COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

KINDRA A. SCALF,	:	CASE NO. 2012-CVH-0744
Appellant,	:	Judge Richard P. Ferenc
Vs.	:	
STATE OF OHIO UNEMPLOYMENT REVIEW COMMISSION, ET AL.,	:	
	:	DECISION AND ENTRY
Appellees.	:	

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Kindra A. Scalf, 4245 Cannongate Drive, Cincinnati, OH 45245, Appellant.

Robin Jarvis, Assistant Attorney General, 1600 Carew Tower, 441 Vine Street, Cincinnati, OH 45202.

Cincinnati Catholic Religious Communities, 100 East Eighth Street, Cincinnati, OH 45202, Appellee.

Ryan LaFlamme, 1714 West Galbraith Road, Cincinnati, OH 45239-4812, Attorney for Batavia Local Board of Education and Milford Exempted Village Board of Education.

Procedural Posture

Appellant, Kindra A. Scalf, ("Scalf"), appeals a determination of the Unemployment Compensation Review Commission ("Commission"), that she is not entitled to unemployment benefits.

Scalf filed an application for unemployment benefits on June 7, 2011. On July 1, 2011, the Ohio Department of Jobs and Family Services ("ODJFS"), through its Director, determined that Scalf was entitled to Unemployment Compensation and her weekly benefit amount was set at $272.00 based on her base period weeks and wages eligibility requirements. On July 6, 2011, a second notice was sent to Scalf informing her that the original determination was being corrected "due to a typographical or clerical error in the determination." Her benefits were cancelled and she was ordered to repay the benefits she had received to date in the amount of $816.00.

Scalf appealed the redetermination and it was affirmed on August 1, 2011, at which time the benefits to be repaid had risen to $1,632.00. Scalf appealed again and the matter was transferred to the Review Commission.

On January 25, 2012, a Hearing Officer conducted a telephone hearing. Scalf appeared unrepresented and was the only witness to testify. The Hearing Officer affirmed ODJFS's redetermination finding Scalf ineligible for benefits between school terms and further finding that she had been overpaid $1,632.00. On March 22, 2012, the Commission subsequently disallowed Scalf's request for review of the Hearing Officer's decision. Scalf has now timely appealed the decision to this Court pursuant to R.C. 4141.282.

Legal Standard

Ohio statutory law governs the scope of this Court's review of the Commission's decision. Pursuant to R.C. 4141.282, the Court must hear the appeal on the certified record as provided by the Commission. The Court may reverse the matter only if the Commission's findings were "unlawful, unreasonable, or against the manifest weight of the evidence." R.C. 4141.282(H).

In reviewing the Commission's record, the Court may not make factual findings, nor may it determine the credibility of witnesses. *Tzangas, Plakas & Mannos v. Ohio Bur. Of Emp. Serv.*, 73 Ohio St.3d 694, 696, 653 N.E.2d 1207 (1995); *Irvine v. Unemp. Comp. Bd. Of Rev.*, 19 Ohio St.3d 15, 18, 482 N.E.2d 587 (1985). Instead, the Court may only determine whether evidence exists in the record to support the Commission's decision. *Irvine, supra* at 18. The Court will not reverse, as against the manifest weight of the evidence, any findings by the Commission that are supported by some competent credible evidence. *C. E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 280, 376 N.E.2d 578 (1987); *Lombardo v. Ohio Bur. Of Emp. Serv.*, 119 Ohio App.3d 217, 220, 695 N.E.2d 11 (6th Dist. 1997). Further, "[t]he fact that reasonable minds might reach different conclusions is not a basis for reversal of the [board's] decision." *Tzangas, supra* at 697.

