COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

Jeffrey Burroughs	:	
Appellant,	:	CASE NO. 11CVF-05-5950
-vs-	:	**JUDGE SERROTT**
Ohio State Department of Administrative Services,	:	
Appellee.	:	

DECISION AND JUDGMENT ENTRY AND NOTICE OF FINAL APPEALABLE ORDER

Rendered this 24th day of May, 2012.

SERROTT, J.

I. Introduction

This case involves Appellant's R.C. 119.12 appeal of the decision of the Ohio Department of Administrative Services, Appellee, order terminating Appellant's disability leave benefits and seeking recovery of benefits paid to Appellant. Appellee assigned a hearing officer and afforded Appellant a due process hearing which resulted in the adverse decision to Appellant. Appellant timely filed an appeal and the matter has been fully briefed. For the reasons that follow the Court AFFIRMS in part and REVERSES in part the decision and order of the Department.

II. STANDARD OF REVIEW

The proper standard of review for a common pleas court reviewing an administrative agency decision is a hybrid inquiry that requires the court to consider whether the agency's order is supported by "reliable, probative and substantial evidence" and whether it is in accordance with law. R.C. 119.12. Ohio Historical Society. v. State Employment Relations Board, 66 Ohio St.3d 466, 471 (1993). The Ohio Supreme Court has interpreted this language to mean that a reviewing court must construe the law on its

own; that is, it "is obligated to determine whether the agency's decision is "in accordance with law." Id. The Supreme Court has further expressed that:

> [a]n agency adjudication is like a trial, and while the reviewing court must defer to the lower tribunal's finding of facts, it must construe the law on its own. To the extent that an agency's decision is based on construction of the state or federal Constitution, a statute, or case law, the common pleas court must undertake its R.C. 119.12 reviewing task completely independently.

This Court must affirm the orders of an administrative agency if the orders are supported by substantial, reliable, and probative evidence. (R.C. §119.12 and Our Place Inc. v. Ohio liquor Comm. 63 Ohio St.3d 570 (1992)). Evidence is substantial, reliable, and probative if the evidence has weight, is dependable, and if it tends to prove the issue in question. (See Our Place, Id. at 63 Ohio St.2d 571). The Court must defer to the agency on issues of credibility of witnesses and on issues of evidentiary conflicts. (See University of Cincinnati v. Conrad, 63 Ohio St.2d 108, 111 (1980)). The Court must also defer to the agency with respect to its interpretation of its rules. (Frish's Restaurants, Inc. v. Ryan, Administrator Bureau of Workers' Compensation 121 Ohio St.3d 18, 2009-Ohio-2, ¶16).

III. FACTS

The Appellant was an Ohio State Trooper who applied for disability leave pay. The Appellant filled out an application on June 29, 2010 affirming that he had not "engaged in any occupation for wage or profit since the onset of (your) disability." (TR.15) Disability benefits were approved and paid to Appellant beginning June 25, 2010 to September 29, 2010. (TR.7). Appellant's "onset" of disability was June 11, 2010. (TR.15). Appellant later in the fall of 2010 sought permanent disability retirement benefits.

In completing the application for permanent disability benefits, Appellant stated he had worked part-time at outside employment as an instructor at Columbus State and the Delaware Career Center from June, 2006 through current and February, 2004 through current respectively. (R. 79-85). Because of the discrepancy between the two applications, Appellee conducted an investigation. The investigation established Appellant received a paycheck from Columbus State for teaching work for hours performed from June 30, 2010 to July 15, 2010 and from June 15, 2010 to June 30, 2010. (See report p. 13 where the

document was scanned into the report. The document also establishes he was paid in May 2010 and in June 2010). Appellant also was paid for 10-14 hours of teaching at the Delaware Career Center in July, 2010. (TR.18). However, this time period was after he signed the application on June 29, 2010. (TR.18). However, Appellant admitted that when he signed the application he knew he would likely continue teaching at Columbus State and filling in teaching at Delaware. (TR.32 lines 9-21). He also admitted he was not sure what dates he worked at Columbus State but acknowledged that the payroll records were correct as far as being paid the checks and the dates the checks were issued. (TR. 30, lines 8-18, 31-32).

Appellant testified that when he filled out the disability application at issue he believed the pertinent "work" question only pertained to Highway Patrol work. (TR. 27 lines 18-25.) He testified that he had no intent to misrepresent or deceive anyone. (TR. 26 lines 13-24.) His testimony was corroborated by the fact he "self-reported" the other employment as soon as he learned he was not supposed to be doing any work. (TR. 13, lines 8-18, 26, lines 17-24, 38, lines 16-25). The testimony also established that Appellee did not have a policy or form which explicitly tells applicants for disability that they are not allowed to perform any work. (Tr. 13 lines 15-23).

As a result of the investigation, Appellee terminated Appellant's benefits and sought repayment of the sums paid Appellant. A Hearing Officer conducted a hearing and took testimony from the agency representative, from Appellant, and admitted exhibits. The salient testimony has been set forth supra in this decision.

