

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

DAYTON METROPOLITAN
HOUSING AUTHORITY,

Plaintiff/Appellant,

-vs-

CINDY M. BOURELLE, et. al,

Defendants/Appellees.

CASE NO. 2011 CV 00230

JUDGE CONNIE S. PRICE

DECISION, ORDER, AND ENTRY
REMANDING TO THE OHIO
DEPARTMENT OF JOB AND
FAMILY SERVICES

This matter is before the court on the appeal of Appellant, Dayton Metropolitan Housing Authority. Appellant filed its Notice of Administrative Appeal on January 11, 2011, and its Brief in Support on April 4, 2011. On April 26, 2011, Ohio Department of Job and Family Services filed its Brief. On May 2, 2011, Appellee, Cindy Bourelle, filed her Brief. Appellant filed its Reply Brief on May 17, 2011. This matter is now ripe for decision.

I. PROCEDURAL HISTORY AND FACTS

Appellee, Cindy Bourelle, was hired as a Site Manager for Wentworth Apartments in November 2008. Bourelle was placed on a Performance Improvement Plan on or around November 2009. Appellant, Dayton Metropolitan Housing Authority, placed Bourelle on administrative leave on January 14, 2010, and terminated her employment on February 19, 2010. Bourelle applied for

unemployment benefits following her termination, which were initially denied due to a finding of termination for just cause in connection with work.

On June 14, 2010, Bourelle filed an appeal from the decision denying her benefits. On June 15, 2010, the Ohio Department of Job and Family Services transferred jurisdiction to the Unemployment Compensation Review Commission. On October 13, 2010, and November 8, 2010, a hearing was held before Hearing Officer Robert J. Wachunas. Bourelle and several witnesses, including Angela Flynn, Wylie Boddie, and Gregory Johnson, testified at the hearing, during which Attorney Christopher Green represented Appellant.

During the hearing on October 13, 2010, Angela Flynn was the only testifying witness, and the hearing was ultimately continued until November 8, 2010, for additional testimony. On November 8, Bourelle testified. During Attorney Green's cross-examination of Bourelle, the following exchange took place:

Hearing Officer: Now wait a minute, wait a minute. What's the value of all this? What weight shall I give this, Mr. Green?

Mr. Green: I'm just saying that there were all these problems, she didn't have proper training and all this.

Hearing Officer: And I haven't heard anything in response to that, so uh do have anything right at the heart of the matter that you want to ask her?

Mr. Green: Uh, I, I can go into specifics, but I, I can see where you're saying, so.

At that point, the hearing officer continued his redirect examination of Angela Flynn, and Mr.

Green was not given another opportunity to continue his cross-examination of Bourelle. The

hearing officer later stated:

Okay, um I'm going to move forward because I'm not going to go beyond 11:30. That's arbitrary and that's my ruling because this is the second hearing on this. Attorney Green, get Mr. Johnson to come in please. That was, Ms. Bourelle called him by subpoena.

Mr. Johnson then testified, and Mr. Green did not have any questions for him.

Following Mr. Johnson's testimony, Wylie Boddie testified under direct examination by Bouelle and the hearing officer. Mr. Green was never afforded an opportunity to cross-examine Mr. Boddie before the hearing officer stated:

Well, all right, it's 11:28, do you want to take 30 seconds or a minute to summarize Attorney Green and then you may Ms. Bouelle and that's going to be it. I'm going to rule Mr. Bouelle's testimony is not relevant. Attorney Green?

Mr. Green and Bouelle then summarized their closing arguments, and the hearing adjourned.

On November 23, 2010, the hearing officer issued the Commission's decision, reversing the Director's Redetermination with respect to Bouelle's denial of benefits and finding that Bouelle was discharged without just cause in connection with work and was qualified for unemployment benefits. On December 13, 2010, Appellant filed a Request for Review with the Commission, which was disallowed on December 22, 2010.

Appellant now appeals the Commission's decision to this court, arguing that the decision was in violation of Appellant's due process rights and was against the manifest weight of the evidence. Appellant argues that it was denied due process when the hearing officer did not provide Appellant with any opportunity to cross-examine witness, Wylie Boddie, and when the hearing officer prevented Appellant from continuing his cross-examination of Bouelle on relevant issues. Appellant also argues that the Commission's decision was against the manifest weight of the evidence and amounts to an abuse of discretion.

II. LAW AND ANALYSIS

The right to appeal from an administrative decision is not an inherent right, but instead is one conferred by statute. *See Harrison v. Ohio State Medical Board* (1995), 103 Ohio App.3d 317, 321. Where a statute confers a right to appeal, strict adherence to the statutory conditions is essential. *Holmes v. Union Gospel Press* (1980), 64 Ohio St.2d 187, 188.

