STATE OF OHIO, WARREN COUNTY
COMMON PLEAS COURT
GENERAL DIVISION

JOHN E. PORINSKY	:	
		CASE NO. 11CV80512
Plaintiff,	:	
Vs.	:	**DECISION AND ENTRY OVERRULING OBJECTION TO MAGISTRATE'S DECISION**
HARRIS CORPORATION, et al.	:	
Defendants,		

The Magistrate in his decision filed April18, 2012 recommends that this Court uphold the decision of the Ohio Unemployment Compensation Review Commission finding that the plaintiff was terminated for cause and therefore not entitled to participate in unemployment compensation benefits. The Magistrate's findings of facts are hereby incorporated by reference herein and adopted. The defendant was formerly represented by counsel who was permitted to withdraw. The plaintiff filed his pro se objection May 02. 2012. He did not file a transcript of the proceedings but as this matter was decided as an administrative appeal by the Magistrate, there was no testimony provided to the Magistrate. While plaintiff complains about the lack of ability to subpoena witnesses to the hearing before the Magistrate, the unemployment compensation system provides

for informal telephonic hearings so as to minimize expense and travel time to both the employee and employer.

Next, the plaintiff complains that the employer, Harris, failed to follow mandatory progressive disciplinary procedure. The Magistrate correctly determined that the hearing officer nonetheless correctly determined that this employee sold a piece of company equipment without authorization. The employer reserved the right to proceed directly to termination of employment if it found that the violation of rules were severe enough. Therefore, the Magistrate correctly determined that the employer was not mandated to follow progressive discipline under the facts presented here.

Next, the plaintiff claims that he was providing a service to his employer and had been given an award and paid a bonus. This certainly contradicts the decision by the company to terminate him. Even if true, it does not preclude the employer in an at will state such as Ohio from terminating the plaintiff here. Finally, as a catchall objection, plaintiff references the Magistrate's finding that the hearing officer's written decision contains some errors, which do not affect the validity of the termination process. In effect, the plaintiff asks this Court to substitute its judgment for that of the hearing officer. The Administrative procedure for getting unemployment benefits concludes this Court from do so. The Magistrate applied the correct test and recognized that the Court can only reverse, vacate, modify or remand the matter to the commission when it finds that the decision of the commission was "unlawful, unreasonable or against the manifest weight of the evidence". The Court here does not

weigh the credibility of the witnesses nor is it free to substitute its own judgment for that of the hearing officer as to factual determinations. The decision of the Magistrate is affirmed and adopted as the final decision of this Court.

Counsel for the Attorney General on behalf of the ODJFS shall provide the appropriate judgment entry within 30 days of the filing of this decision.

IT IS SO ORDERED.

J. Flannery

JUDGE JAMES L. FLANNERY

c: John E. Porinsky, Plaintiff
Robin A. Jarvis, Esq.
Andrew M. Kaplan, Esq.
Magistrate Andrew Hasselbach

IN THE COURT OF COMMON PLEAS
COUNTY OF WARREN, STATE OF OHIO

JOHN E. PORINSKY,	)	
	)	
Appellant,	)	**CASE NO. 11CV80512**
	)	
-vs-	)	
	)	
HARRIS CORPORATION, et al.,	)	
	)	**MAGISTRATE'S DECISION**
	)	
Appellees.	)	

John E. Porinsky brings the above-referenced administrative appeal of a decision of an Ohio Unemployment Compensation Review Commission hearing officer dated June 7, 2011, and a decision of the UCRC dated August 11, 2011 disallowing further review. The UCRC determined that Appellant had been terminated from employment from Appellee Harris Corporation for just cause, and that Appellant had been paid $6,499.00 in benefits to which he was not entitled.

I. PROCEDURAL POSTURE

Appellant was separated from his employment with Harris November 16, 2010 and applied for unemployment compensation benefits December 9, 2010. The Ohio Department of Job and Family Services determined that Appellant was discharged without just cause and allowed benefits on January 5, 2011.