Applicable Law

The Ohio Revised Code provides that an individual is not entitled to receive unemployment benefits based on service for an educational institution:

> . . . for any week of unemployment that begins during the period between two successive academic years . . . if the individual performs such services in the first of those academic years or terms and has a contract or a reasonable assurance that the individual will perform services in any such capacity for any such institution in the second of those academic years or terms. (R.C. 4141.29(I)(1)(a))

Facts

Scalf is a teacher. During the academic year 2010-2011 she was employed as an English teacher at Mt. Notre Dame High School for Cincinnati Catholic Religious Communities ("Cincinnati Catholic"). During the course of her testimony on January 25, 2012 before the Hearing Officer, Scalf initially referred to her Cincinnati Catholic employment as a full-time English teacher. (Transcript page 6) When asked how she could be available as a substitute teacher when she was working full-time she then explained that her employment with Cincinnati Catholic was part-time which allowed her to work occasionally in Batavia when she was not involved in the part-time teaching. (Transcript page 7) Documents in the Director's file, specifically the Determinations and the Redetermination show that Scalf's employment during the base period of 1/1/2010 to 12/31/2010 was comprised of forty-one weeks with Cincinnati Catholic earning a total of $22,654.76, two weeks with Batavia Local Board of Education ("Batavia") earning $180.00 and one week with Milford Exempted Village Board of Education ("Milford") earning $80.00.

During the 2010-2011 academic year, Scalf was employed as a substitute teacher by both Batavia and Milford. She testified she was called by Batavia to substitute a few days but never was called by Milford.

In the spring of 2011, Scalf was informed that her position with Cincinnati Catholic would not be renewed for 2011-2012. There is no issue regarding the fact that Scalf was in fact terminated by Cincinnati Catholic for lack of work.

In early June, 2011, both Batavia and Milford gave Scalf letters of reasonable assurance that she would continue to be employed by both school districts as a substitute teacher for the 2011-2012 school year. Scalf eventually was employed by Kenton County, Kentucky Schools as a full-time teacher for 2011-2012. She received that position on August 19, 2011.

Discussion

In her appeal, Scalf contends that she did not receive the "reasonable assurance," referred to in R.C. 4141.29(I)(1)(a), necessary to disqualify her from benefits for any weeks which began during the period between the end of the 2010-2011 academic year and the beginning of the 2011-2012 academic year. She argues that since she was both a part-time teacher and a substitute teacher during 2010-2011 there must exist reasonable assurance of continued employment in the same or similar capacity in the successive academic year, i.e. the reasonable assurance of substitute teacher employment only is not reasonable assurance of the same type of employment she previously engaged in. She further contends that reasonable assurance of substitute teaching is no guarantee of employment given the vagaries of substitute teaching. As an example, she cites her experience in 2010-2011 with Milford. Though employed as a substitute teacher she was never called upon to teach.

The issue here is whether an offer of substitute teacher employment to a former part-time teacher constitutes "reasonable assurance" such teacher "will perform services in any such capacity."

Prior to its amendment, effective November 18, 1983, former R.C.4141.29(I)(2) defined "reasonable assurance" as a written, verbal or implied agreement that the employee will perform services in the same or similar capacity during the ensuing academic year or term." The current version of R.C.4141.29 does not define "reasonable assurance."

The amendment was prompted by a federal law that disqualified teachers for between-term benefits if "there is a contract or reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms" without mentioning the

"same or similar capacity requirement." *Ash v. Bd. of Review,* 26 Ohio St.3d 158, 162, 497 N.E.2d 724 (1986).

From the legislative history it is clear that Scalf's argument that the continued employment must be in a same or similar capacity to disqualify her from benefits is incorrect. "In any such capacity" has been substituted for "in a same or similar capacity."

Under the former definition of "reasonable assurance" the Ohio Supreme Court in *Ash, supra,* concluded that a full-time teacher who is informed that her regular teaching contract was not going to be renewed for the succeeding year, but she would be hired as a substitute teacher, did not have "reasonable assurance" of employment and therefore was not disqualified from benefits.

The Findings of Fact of the Hearing Officer's Decision, mailed February 24, 2012, include a finding that Scalf was a substitute teacher for both Milford and Batavia for the 2010-2011 school year. Likewise, in his Brief the Director references the same part-time substitute teacher employment. Neither references Scalf's employment by Cincinnati Catholic during 2010-2011. Yet the Determinations of July 1, 2011 and July 6, 2011, as well as the Redetermination of August 1, 2011, all found "the claimant is totally unemployed from Cincinnati Catholic Religious Communities, ("INC.") due to lack of work.

