

FILED
 COURT OF COMMON PLEAS
 TUSCARAWAS COUNTY, OHIO
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 CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
 TUSCARAWAS COUNTY, OHIO
 GENERAL TRIAL DIVISION

DONALD A. SHEARER,	:	
	:	Case Number: 2011 AA 01 0043
Appellant,	:	
	:	Judge Elizabeth Lehigh Thomakos
vs.	:	
	:	
DIRECTOR, OHIO DEPARTMENT	:	<u>JUDGMENT ENTRY</u>
OF JOB AND FAMILY SERVICES,	:	
et al.,	:	
	:	
Appellees.	:	

This matter came before the Court on its non-oral docket for Review on October 1, 2012. The matter before the Court for consideration of the arguments of the parties relative to the Administrative Appeal, based upon the Notice of Appeal by Appellant, Donald Shearer filed on January 13, 2011.

The consideration of Appellant's Administrative Appeal was deferred pursuant to this Court's August 1, 2011 Judgment Entry, pending resolution of Appellant's Appeal of

the Court's rulings issued on July 1, 2011. This matter came back before the Court upon receipt of the Opinion dated May 18, 2012 from the Fifth District Court of Appeals for Tuscarawas County, Ohio. The Appeal, filed as Case No. 2011 AP 07 0033, was dismissed as not being an appeal from a final appealable order.

The Court has reviewed the following filed briefs:

- | | |
|----------------|--|
| April 14, 2011 | Appellant Donald A. Shearer's Brief |
| April 6, 2010 | Brief of Appellee, Ohio Department of Job and Family Services |
| May 11, 2011 | Appellee HP Auto Tuning, LLC's Reply to Appellant H. Shearer's Brief |

The Court notes that it did not consider Appellant's Affidavit attached to its Brief filed on April 14, 2011 in determination of this Appeal because the Affidavit was stricken from the record as provided in this Court's Judgment Entry filed on July 1, 2011.

STATEMENT OF THE CASE

This matter is an appeal from the State of Ohio Unemployment Compensation Review Commission's ("Commission") Decision dated December 15, 2010, which affirmed the Director's Initial Determination finding that the discharge of Appellant was for just cause, thereby disallowing benefits.

Appellant was discharged by HP Auto Tuning LLC. Appellant filed an application for benefits with the Office of Unemployment Compensation on March 24, 2009.

On April 13, 2009, the Ohio Department of Job and Family Services Office of

Unemployment Compensation issued an Initial Determination of Unemployment Compensation Benefits, which disallowed Appellant's application for unemployment compensation benefits and found that Appellant was discharged with just cause. The Initial Determination informed Appellant that he had until May 4, 2009 to file an appeal.

Appellant appealed the Initial Determination by letter sent June 10, 2009. Appellant explained in his letter that he felt that he had completed and submitted an appeal online in April of 2009 and did not discover that the appeal was not filed until June 10, 2009.

On July 2, 2009, the Director issued a Redetermination decision, which held that Appellant's appeal of the Initial Determination was not filed in a timely manner. Claimant appealed the Redetermination decision, and the Director transferred jurisdiction to the Review Commission. A hearing was held before Hearing Officer Dana C. McCue on October 29, 2009. The hearing officer's November 3, 2009 Decision affirmed the Director's Redetermination and held that the appeal was not filed in a timely manner. Upon appeal to the Commission, the Commission disallowed Appellant's request for further review. Appellant appealed the Commission's decision to the Tuscarawas County Court of Common Pleas in Case No. 2010 AA 01 0008. The Court issued a decision on August 24, 2010, which reversed and vacated the Commission's decision and remanded this matter to the Commission for further proceedings.

On November 16, 2010, a telephone hearing on the merits was held before Hearing Officer McCue. Appellant was present at the hearing. HP Auto Tuning, LLC ("Employer")

was represented by Attorney Michael Gatein. The co-owner of Employer, Eric Garbe, was also present as a witness.

Before the hearing, Appellant requested that a subpoena issue in order to request the following: (1) A list of names of all employees employed at Employer during the year 2008 and the date of hire for each person listed; (2) A list of names of all employees employed at Employer during the years 2009 & 2010 and the dates of hire for each person listed; (3) All written records of disciplinary action or documented complaints pertaining to Donald Shearer while employed by Employer during the years 2008 & 2009; and (4) Eric Garbe's presence at the November 16, 2010 hearing.

On November 10, 2010, the Commission issued a Subpoena of Documents and Witness to the Custodian of Records of Employer, which requested all written records of disciplinary action or documented complaints pertaining to claimant. The Commission also issued a Subpoena of Witness requiring the presence of Eric Garbe at the November 16, 2010 hearing.

At the beginning of the hearing, Eric Garbe reported that Employer had not received the subpoena and that he did not bring any additional documents with him to the hearing. Hearing Officer McCue informed Appellant that the issue of the subpoenaed documents could be addressed at the end of the hearing to determine whether any additional documents would be needed and whether a continuance would be necessary. Appellant requested a continuance until he received the requested documents, and his request was

denied by the hearing officer. The hearing officer notified Appellant that he could renew his request at the end of the hearing if he wanted to do so.

At the end of the hearing, the parties were given an opportunity to make final statements. The hearing officer asked Appellant if there was anything final that he would like to state. Both parties made closing statements, and the hearing officer ended the hearing without Appellant raising the issue of a subpoena or a continuance again.

On December 15, 2010, the Commission issued a Decision affirming the Director's Initial Determination and disallowing Appellant's application for unemployment benefits. The Commission found that Appellant was discharged by Employer for just cause in connection with work.