On January 26, 2011, Harris appealed that determination. On February 24, 2011, ODJFS issued a redetermination, affirming its initial determination. On March 21, 2011, Harris appealed the redetermination and on March 25, 2011, ODJFS transferred this matter to the UCRC.

On June 1, 2011 a telephonic hearing was held before an UCRC hearing officer. On June 7, 2011, the hearing officer issued a decision finding that Appellant's employment had

been terminated for just cause, thus making him ineligible for benefits, and finding that Appellant had been paid $6,499.00 in benefits to which he was not entitled.

On June 28, 2011, Appellant sought further review, which was disallowed by the UCRC by decision dated August 11, 2011.

Appellant filed a timely notice of appeal to this Court September 12, 2011.

II. THE RECORD ON APPEAL

On December 23, 2010, in response to Appellant's application for benefits, Harris' representative sent the following statement concerning Appellant's discharge to ODJFS:

> This is in response to form JFS-8200, Request to Employer for Separation Information, dated December 10, 2010 with an effective date of December 5, 2010. In view of the following, we request a determination on the claimant's eligibility.
>
> First Day: 01/05/2004 Last Day: 11/15/2010
> The claimant was discharged for violation of a reasonable and known policy. Discipline prior to dismissal: On April 21, 2010, Mr. Porinsky was issued a written warning for frequently using company computers during working hours to transact personal business on the Internet (eBay and Craig's List). Mr. Porinsky admitted to accessing e-Bay and Craig's List during the work day. The company's Internet and Computer Resource Use policy specifically states, Harris Internet and computer resources cannot be used for an employee's own business purposes. The warning advised that evidence of continued misuse of the company's computer systems or computer equipment would be grounds for further discipline up to and including termination.
>
> Final Incident: Mr. Porinsky listed a piece of company owned equipment for sale on his personal eBay account (price listed at $1,399.99). Mr. Porinsky did not purchase this equipment from Harris, nor did Harris request he try to sell it on behalf of the company. When questioned by the H.R. Manager on November 10, 2010, Mr. Porinsky acknowledged that he did not purchase

the equipment from Harris nor was he requested to dispose of this item by Harris.

On November 15, 2010, Mr. Porinksy was advised his employment was being terminated immediately due to improper handling of company equipment. Discharged by Kim Ratcliffe, "Human Resources Generalist."

Attached to this letter was a Harris "Job Performance Counseling Form" signed by Appellant on April 22, 2010, outlining the April incident referenced in the letter. It states:

Reason for Counseling: (Describe specific problem, dates, etc; and the business impact of the problem)

A co-worker reported to HR that you were using Harris' computer system and equipment, during working hours, to transact sales of items on e-Bay and Craig's list, and that some Harris parts are listed on your e-Bay offerings. HR turned this matter over to the Mason BSA. As a result of an audit of your computer use during work hours, it was confirmed that not only have you been frequenting both sites during work hours, but also that you have shipped items sold on e-Bay using the Harris Fed-Ex account number.

On April 21, 2010 HR and the Mason BSA met with you to discuss these allegations and you acknowledged accessing e-Bay and Craig's list during the work day and that you have shipped items you sold via these sites using the Harris Fed Ex account number. You stated that allowing employees to ship packages via Fed-Ex using the company's account number has been common practice in Quincy and Mason, providing that employees reimburse Harris for the actual related charges, which you have done for those items you shipped. As for the allegation of Harris parts being offered for sale under your e-Bay address, you have stated that you acquired these parts legitimately via auction.
Corrective Action Required: (What employee needs to do to avoid future problems)

> Per Harris policy G-28, you must cease using Harris computer systems and equipment for conducting non-Harris related business transactions. Also, you are to immediately stop using the Harris Corporation account and related resources to ship items sold in your non-Harris related business ventures.
>
> Consequences and Follow-Up: (Include dates for follow-up and review)
>
> Evidence of continued misuse of Harris computer systems, computer equipment, or shipping resources will be grounds for further disciplinary action up to and including termination of employment.

