issue of just cause. *Irvine v Unemp. Comp. Bd. of Review* (1985), 19 Ohio St.3d 15, 16, 482 N.E.2d 587. Just cause is defined as “that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act.” *Id.* at 17. In the unemployment compensation context, just cause determinations “must be consistent with the legislative purpose underlying the Unemployment Compensation Act.” *Id.* The Act was designed to aid an individual who had worked, was able and willing to work, but became involuntarily unemployed through no fault of his or her own. *Id.* However, the Act is not designed to protect employees from their own actions, but to protect employees from economic forces out of their control. *Tzangas*, 73 Ohio St.3d at 697. When the individual is at fault, he or she is no longer the victim of circumstance, but is responsible for his or her own predicament. *Id.* at 698. Because fault removes the employee from the Act's protection, fault is an essential element of a just cause termination. *Id.* Determining whether just cause exists in any particular case turns on the unique factual considerations present, not on a rigid definition of fault. *Id.*

### **2. Standard of Review – O.R.C. § 4141.282**

The standard of review for courts in unemployment compensation appeals is limited. *Silkert v. Ohio Dept. of Job and Family Servs.*, Montgomery App. No. 22936, 184 Ohio App.3d 78, 2009-Ohio-4399, 919 N.E.2d 783, ¶26 (citing *Giles v. F & P Am. Mfg, Inc.*, Miami App. No. 2004-CA-36, 2005-Ohio-4833, at ¶13). O.R.C. § 4141.282(H) applies to any court reviewing a decision of the Unemployment Commission and states:

The court shall hear the appeal on the certified record provided by the commission. If the court finds that the decision of the commission was unlawful, unreasonable, or against the

manifest weight of the evidence, it shall reverse, vacate, or modify the decision, or remand the matter to the commission. Otherwise, the court shall affirm the decision of the commission.

*See also Irvine*, 19 Ohio St.3d at 17-18; *Tzangas*, 73 Ohio St.3d at 696; *Silkert*, 2009-Ohio-4399 at ¶26. Manifest weight of the evidence is defined as “some competent, credible evidence going to all the essential elements of the case.” *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus. It follows, that the agency’s role as factfinder is intact and the Commission’s just cause determination can only be reversed on appeal if it is unlawful, unreasonable or against the manifest weight of the evidence. *Tzangas*, 73 Ohio St.3d at 697. “All reviewing courts, including common pleas, courts of appeal, and the Supreme Court of Ohio, have the same review power and cannot make factual findings or determine witness credibility.” *Silkert*, 2009-Ohio-4399, ¶26. Rather, the duty of the reviewing court is to determine if the agency’s decision is supported by the record. *Id.* The fact that reasonable minds might reach different conclusions under the factual circumstances presented by a particular case is not a basis for reversing the agency’s determination. *Id.* Moreover, the statutory scheme is designed to leave the agency’s determination intact on close questions; if the Commission could have gone either way the courts have no authority to upset the agency’s determination. *Id.*

### 3. Analysis

Here, the Commission’s decision was supported by some competent, credible evidence going to the essential elements of the case. The essential element in this case is whether Fricke was at fault, which would be a justifiable reason to discharge her, i.e. there was just cause for Fricke’s termination. The hearing officer found that Fricke “was terminated for falsely stating that she needed sick leave on January 15, 2010” and “violating numerous policies...including the policy regarding ‘absence without leave.’” *Tr. of Rec. Ex. 12* (2011-CV-00565). The hearing officer determined that Fricke’s actions on January 15<sup>th</sup> constituted “misconduct on her part”, which meant the City had just cause to terminate her in connection with work. *Id.* According to the hearing officer, Fricke was at fault for going “along with personnel in the communications office and [taking] sick leave...after [telling] a supervisor that she would be making it in to work as soon as possible. Worse yet, was that she did not then contact her supervisor to tell them that she would not be making it in to work after all.” *Id.* The hearing officer concluded that the City “provided sufficient

evidence" that Fricke was at fault and found that her discharge was with just cause. *Id.* The hearing officer's conclusions are supported by some competent, credible evidence. Namely, Chief Redden testified regarding the City's policy on falsification and why he strictly enforces the policy in light of the DFDs role in providing emergency services. Additionally, the hearing officer heard testimony that Captain Meyers attempted to contact Fricke several times on January 15<sup>th</sup> to no avail, despite leaving messages at multiple telephone numbers. *Comm'n Tr. 1 22:14-23:3*. Moreover, the hearing officer was able to listen to the taped phone conversation between Fricke and dispatch, and draw her own conclusions regarding Fricke's conduct.

The hearing officer also heard testimony from Chief Redden regarding the impact on the work environment when a member of the DFD calls off sick when he or she is not sick. Chief Redden noted that such conduct compromises the DFD's position because co-workers lose faith in the other employee. Specifically, Chief Redden stated "if [the employee is] not reliable in a non-emergency situation how can you expect them to be reliable in an emergency situation." Chief Redden also testified that the falsification memo promulgated by the City was directly in response to employees calling off sick when they were not sick. It follows that the record supports the Commission's decision that Fricke was terminated for just cause.

To be sure, the evidence used to support the Commission's decision could be interpreted differently and be used to reach another conclusion, but such a determination requires weighing witness testimony and credibility and making factual findings. The case law is clear that the reviewing court cannot engage in such a review because the agency occupies the role of factfinder, not the reviewing court. Moreover, the case law instructs that when there is a close call, such as the case here, the reviewing court has no authority to upset the agency's decision. While reasonable minds could have reached different conclusions in this matter, that is not enough for this Court to overturn the agency's determination that Fricke was terminated for just cause, and therefore, not eligible for unemployment benefits. The Court grasps the gravity of the situation, but just because the agency's decision has drastic results is not grounds for this Court grant a reversal. Accordingly, the decision of the Commission is AFFIRMED.

### **III. Conclusion**

While the Court may have reached a different decision under the facts presented, it is not the Court's role to replace the judgment of the administrative agency with that of its own. Rather, the Court's role is to determine if the administrative agency's decision survives scrutiny under the applicable standard of review.

In this case, the Court finds that the Board's decision was supported by reliable, probative and substantial evidence. Additionally, the Court finds that the Commission's just cause determination was not unlawful, unreasonable or against the manifest weight of the evidence. Accordingly, the decisions of both administrative bodies are AFFIRMED.

Additionally, the Court GRANTS ODJFS's motion to strike and orders that the letter from James E. Cox, President of Dayton Fire Fighters' Local 136, the written transcript of Fricke's hearing before Chief Redden dated March 31, 2010, and Exhibit A, an order on appeal issued by the Board, attached to the City's brief in case 2011-CV-00565 be stricken from the record.

**THIS IS A FINAL APPEALABLE ORDER PURSUANT TO CIV.R. 58 AND APP. R. 4, THE PARTIES HAVE 30 DAYS TO APPEAL.**

SO ORDERED

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JUDGE MARY WISEMAN

**To the Clerk of Courts:**

**Please forward a copy of this Decision to each and every party in the instant case pursuant to Civ. R. 58(B):**

This document is electronically filed by using the Clerk of Courts e-Filing system. The system will post a record of the filing to the e-Filing account "Notifications" tab of the following case participants:

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**Case Title:** MELISSA Y FRICKE vs OHIO DEPARTMENT OF JOB  
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**Case Number:** 2011 CV 00565  
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So Ordered

Mary Wiseman