It is from the Action of the Commission that Appellant filed an **Administrative Appeal** with this Court on **January 13, 2011**. The Court has reviewed the **Transcript of the Record of the Proceedings** from the Commission, which was filed with the Court on **February 24, 2011**.

ARGUMENTS

Appellant argues that the Commission violated his due process rights by failing to conduct the hearing in conformity with procedural due process, including failing to enforce a subpoena, failing to grant Appellant a continuance, and failing to give Appellant an opportunity to proffer into the record. Appellant argues that these violations of his due process rights prohibited him from pointing to facts showing that his firing was based upon

a slowdown of business instead of the alleged poor work performance. Appellant argues that the Hearing Officer abused his discretion, and therefore, the Commission's decision was unlawful, unreasonable, and lacked competent evidence in support of the decision. Appellant argues that the decision of the Commission should be reversed because Appellant's due process rights were violated.

Appellee, Director, Ohio Department of Job and Family Services ("ODJFS") argues that the decision of the Commission should be affirmed. ODJFS argues that the Commission's decision is not unlawful, unreasonable, or against the manifest weight of the evidence because competent, credible evidence establishes that Appellant was discharged from his employment for just cause. ODJFS argues that Appellant's due process rights were not violated at the hearing. ODJFS argues that Appellant was not prejudiced by the employer's failure to produce documents concerning records of disciplinary action or documented complaints regarding his work performance. ODJFS argues that the fact that the hearing officer did not continue the hearing does not warrant a remand in this case. ODJFS argues that Appellant was given a full and fair opportunity to present evidence on his behalf and to question the Employer's witness, and therefore, there was no due process violation.

Employer incorporates the arguments of ODJFS. Employer further argues that Appellant did have the opportunity to renew his subpoena request and proffer into the record what his subpoenaed documents would have shown, but he failed to do so.

Employer argues that Appellant had the opportunity to renew his arguments in his final statement. Employer argues that the hearing officer acted within his broad discretion in accepting and rejecting evidence. Employer argues that the Commission's decision was lawful, reasonable and within the manifest weight of evidence.

STANDARD OF REVIEW

R.C. 4141.282(H), which addresses appeals from a final decision of the Commission to a court of common pleas, provides that:

"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. 4141.46 provides that "[s]ections 4141.01 to 4141.46, inclusive, of the Revised Code shall be liberally construed."

R.C. 4141.281(C)(2) provides, in relevant part, that "[t]he 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." *See also* Ohio Admin. Code 4146-7-02.

If a hearing officer's failure to grant a continuance and enforce a subpoena denies a claimant the opportunity to produce evidence essential to his claim, the hearing officer denies the claimant a fair hearing. *See Owens v. Ohio Bureau of Employment Services*, 135 Ohio App.3d 217, 221, 733 N.E.2d 628 (1st Dist. 1999).

However, a hearing officer has discretion to exclude any cumulative or irrelevant evidence, and in the absence of a proffer, the court cannot determine whether the hearing officer abused his discretion in making a determination based solely on the evidence in the commission's record. *Harrison v. Penn Traffic Co.*, 10th Dist. No. 04AP-728, 2005-Ohio-638, ¶24, citing R.C. 4141.281(C)(2).

"The key factor in deciding whether the hearing satisfied procedural due process is whether the claimant had the opportunity to present the facts which demonstrate that she was entitled to unemployment benefits." *Bulatko v. Ohio Dept. of Job and Family Services*, 2008-Ohio-1061, ¶12; *See also Nardon Hills City School District Board of Education v. Unemployment Compensation Board of Review*, 11 Ohio App.3d 189, 463 N.E.2d 1276, at paragraph one of the syllabus (9th Dist. 1983). There is no due process violation if a party is given an opportunity to proffer evidence but does not do so. *Bulatko*, at ¶12, citing *Gregg v. SBC Ameritech*, 10th Dist. No. 03AP-429, 2004-Ohio-1061.

Ohio Admin. Code 4146-7-02(H) provides that “[o]n its own motion, or upon the showing of good cause by an interested party, or whenever it appears that such action is necessary to afford the claimant or employer a reasonable opportunity for a fair hearing, the review commission or hearing officer may adjourn or continue a hearing to another time or place.”

“If the parties do not receive a fair hearing, the resulting determination is unlawful and unreasonable.” *Cottrell v. Administrator*, 5th Dist. No. 00CA06, 2001 WL 62294, *1.

DECISION

The Court **FINDS** that the hearing officer’s failure to enforce the subpoena, grant a continuance, or provide Appellant with a reasonable opportunity to proffer evidence in to the record denied Appellant a fair hearing.

The Court **FINDS** that because Appellant was denied a fair hearing, the Commission’s Decision was unlawful and unreasonable.

The Court **FINDS**, therefore, that the **Decision** of the Commission dated December 15, 2010 should be **Vacated**, and this matter should be **Remanded** to the Commission for Appellant to receive a fair hearing.

It is therefore **ORDERED** that the **Decision** of the Commission dated December 15, 2010 is **Vacated**, and this matter is **Remanded** to the Commission for Appellant to receive a fair hearing.

It is further **ORDERED** that the costs of this Appeal shall be assessed to ODJFS.

It is further ORDERED that the Clerk of Courts shall close the case file and remove it from the pending docket of the undersigned.

IT IS SO ORDERED.



Judge Elizabeth Lehigh Thomakos

Dated: Nov. 8, 2012

cc: Joseph I. Tripodi, Esq.
J. Michael Gatien, Esq.
Assistant Attorney Generals Susan M. Sheffield & Lori Weisman
Court Administrator
Clerk of Courts