After hearing the testimony, the Hearing Officer in her report concluded the Appellant did work in an "occupation" for wage or profit after the onset of disability and that as a result his answer to the pertinent question constituted an act of "fraud or misrepresentation" involving his disability claim. (See Report, Conclusions of Law). The Appellant has timely filed this appeal.

IV. LEGAL ANALYSIS

First, the Appellant claims the agency's decision to terminate his benefits due to "fraud or misrepresentation" is not supported by substantial, probative, and reliable evidence and is contrary to law.

The Appellant does not dispute the agency's statutory right and power to promulgate regulations governing the qualifications and limitations on disability leave applications. (See R.C. §124.385(B)). Instead, Appellant argues that the Hearing Officer failed to require any "mens rea" element in the regulation and ignored all the evidence that he simply made a mistake or misunderstood the question rather than engaging in any intent to deceive or defraud the agency. The pertinent portions of the regulation at issue in the first claimed error is O.A.C. §123:1-33-11, which provides the following verbatim:

> **(A) An employee's benefits will be terminated if the employee:**
>
> * * *
>
> **(2) Engages in any act of fraud or misrepresentation involving the disability claim.**

The term misrepresentation and fraud are not defined but have specific legal meanings based upon the development of the law through prior cases. Appellant argues that "fraud and misrepresentation" requires a knowing misstatement with an intent to mislead. (Brief, p. 12). Appellant relies and cites to the case of Republic Bank v. Conner, 9th Dist. No. 25028, 2010-Ohio-5212, ¶25 (quoting Burr v. Stark Cty. Bd. of Commr's, 23 Ohio St.3d 69, paragraph two of the syllabus (1986)). The Appellee does not really dispute Appellant's interpretation when it claims that fraud or misrepresentation means "to represent falsely or unfairly," relying on a dictionary definition. (Appellee's Brief, p. 13).

The Court believes fraud or misrepresentation does require a knowingly false statement with some intent to mislead or deceive. In the case at bar, there is no substantial, reliable, or probative evidence that Appellant engaged in a knowing "fraud or misrepresentation" with regard to his application for disability benefits. First, the evidence establishes that Appellant "self-reported" the error once he became aware that he was not permitted to work anywhere while receiving disability. This action is not the action of a person intending to deceive or mislead the agency in order to receive benefits. Appellant discontinued all work once he discovered he could perform no work. Moreover, the agency itself did not explicitly inform applicants that they were not permitted to perform any work. As a law enforcement officer with an unblemished record it would make no

sense for Appellant to knowingly mislead or lie about the minimal part-time teaching work he performed. It is not unreasonable to believe that Appellant honestly believed the question and term "occupation" solely related to his full time "occupation" as a trooper. Importantly, the Hearing Officer did not find that Appellant lacked credibility or that she disbelieved his testimony that he had made a mistake in interpreting the question.

The record contains no evidence of any knowing intent of the Appellant to deceive or mislead the agency. The Agency had no evidence to rebut or overcome Appellant's testimony that it was a simple mistake. The agency had the burden to prove the statement was made with an intent to deceive. The agency offered no such proof. Thus, the decision of the agency with respect to this issue was not supported by substantial, reliable, or probative evidence. Finally, to the extent the hearing officer's decision failed to require a knowing misstatement or failed to require an intent to deceive or mislead, that decision is contrary to law. See Conner and Burr, supra.

Next, Appellant claims that the agency's decision to terminate and recoup the benefits paid based upon O.A.C. § 123:1-33-11(A)(2) was not supported by the requisite standard of proof and was contrary to law. The pertinent portion of the regulation at issue in this claimed error is set forth verbatim below:

> **(A) An employee's benefits will be terminated if the employee:**
>
> *** * ***
>
> **(2) Engages in any occupation for wage or profit except as provided in rule * * * .**

Both parties agree that the exception set forth in (A)(2) has no application to this case. The parties disagree however as to the interpretation of the term "occupation" and disagree as to when the disqualification occurs. A review of the language used indicates that the use of the words "an employee's benefits will be terminated if * * *" clearly indicates you are not permitted to engage in any occupation for wage or profit once you are being paid benefits. Thus, the triggering event is that, once an employee is being paid, he or she is not entitled to engage in any occupation for wage or profit. Here, the Appellant was paid from the onset of his disability, June 11, 2010, and also on June 29, 2010

answered the question on the application which asked if he had "engaged in any occupation for wage or profit since the onset of your disability?' The onset of disability was June 11, 2010, and therefore, the issue in this appeal is whether the Appellant engaged in "any occupation for wage or profit" after June 11, 2010.