It is unclear from the record what is "Harris policy G-28;" however, also accompanying the December 23, 2010 letter is a copy of Harris' "Standards of Business Conduct," page 25 of which, headed "IV EMPLOYEE RESPONSIBILITIES Proper Use of Company, Customer, and Supplier Resources," states:

> Every employee is responsible for safeguarding Harris property, plant equipment, and other assets, as well as any equipment, property, or information that has been furnished by customers or suppliers.
>
> Company resources are to be used consistent with Harris' policies and procedures. Abusive, unreasonable, or other inappropriate uses of Company resources are prohibited. These resources include Company time, material, equipment, information and electronic communication/mail systems.

In response to ODJFS's initial determination, Harris' representative sent the following letter on January 26, 2011:

> This is in reference to form JFS-83000, Determination of Unemployment Compensation Benefits, dated January 5, 2011 which allows benefits to the above individual. We respectfully request a redetermination based on the following information.

> The claimant was discharged for violation of a reasonable and known policy. The final incident was when the claimant sent an email about a part and asked if it could be deposed of and he never received a reply from management on what to do. He in turn disposed of the product. He was going to sell it for personal gain. The attached policy notes that this would be considered theft and the claimant would be discharged. Reconsideration is being requested on this claim.

On or about February 26, 2011, Appellant responded as follows:

> I was informed at the debriefing that I was being terminated due to not following the Harris Business Conduct Policy. I am not aware of what is meant by "final incident." The email that is referenced, as stated, was not responded to after several weeks. I then asked my BA (business advisor) what to do, (he was the same individual that I had sent the email too). He informed that if the part had no asset tag it was scrap and could be disposed of. I felt that the item had some value and rather than dispose I would try and sell it on eBay with the proceeds going to Harris. Prior to the auction end I was questioned by Harris HR regarding this item being listed on eBay. HR and the BA were present when I was being questioned, they asked me if the sale was for personal gain and I told them "no". Several weeks prior to this meeting the BA asked me if I could sell some other items on eBay for the company, the items he was referring to were too large to ship so I informed him of that. The item in question never left the Harris property and was not disposed of, as stated by Harris.
>
> I have personally sold approximately $60,000 worth of Harris equipment; all funds were given to Harris. I did not personally gain as much as $.01 and most of these sales were done on my personal time (nights, weekends) and Harris never compensated me for this time. Methods of these sales were, contacting individuals, postings on craigslist, checking on the internet for buyers of used equipment, conversations with local contractors, and contacting EBay buyers and sellers. Never once did Harris

> object to, question me or have a hard time accepting the payments for goods sold.
>
> The piece of equipment being referenced by Harris had a very specific use, so it was listed on eBay so it would reach more individuals than a local Craig's list posting.
>
> There was absolutely no violation committed on my behalf as stated in the first sentence: "the claimant was discharged for violation of a reasonable and known policy."
>
> On November 10, 2010, after I was asked to turn in my company badge and keys I went and looked at the item in question. I requested HR to look at the item with me and they declined. The item was still on Harris property and I once again confirmed there was no asset tag on the item.

Harris appealed ODJFS's redetermination on March 17, 2011 with the following letter:

> This is in reference to form JFS-83100, Director's Redetermination, dated February 24, 2011 which allows benefits to the above individual. We wish to appeal the determination based on the following.
>
> The claimant was discharged for violation of a reasonable and known policy. The final incident was that the claimant sent an email about a part and asked if it could be disposed of. He never received a reply from management on what to do. He in turn disposed of the product by taking it. He was going to sell it. The employer requests that benefits be denied.