During the course of the phone hearing of January 25, 2012, the Hearing Officer recited that the matter was before the Review Commission on appeal from the Determination of August 1, 2011 "in which the Director held that the Claimant was separated from work with Cincinnati Catholic Religious Communities due to lack of work" (1/25/12 transcript, page 6), that she was ineligible for benefits because she had a reasonable assurance of employment for the next educational term, and that she was consequently overpaid benefits. The Hearing Officer then stated that the first issue, separation from work with Cincinnati Catholic, "was not appealed and so, therefore, that issue is not before the Review Commission" (1/25/12 transcript, page 7).

Somehow that uncontested finding of Scalf's separation from work with Cincinnati Catholic at the end of the 2010-2011 school year was replaced by the

Hearing Officer's finding that she was only a substitute teacher with Milford and Batavia during 2010-2011. That finding is correct but it is incomplete, it ignores the uncontested fact of Scalf's Cincinnati Catholic employment.

As a result, the Hearing Officer used only Scalf's substitute teacher employment to determine whether there was a "reasonable assurance" that she will "perform services in any such capacity" the succeeding year. Based upon a history of only substitute teacher employment, the Hearing Officer concluded a "reasonable assurance" existed. That conclusion comports with *Cohen v. Toledo Public Schools,* 6th Dist.No. L041056, 2004-Ohio-6889. In view of the uncontested nature of her separation from work with Cincinnati Catholic, the Hearing Officer should have determined whether one who has been terminated from part-time employment is disqualified from benefits by assurances of substitute teaching the succeeding year.

Accordingly, the issue for this Court is whether the assurances of substitute teaching received by Scalf for the succeeding year disqualified her from payments when the employment from which she was previously terminated was part-time.

There is no case law available for guidance. No case addresses a fact situation similar to *Ash,* substitute employment following full-time employment, applying the post-November 18, 1983 version of R.C.4141.29. Nor is there any case law wherein the latter version of the statute is applied to substitute teaching following part-time teaching.

When interpreting the statute, the Court must give due deference to an administrative interpretation formulated by an agency. *State ex rel. McClean v. Indus.Comm.,* 25 Ohio St.3d 90, 92, 495 N.E.2d 370 (1986). But here the agency's interpretation is based upon incorrect facts, that Scalf's previous employment consisted only of substitute teaching. When an agency's interpretation is unreasonable and thwarts the intent of the legislature, it must be overturned. *University of Toledo v. Heiny,* 30 Ohio St.3d 143, 146, 507 N.E.2d 1130 (1987).

As stated in *University of Toledo v. Heiny:*

> Unemployment compensation legislation has been enacted to benefit teachers and non-instructional employees of educational institutions whose employment has terminated at the end of an academic year and whose employment prospects for the ensuring academic year are doubtful. It surely was not enacted to "subsidize the vacation periods of those who know well in advance that they may be laid off for certain specified periods." (citations omitted) *Id.* at 146.

The intent of the legislature amending R.C.4141.29 in 1983 is obvious. It wanted to expand the breadth of the between-sessions disqualification by striking the definition of "reasonable assurance" so that the subsequent employment no longer had to be "same or similar" to the previous employment to trigger the disqualification. The amended version provides that a reasonable assurance of performing certain services "in any such capacity" will trigger it. "Any such capacity" in this context reasonably means that substitute teaching subsequent to part-time teaching acts as a disqualification. Here the agency's interpretation does not thwart the intent of the legislature and is not unreasonable.

Based upon the foregoing, Scalf was not entitled to unemployment benefits. The determination of the Commission is affirmed.

This Decision and Entry is and shall constitute the final appealable order in this case.

Richard P. Ferenc, Judge

INSTRUCTION FOR SERVICE:

The Clerk is to serve the Appellant and counsel of record with a copy of this final order by regular U.S. Mail at their respective addresses on record.

Richard P. Ferenc, Judge