The law governing administrative appeals concerning unemployment benefits is codified under R.C. 4141.281, and provides, in part:

Any party notified of a determination of benefit rights or a claim for benefits determination may appeal within twenty-one calendar days after the written determination was sent to the party or within an extended period as provided under division (D)(9) of this section.

Within twenty-one days after receipt of the appeal, the director of job and family services shall issue a redetermination or transfer the appeal to the unemployment compensation review commission. A redetermination under this section is appealable in the same manner as an initial determination by the director.

The commission shall provide an opportunity for a fair hearing to the interested parties of appeals over which the commission has jurisdiction. The commission has jurisdiction over an appeal on transfer or on direct appeal to the commission. If the commission concludes that a pending appeal does not warrant a hearing, the commission may remand the appeal to the director for redetermination. The commission retains jurisdiction until the appeal is remanded to the director or a final decision is issued and appealed to court, or the time to request a review or to appeal a decision of a hearing officer or the commission is expired.

Hearings before the commission are held at the hearing officer level and the review level. Unless otherwise provided in this chapter, initial hearings involving claims for compensation and other unemployment compensation issues are conducted at the hearing officer level by hearing officers appointed by the commission. Hearings at the review level are conducted by hearing officers appointed by the commission, by members of the commission acting either individually or collectively, and by members of the commission and hearing officers acting jointly. In all hearings conducted at the review level, the commission shall designate the hearing officer or officers who are to conduct the hearing. When the term "hearing officer" is used in reference to hearings conducted at the review level, the term includes members of the commission. All decisions issued at the review level are issued by the commission.

Provisions contained in the remainder of this paragraph apply to hearings at both the hearing officer level and the review level. The principles of due process in administrative hearings shall be applied to all hearings conducted under the authority of the commission. In conducting hearings, all hearing officers shall control the conduct of the hearing, exclude irrelevant or cumulative evidence, and give weight to the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of serious affairs. Hearing officers have an affirmative duty to question parties and witnesses in order to ascertain the relevant facts and to fully and fairly develop the record. Hearing officers are not bound by common law or statutory rules of evidence or by technical or formal rules of procedure. No person shall impose upon the claimant or the employer any burden of proof as is required in a court of law. The proceedings at hearings shall be recorded by mechanical means or otherwise as may be prescribed by the commission. In the absence of further proceedings, the record need not be transcribed. After considering all of the evidence, a hearing officer shall issue a written decision that sets forth the facts as the

hearing officer finds them to be, cites the applicable law, and gives the reasoning for the decision.

(Emphasis added).

Additionally, “[t]he review commission and hearing officers shall conduct hearings and other proceedings in a case in such order and manner and shall take any steps consistent with the impartial discharge of their duties which appear reasonable and necessary to ascertain all relevant facts and to render a fair and complete decision on all issues which appear to be presented.” *OAC 4146-7-02(A)*. “All facts relevant to a fair and complete decision shall be received as directly and simply as possible. The proceedings shall be informal, and the review commission and hearing officers shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure.” *OAC 4146-7-02(B)*. “*The review commission or hearing officer conducting a proceeding may examine the interested parties and other witnesses, and each interested party and the interested party’s representative shall have all rights of fair hearing, including:*

- (1) *The right of examination and cross-examination of witnesses,*
- (2) *The right to present testimony and other evidence,*
- (3) *The right to inspect and examine documents, files, reports and records received in evidence,*
- (4) *The right to present testimony and other evidence in explanation and rebuttal,*
- (5) *The right to subpoenas for witnesses and documentary evidence and the right to present argument.”*

(Emphasis added) *OAC 4146-7-02(C)*. “*The review commission or hearing officer conducting the proceeding shall advise each party as to rights, aid in examining and cross-examining witnesses, and give every assistance compatible with the discharge of the official duties of the review commission or hearing officer.*” (Emphasis added) *OAC 4146-7-02(D)*. “The statutes and rules governing the procedure employed in reviewing an unemployment compensation claim are

constitutional because they give an opportunity for a fair hearing before an impartial tribunal.”

Bulatko v. Dir., Ohio Dep't of Job & Family Servs. (2008), 2008 Ohio 1061, citing *Henize v. Giles* (1986), 22 Ohio St.3d 213, 215.