Following transfer of this case, the UCRC sent the parties instructions concerning the telephonic hearing. These instructions include the following:

> Subpoenas
>
> Each party may request the issuance of subpoenas to require the attendance of necessary witnesses or the production of necessary

documents. A request for subpoenas should be made as soon as possible. **You need not wait for a scheduled hearing date before making your request for subpoenas**. The request must be received by the Commission at least five (5) calendar days prior to the hearing to allow sufficient time for service. A request for subpoenas may be filed by writing to the Commission at the address found at the top of this notice, by telephoning **1-866-833-8272**, or by faxing to **(614) 387-3694**.

The request must include the name and address of the witness. If the request is for documents or other physical evidence, specifically describe the item and identify the person (including title, if known) who has custody of the item. If the subject of any subpoena request appears to be unreasonable, the Commission may require a showing of necessity for your request. Without a showing of necessity, only three subpoenas will be issued.

At the June 1, 2011 telephonic hearing, the hearing officer heard testimony from Kenneth Okamoto, Harris' Director of Human Resources; Joe Cox, Harris' Accounting Director and Business Standards Advisor; and Appellant.

Okamoto testified that Appellant worked for Harris from March 1, 2003 to November 16, 2010 in the shipping and receiving department. Appellant was terminated when he attempted to sell a piece of electronic equipment used for radio and television broadcasting on e-Bay. Appellant did not have authorization to sell the equipment. According to Okamoto, this piece of equipment's value, if new, was $70,000.00, but because it was in need of repair, Harris had not assigned it a value.

The posting on e-Bay was brought to Okamoto's attention by an unnamed co-worker. The listing contained a photograph of the equipment sitting on a cart and the background was recognizable as Harris' facility. Okamoto noted that Appellant had sent an e-mail to Cox concerning that piece of equipment, which was entered into evidence and reads as follows:

From:	Porinsky, John
Sent:	Thursday, October 21, 2010 11:08 AM
To:	Cox, Joe
Subject:	E-Waste

> Joe,
> We have a defective piece of equipment that will cost more to repair than the item is worth. I could not find an asset tag but I do have the following:
> Mfg: Panasonic
> Description: Digital Cassette Recorder
> Model: AJ-HD2700
> S/N: F9TMA0298
> Please advise if this can be disposed.
> Thanks, Jp

During the hearing officer's initial examination of Okamoto, the following exchange took place:

> Q: Okay and um was, was this the first instance of this type of incident?
>
> A: Uh well there was a similar incident in I believe it was April 2010 when again it was brought to our attention a kind of similar kind of thing, same kind of accusation or allegation, however, we could not prove whether the equipment that was on sale on e-Bay was taken from the company or as he explained at the time, purchased during an employee auction of obsolete equipment, so we didn't have any record to prove one way or another, so we ended seeking disciplinary action based on the fact that he was using the company's internet, company computer to advertise, go online and access e-Bay and also he was using the company's shipping number for I believe it was FedEx to ship the products out after it was sold.

During Appellant's cross-examination of Okamoto, Appellant advised the hearing officer that he had telephoned the UCRC six calendar days prior to the hearing to request that subpoenas issue for two co-workers, Matt Carter and Wayne Ward, as well as the piece of equipment at issue, but was told that it was too late, as Appellant had called on a Thursday before Memorial Day weekend and no one would be there to issue the subpoenas. Appellant claims he was advised that a note would be put in the hearing officer's file, but no such note appears in the record.