Appellant makes a number of arguments that the regulation and question are really only applicable if you earn more than a de minimis amount and that occupation requires that the renumeration be more than a "pittance." (Appellant's Brief, p. 16). However, Appellant's arguments would require this Court to judicially "rewrite" the regulation at issue. The regulation states that a person cannot engage in any occupation for wage or profit. The term profit is even broader than the term wages and the use of the word any clearly indicates any work in any "occupation" is prohibited. Performing "work" for a neighbor or receiving gifts for chores performed would not constitute engaging in an occupation. However, no one, not even Appellant, can seriously claim that teaching at a college or instructing other troopers or students is not an occupation.

Implicit in the Appellant's arguments is the concept that he had to know that "occupation" meant something other than his work as a trooper, or that it meant working full time or part time for significant income. However, the regulation contains no such limitations. The agency, through the Hearing Examiner, obviously broadly interprets the regulation to prohibit any employee from working in any "occupation" for any renumeration. Indeed, the term wages or profit are expansive terms. Profit would obviously simply include being paid any amount for the work. The Court must defer to the agency's interpretation of its own rules and regulations. Frisch's Restaurants v. Ryan, Administrator, 121 Ohio St.3d 18, 2009-Ohio-2, ¶16.

Moreover, the Franklin County Court of Appeals has broadly interpreted the regulation at issue. Settlemire v. O.D.A.S., 10th Dist. No. 00AP-440 (Oct. 31, 2000). In the Settlemire case, the employer was a secretary with O.D.A.S. and applied for disability due to depression and stress. Her application was approved and she received benefits. The agency terminated her benefits because it discovered she was working part time at a restaurant for a total of eight days for four hours a day. The only evidence in the record of her actual earnings was that she was paid $20.92. The agency claimed she earned $2,000.00, but the appellate court noted "there is presently no evidence in the record to

support this allegation. Thus, the court concluded that Mrs. Settlemire was disqualified from all benefits from the date she began working at the restaurant. The Court did remand the case for the issue of whether Settlemire had permission to work at the restaurant or whether "the rehabilitation" exception applied.[1] But, the case clearly holds that this de-minimis work constituted a disqualification of her benefits.

In the case at bar, Appellant undisputedly worked ten to fourteen hours while receiving disability and received Columbus State paychecks for working time periods after June 11, 2010. Appellant complains that there is no affirmative proof he "actually worked" those time periods contained in the Columbus State pay roll records. However, the records themselves are direct and circumstantial proof he did perform work during this time period. He was paid every two weeks and would not be paid for work he did not perform. Contrary to Appellant's assertions otherwise, Appellant did not deny he worked during the paycheck time period. Instead, he said he could not remember the exact dates that he worked at Columbus Sate. The record was held open at his request for further proof to be submitted that he did not actually work those dates or to prove the paychecks were for work performed before June 11, 2010. Appellant offered no further proof. The Hearing Officer was free to rely on the records as "substantial, reliable probative evidence that Appellant worked during the time periods reflected in the checks which included June and July, 2010. Finally, the Appellant does not dispute that he performed work at the Delaware Career Center after the onset of his disability.

Thus, the Hearing Officer's determination that the Appellant engaged in an "occupation" for wage or profit after he began receiving benefits is fully supported by the requisite proof in the record. This Court believes the result in this case is unfair given the end result and the minimal work the Appellant performed. The Court does not believe the Appellant at any time intended to deceive, mislead, or defraud the agency. However, the rule at issue does not require any such mens rea culpability. The rule prohibits any work in any occupation for wag or profit without regard to motive. The Appellant did perform work for profit in a teaching "occupation" and thus was disqualified from benefits and must repay the benefits. The result is unfair, but this Court must apply the law and the rule as

[1] Settlemire's doctor testified her restaurant work was "therapy" in an effort to rehabilitate her to return to her secretarial job.

written.[2] Any change in the law to lead to a more just result must come from either a rule change or a statutory change. The Court believes the result in this case is compelled by the law.

Therefore, based upon the foregoing, the decision and order of the agency is REVERSED, in part, and AFFIRMED, in part. The net result is that the Appellant is disqualified from the benefits and is required to repay the benefits paid.

Pursuant to Civ. 58(B), the Clerk of Courts is hereby directed to serve upon all parties notice and the date of this judgment

IT IS SO ORDERED.

COPIES TO:

Tony C. Merry
Counsel for Appellant

Catherine J. Calko
Counsel for Appellee

[2] The Court is certain that the trooper in the enforcement of his duties applied the "letter of the law" in issuing citations even if he did not always agree with the law.

Franklin County Court of Common Pleas

Date: 05-25-2012

Case Title: JEFFREY BURROUGHS -VS- OHIO STATE DEPARTMENT ADMINISTRATIVE SERVICE

Case Number: 11CV005950

Type: DECISION/ENTRY

It Is So Ordered.

/s/ Judge Mark Serrott

Court Disposition

Case Number: 11CV005950

Case Style: JEFFREY BURROUGHS -VS- OHIO STATE DEPARTMENT ADMINISTRATIVE SERVICE

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 11CV0059502012-05-0899980000
   Document Title: 05-08-2012-MOTION
   Disposition: MOTION IS MOOT