In general, *the object of the hearing is to ascertain the facts that may or may not entitle the claimant to unemployment benefits.* (Emphasis added) *Bulatko v. Dir., Ohio Dep't of Job & Family Servs.* (2008), 2008 Ohio 1061; *Simon v. Lake Geauga Printing Co.* (1982), 69 Ohio St.2d 41, 43. The hearing officer has broad discretion in accepting and rejecting evidence and in conducting the hearing. *Owens v. Ohio Bureau of Empl. Servs.* (1999), 135 Ohio App. 3d 217, 220. “When the evidence offered would provide some insight into the very subject of the dispute, this discretion is tempered by the need for a conscious effort on the part of the hearing officer to allow each side to present available evidence that would aid in the determination of the issues. The parties must be afforded a reasonable opportunity to be heard.” *Owens v. Administrator, Ohio Bureau of Empl. Servs.* (1999), 135 Ohio App. 3d 117, 219-221, citing *Nordonia Hills City School Dist. Bd. of Edn. v. Unemployment Comp. Bd. of Rev.* (1983), 11 Ohio App. 3d 189, 190-191; *Metzenbaum v. Unemp. Comp. Bd. of Rev.* (1997), 1997 Ohio App. LEXIS 4012; *Peters v. Riverview Publications, Inc.* (1987), 1987 Ohio App. LEXIS 9419. “However, a hearing officer’s failure to allow a party to present witnesses or otherwise develop their case is grounds for reversing the decision of the review commission.” *Bulatko v. Dir., Ohio Dep't of Job & Family Servs.* (2008), 2008 Ohio 1061, citing *Owens v. Admr., Ohio Bur. of Emp. Svcs.* (1999), 135 Ohio App.3d 217, 220-221.

Any interested party may appeal the decision of the commission to the court of common pleas. *R.C. 4141.282(A)*. A reviewing court may reverse the Review Commission’s decision only if it is unlawful, unreasonable, or against the manifest weight of the evidence. *Owens v. Administrator, Ohio Bureau of Empl. Servs.* (1999), 135 Ohio App. 3d 217, 221, citing *Tzangas, Plakas & Mannos v. Adm., Ohio Bur. Of Emp. Serv.* (1995), 73 Ohio St. 3d 694, 696-697; *Allen v.*

Adm., Ohio Bur. Of Emp. Serv. (1997), 1997 Ohio App. LEXIS 2002. “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.” *R.C. 4141.282(H)*.

The reviewing court is limited to the record as certified by the review commission. *Abrams-Rodkey v. Summit County Children Servs.* (2005), 163 Ohio App. 3d 1. The court must give due deference to the agency’s resolution of evidentiary conflicts, and the court may not substitute its judgment for that of the agency. *Budd Co. v. Mercer* (1984), 14 Ohio App. 3d 269. Moreover, “[a] reviewing court may not make factual findings or determine the credibility of witnesses, and may not overturn a decision of the commission simply because it might reach a different result.” *Gregg v. SBC Ameritech* (2004), 2004 Ohio 1061, citing *Tzangas, Plakas & Mannos v. Administrator, Ohio Bureau of Employment Servs.* (1995), 73 Ohio St. 3d 694, 696-697.

“A claimant bears the burden of proving his entitlement to unemployment compensation benefits.” *Brooks v. Unemployment Comp. Review Comm’n* (2007), 2007 Ohio 4986, citing *Kosky v. Am. Gen. Corp.* (2004), 2004 Ohio 1541. “A party unsatisfied with the trial court’s decision may appeal to the court of appeals. The appellate court, like the trial court, is generally limited to reviewing whether the decision is supported by evidence in the record.” *Id.*, citing *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Serv.* (1995), 73 Ohio St. 3d 694, 696, citing *Irvine v. Unemp. Comp. Bd. of Review* (1985), 19 Ohio St.3d 15, 18.

In this case, Appellant wanted the opportunity to more fully cross-examine Bouelle and to cross-examine Boddie. While the hearing officer has broad discretion in controlling the conduct of the hearing and excluding irrelevant evidence, Appellant had the right to cross-examine Bouelle and Boddie. Appellant was entitled to a full and fair opportunity to present evidence to support its

claim that Bourelle was terminated for just cause. The hearing officer abused its discretion by not allowing Appellant to cross-examine two witnesses and "to ascertain the facts that may or may not entitle" Bourelle to benefits. Because the proceedings before the commission failed to meet the fair-hearing requirements of R.C. 4141.281 and OAC 4146-7-02, the Commission's decision is unlawful. Accordingly, the court **REMANDS** this matter for a new hearing before the Commission.

III. CONCLUSION

This matter is **REMANDED** to the Ohio Department of Job and Family Services for a new hearing consistent with the law and this decision.

SO ORDERED:

JUDGE CONNIE S. PRICE

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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Type: Decision

So Ordered

A handwritten signature in black ink, which appears to read "William H. Wolff Jr." The signature is stylized and cursive.

William H. Wolff Jr.