Concerning these witnesses, the following exchange took place:

> Hearing Officer: Who did you wish subpoena?
>
> Mr. Porinsky: I wished to subpoena Matt Carter (phonetic), Wayne Ward (phonetic), and the piece of equipment that says I took it and I've talked to those people about this equipment.
>
> Hearing Officer: Who are this Matt Carter (phonetic) and Wayne Ward (phonetic)?
>
> Mr. Porinsky: Those are the people that were aware and I had a discussion after the initial meeting with Ken when he collected my company badge and keys and I talked to Matt Carter (phonetic) immediately after that about this piece of equipment, what I'm saying and Ken is not denying it now, but he is uncertain where it came from of me taking this item. The item, when I was there, never left the Harris property and it's, I had at least three incidents here where it's written that I took the property and that would be considered theft and in fact, I know that was written by Ken. It would be considered, here it is, right here, the claimant was discharged for violation of a reasonable and known policy. The final incident was when the claimant sent an email about a part and asked if it could be disposed of and never received a reply, which sounds exactly like the others. He in turn disposed of the product. He was going to sell it for personal gain. Now, my question to Ken is, how do they know I was going to sell it for personal gain?

Cox testified that Appellant had taken it upon himself to advertise the piece of equipment for sale, without proper authorization from management, which was a violation of Harris' Standards Policy. Cox received Appellant's e-mail, but did not respond to it because the disposition of the equipment had yet to be determined.

On cross-examination by Appellant, Cox acknowledged that Appellant had, in the past, assisted the company in finding buyers for company property which the company no longer wished to carry on its books. However, Cox testified that in all of the transactions he was

involved in, Appellant brought buyers to Harris and the property was sold by Harris. According to Cox there was a process for this which required the accounting department to generate an invoice. Appellate, in his capacity in the shipping and receiving department, would help arrange the pick up or shipment of the sold equipment.

Appellant attempted to cross-examine Cox about the April, 2010 incident which led to disciplinary action against him. The following colloquy transpired.

> Mr. Porinsky: For Mr. Cox, I'd like his, to get understanding how this first incident because they word it the final incident, how the first one of not utilizing the time properly ties into this particular issue.
>
> Hearing Officer: I'm sorry, what is your question?
>
> Mr. Porinsky: My question there was a write up in April for not utilizing or utilizing company time to perform personal business. How does this relate to what we're discussing right now.
>
> Hearing Officer: Okay, I don't see that as being relevant, sir. The testimony that's for has been that you were discharged for misappropriation or the selling of company property on e-Bay. I would like to, there's been no testimony about any events that occurred that transpired in April. This event, the testimony that this electronic equipment was posted on or about November 2010. Do you have any other questions that relate to that?

Appellant testified that he had been given "carte blanche" to sell any equipment that was going to be scraped, and the piece of equipment at issue had no asset tag on it. Appellant maintained that he had sold numerous items which had brought $60,000.00 to Harris and he was never questioned about it, and never personally profited from it.

The piece of equipment at issue in this appeal was listed for sale on e-Bay for $1,399.99.

The hearing officer issued a decision on June 7, 2011, which states in relevant part,

FINDINGS OF FACT

Claimant was employed by Harris Corporation from March 1, 2003, through November 16, 2010. He worked as a Shipping and Receiving Associate.

The employer has a company policy which prohibits the taking or selling or any company equipment without authorization. Such policy also prohibits the use of company policy for non business purposes. This policy is specified in the employer's handbook which entitled Standards of Business Conduct. Upon hire, the claimant was given a copy of the employer's "Standards of Business Conduct" handbook.

The employer also has a progressive disciplinary policy which provides for verbal counseling, a first written warning and a final written warning before subjecting an employee to discharge. However, the employer reserves the right to proceed directly to termination of employment depending on the severity of the infraction.

The violation of any company policy or violation of the company's "Standards of Business Conduct" subjects an employee to possible disciplinary action up to and including termination. The claimant was aware of the employer's disciplinary policies.

In April 2010, the employer noted that a particular piece of its equipment was sold by the claimant. At that time, the employer could not determine whether such equipment was legitimately obtained by the claimant through an auction and subsequently sold, or if it was obtained without authorization. As a result, the claimant was not subject to disciplinary action.

In November 2010, the claimant's co-worker noted that the claimant had access to a particular piece of equipment which later appeared on the internet for sale. The co-worker alerted the

employer. The employer was able to identify the item because it was on a cart owned by the employer and the background showed it in the employer's workplace. The value of the equipment was approximately $70,000.00. The claimant had not been given authorization to sell the equipment nor had it been given to him by the company.

The claimant acknowledged attempting to sell the equipment but told the employer that he believed that it was discarded equipment and that he had the right to dispose of it.

On November 16, 2010, the employer discharged the claimant for violation of its "Standards of Business Conduct" in attempting to sell company property without authorization.

***

REASONING

The credible evidence establishes that the employer discharged the claimant for violation of its "Standards of Business Conduct" in attempting to sell company property without authorization. The employer's policies prohibited the selling of company property without authorization. The claimant did not have authorization to sell the employer's property nor had he been given ownership of the employer's property. The claimant knew, or should have known, that attempting to sell the employer's property, without the employer's authorization, would subject him to disciplinary action and jeopardize his employment. Therefore, this Hearing Officer finds that the claimant was discharged by Harris Corporation with just cause in connection with work.

Based upon this finding, claimant received benefits to which he was not entitled and is required to repay those benefits to the Ohio Department of Job and Family Services.

III. ASSIGNMENTS OF ERROR

Appellant states two assignments of error:

> Assignment of Error 1:
>
> THE DECISION OF THE UNEMPLOYMENT COMPENSATION REVIEW COMMISSION WAS UNLAWFUL, UNREASONABLE, AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE APPELLANT WAS DISCHARGED WITHOUT JUST CAUSE.
>
> Assignment of Error 2:
>
> APPELLANT WAS DENIED A FAIR HEARING DUE TO PROCEDURAL ERRORS INCLUDING FAILURE TO ISSUE SUBPOENAS AND DISALLOWANCE OF QUESTIONS CONCERNING A RELEVANT SUBJECT.

IV. SCOPE OF THE COURT'S REVIEW

The jurisdiction of the Court of Common Pleas in an unemployment compensation case is provided by statute. Specifically, R.C.4141.282 (H) 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.

Thus, the role of the Court upon an appeal from a decision of the Unemployment Compensation Review Commission is limited to determining whether the Review Commission's decision is supported by evidence in the record. *Verizon North, Inc. v. Ohio Dep't of Job & Family Services* (2007), 170 Ohio App.3d 42, 48. The Court may only reverse a decision of the Review Commission if it is unlawful, unreasonable, or against the manifest

weight of the evidence. *Kelly v. Lamda Research, Inc.* (Jan. 11, 2002), Hamilton App. No. C-010253, 2002 Ohio 24, 2002 Ohio App. LEXIS 69 at ¶15; *Piazza v. Ohio Bur. of Employment Services* (1991), 72 Ohio App.3d 353, 356; *Jones v. Unemployment Compensation Bd. of Rev.* (1989), 61 Ohio App.3d 272, 275.

In reviewing a decision of the Review Commission, a court must adhere to the principal that decisions of purely factual questions are primarily within the purview of the Review Commission. *Verizon North, Inc., supra.; Guy v. City of Steubenville* (2002), 147 Ohio App.3d 142, 148; *Lombardo v. Ohio Bur. of Employment Services* (1997), 119 Ohio App.3d 217, 222; *Irvine v. Unemployment Compensation Bd. of Rev.* (1983), 19 Ohio St.3d 15, 19. The Court does not make factual findings or determine the credibility of witnesses who appeared before the Review Commission. *McCarthy v. Connectronics Corp.* (July 10, 2009), Lucas App. No. L-08-1293, 2009 Ohio 3392, 2009 Ohio App. LEXIS 2923 at ¶10; *Becka v. Unemployment Compensation Bd. of Rev.* (March 22, 2002), Lake App. No. 2001-L-037, 2002 Ohio 1361, 2009 Ohio App. LEXIS 2933 at ¶10; *Gaston v. Bd. of Rev.* (1983), 17 Ohio App.3d 12, 13. The Court may not weigh the evidence or substitute its judgment for that of the hearing officer as it pertains to factual determinations. *Lombardo, supra.* The fact that reasonable minds might reach different conclusions about the evidence in the record is not a basis for reversal of a decision of the Unemployment Compensation Review Commission. *Tzangas, Plakas & Mannos v. Ohio Bur. of Employment Services* (1995), 73 Ohio St.3d 694, 697; *Irvine, supra at 18; Guy, supra; Fredon Corp. v. Zelenak* (1997), 124 Ohio App.3d 103, 109.

However, while courts are not permitted to make factual findings or to determine the credibility of witnesses, they do have a duty to determine whether the unemployment board's decision is supported by the evidence in the record. *Fuller v. Semma Enterprises, Inc.* (April 7, 2008), Butler App. No. CA2006-11-292, 2008 Ohio 1664, 2008 Ohio App. LEXIS 1434 at ¶ 9; *Warren County Auditor v. Sexton* (Dec. 28, 2007), Warren App. No. CA2006-10-124, 2007 Ohio 7081, 2007 Ohio App. LEXIS 6150 at ¶ 25.

V. ANALYSIS

A. Just Cause for Termination

In an administrative appeal, a reviewing court may reverse the Unemployment Compensation Review Commission's "just cause" determination only if it is unlawful, unreasonable, or against the manifest weight of the evidence. *Guy, supra at 147-48.*

In the context of an unemployment compensation case, in considering the definition of just cause, courts are instructed to look to the two main purposes of the Ohio Unemployment Compensation Act. One purpose is to assist unfortunate individuals who become involuntarily unemployed by adverse business and industrial conditions. A second purpose is to assist an individual who has worked, is able to work, and is willing to work, but is temporarily without employment through no fault of his own. Thus, it has been said that the Act does not protect employees from themselves. *City of Struthers v. Morell* (2005), 164 Ohio App.3d 709, 715. When an employee is at fault, he is no longer the victim of fortune's whim, but is instead directly responsible for his own predicament. Fault on the employee's part separates him from the Act's intent and the Act's protection. Fault on behalf of the employee is an essential component of a just cause determination. *Lorian County Auditor v. Ohio Unemployment Compensation Review Comm'n.* (2010), 185 Ohio App.3d 822, 825-26.

Traditionally, just cause, in a statutory sense, is that which, to an ordinarily intelligent person, is a justifiable reason or doing or not doing a particular act. *Guy, supra* at 148. The critical issue in determining whether an employee has been terminated for just cause is not whether an employee has technically violated some company rule, but whether the employee, by his actions, has demonstrated an unreasonable disregard for his employer's best interests. *Brown v. Bob Evans Farms, Inc.* (2010), 190 Ohio App.3d 837, 843. Where an employee demonstrates an unreasonable disregard for his employer's best interest, just cause for the employee's termination is said to exist. *Marano v. Duramax Marine, LLC* (Nov. 21, 2011), Stark App. No. 2011CA00081, 2011 Ohio 6147, 2011 Ohio App. LEXIS 5046 at ¶ 22.

The hearing officer in this case found, as a factual matter, that Appellant attempted to sell a piece of equipment owned by his employer, without prior authorization. There is sufficient evidence in the record to support this finding, and this Court must accept it. The attempted sale was obviously not in Harris' best interest, insofar as Harris was given no input as to the price, and its accounting department was not involved to issue a proper invoice. While there was no evidence that Appellant undertook this sale for personal gain, that alone does not affect a just cause analysis.

B. Procedural Errors

The June 1, 2011 telephonic hearing, as well as the hearing officer's decision of June 7, 2011, were not error free.[1] The only question, however, is to what degree, if any, these errors affect the just cause determination.

The notice given to Appellant regarding subpoenas appears to be taken directly from OAC4146-15-01. It is apparent that, in the case of a Tuesday hearing, following a three day weekend, "five calendar days" is insufficient time to allow the issuance of subpoena, and the UCRC misleads claimants when it tells them as much. The rule should be revised.

Appellant, however, failed to request a continuance of the hearing and failed to proffer what evidence these witnesses, Matt Carter and Wayne Ward, would provide, had they been properly subpoenaed. It appears from the record that Appellant sought to subpoena the piece of equipment itself for the sole purpose of demonstrating it had never left Harris' facility, an issue which was not disputed by Harris at the hearing. Appellant's failure to proffer waives any objection on the issue. See *Chen v. Ohio Dep't. of Job & Family Services* (Mar. 12, 2012), Clermont App. No. CA2011-04-026, 2012 Ohio 994, 2012 Ohio App. LEXIS 861 at ¶ 48; *Harrison v. Penn Traffic Co.* (Feb. 17, 2005), Franklin App. No. 04AP-728, 2005 Ohio 638, 2005 Ohio App. LEXIS 631 at ¶¶ 23-26.

This Magistrate would note that the April 21, 2010 disciplinary incident was mentioned twice by Harris in its fillings with ODJFS. The UCRC hearing officer asked Okamoto about it. The hearing officer refers to it in her decision. Therefore, the hearing officer was incorrect in stating to Appellant that "there's been no testimony about any events that occurred that transpired in April," and erred in failing to allow Appellant to cross-examine Cox on this issue. The question, however, is whether such failure was prejudicial to Appellant, which is to say whether such cross-examination would materially affect a just cause determination.

There is in Ohio a line of cases which hold that a failure to follow a *mandatory* progressive disciplinary procedure which results in an employee's discharge is a discharge without just cause and entitles that employee to receive unemployment benefits. See *Groves v. Ohio Dep't. of Job & Family Services* (May 4, 2009), Ashtabula App. No. 2008-A-0066, 2009 Ohio 2085, 2009 Ohio App. LEXIS 1748 at ¶14. However, as the hearing officer correctly

[1] The hearing officer found the value of the equipment to be $70,000.00, which is incorrect. $70,000.00 was the cost if new. No evidence was presented to establish the fair market value of this particular piece of equipment.

Entry prep per Kaplan 5/13

notes, Harris reserves the right to forego progressive discipline and proceed directly to termination, so it is difficult to perceive how a development of the facts surrounding the April 21, 2010 incident would have changed the hearing officer's just cause determination. Although troubling, this Magistrate finds the hearing officer's error to be harmless. See *Sutfin v. Carlsbad Marketing & Communications, Inc.* (Nov. 18, 2011), Montgomery App. No. 24555, 2011 Ohio 5988, 2011 Ohio App. LEXIS 4894 at ¶21 (applying harmless error analysis to UCRC hearings).

VI. MAGISTRATE'S DECISION

The decision of the Ohio Unemployment Review Commission is *affirmed.*

Counsel for Appellee shall prepare and present a final judgment entry for the Court's signature upon its adoption of this decision.

Costs to be assessed to Appellant.

MAGISTRATE ANDREW HASSELBACH

Mary, Looks like they changed. Prepare an entry adopting the Magistrate's decision for Judge Hanner's signature. Thanks

NOTICE TO PARTIES

ice that this decision may be adopted by the Court unless
1 (14) days of the filing hereof in accordance with Civil Rule

error on appeal the court's adoption of any factual findings
specifically designated as a finding of fact or conclusion
, unless the party timely and specifically objects to that
required by Civ.R.53 (D)(3)(b).

MAGISTRATE ANDREW HASSELBACH

CERTIFIED COPY
JAMES L. SPAETH, CLERK
WARREN COUNTY, OHIO
COMMON PLEAS COURT
BY _____
DEPUTY

C: Attorney Robin Jarvis
Attorney Andrew Kaplan
Attorney Maxwell Kinman