

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

TINA FREEMAN, : CASE NO. 2012-CVH-0841
Appellant, : Judge Richard P. Ferenc
Vs. :
STATE OF OHIO UNEMPLOYMENT :
REVIEW COMMISSION, ET AL., :
Appellees. : DECISION AND ENTRY

PARSONS A. WOODRUFF
CLERK OF COURT
CLERMONT COUNTY, OHIO
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FILED

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Tina Freeman, 667 Holiday Drive, Cincinnati, OH 45245.

Procedural Posture

Appellant, Tina Freeman, ("Freeman"), appeals the determination of the Unemployment Compensation Review Commission ("Commission"), that her Request for Review before the Commission was not timely filed. Freeman filed an Application for unemployment benefits on June 27, 2011, after she was discharged by Hogue Cleaning and Supply, Ltd., for lack of work. On July 18, 2011, the Ohio Department of Job and Family Services ("ODJFS"), through its Director, determined that Freeman was entitled to unemployment compensation with a benefit year beginning June 26, 2011, and a weekly benefit amount of \$254.00 based on her base period weeks and wages eligibility requirements. On November 29, 2011, a second Notice of Determination was sent to Freeman informing her that ODJFS had learned that she had "unreported earnings" with another employer, Marketing Support Services, Inc., ("MSS"), for the period June 26, 2011, through November 12, 2011, that she had withheld this information with the intent of obtaining benefits to which she was not entitled and as a result the weeks at issue were disallowed.

ODJFS determined that Freeman was overpaid benefits totaling \$4,826.00 which she was ordered to repay. Because Freeman's actions were found to constitute a fraudulent misrepresentation, it was further ordered that if she filed valid weekly claims during the period from November 28, 2011, through November 29, 2017, she would be ineligible for 38 valid weekly claims pursuant to R.C. 4141.35(A) and (A)(2).

Freeman appealed the November 29, 2011 Determination on December 5, 2011, and it was affirmed on December 19, 2011. She appealed again and the matter was transferred to the Review Commission.

On January 30, 2012, a Hearing Officer conducted a telephone hearing. In a Decision mailed January 31, 2012, the Hearing Officer modified ODJFS's Determination. She found that Freeman was entitled to unemployment benefits if she was partially unemployed, i.e. if in any week her total wages were less than her weekly benefit amount. She found that in four of the weeks between July 2, 2011, and November 12, 2011, Freeman's earnings were less than her weekly benefit amount. In each remaining week, it was higher and for those weeks she was not entitled to benefits.

The Hearing Officer found, however, that Freeman had not made a fraudulent misrepresentation regarding her MSS income. To the contrary, she concluded that Freeman had reported her second job at the time of her initial application and was given incorrect instructions on how to file her benefits. There followed numerous weeks where ODJFS staff filed for Freeman after she disclosed to them her income from her second employment.

The January 31, 2012 Decision advised Freeman of her right to appeal within twenty one days, on or before February 21, 2012. Freeman appealed but her notice of appeal was sent by regular mail bearing a February 27, 2012 postmark. The Commission's receipt stamp shows it received the notice on February 29, 2012.

On March 26, 2012, the Commission gave notice of an April 5, 2012 hearing to address solely the issue of the timeliness of Freeman's appeal. At the hearing, Freeman was the only witness. She acknowledged that her notice of

appeal was filed late but offered as her excuse the fact that she was waiting for a statement from ODJFS stating the amount it claimed she owed. According to Freeman, "so I had to wait until I got that statement to decide if I was going to appeal it or not." In a Decision mailed April 6, 2012, the Hearing Officer concluded that Freeman's request for review was not timely filed. On May 3, 2012, Freeman filed her appeal to this Court.

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), citing, *Irvine v. Unemp. Comp. Bd. Of Rev.*, 19 Ohio St.3d 15, 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.

Issue on Appeal

In her Notice of Appeal and in her Complaint, Freeman states that she is appealing both the Commission's Decision mailed April 6, 2012, finding her request for review not timely filed and the January 31, 2012, Decision, finding her liable for repayment of benefits that were overpaid. Contrary to Freeman's stated

intent, the only issue before the Court on this appeal is the propriety of the finding that her Request for Review postmarked February 27, 2012, was untimely.

Applicable Law

R.C. 4141.281(A) provides:

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.

R.C. 4141.281(D)(9), regarding the extension of the appeal period, provides four scenarios as a result of which the time for filing an appeal is extended. None of them apply here.

R.C. 4141.281(D)(1) provides:

The date of the mailing provided by the director or the commission is sufficient evidence upon which to conclude that a determination, redetermination, or decision was sent to the party on that date. Appeals may be filed with the director, commission, with an employee of another state or federal agency charged with the duty of accepting claims, or with the unemployment insurance commission of Canada. Any timely written notice by an interested party indicating a desire to appeal shall be accepted.

The director, commission, or authorized agent must receive the appeal within the specified appeal period in order for the appeal to be deemed timely filed, except that: if the United States postal service is used as the means of delivery, the enclosing envelope must have a postmark date or postal meter postmark that is on or before the last day of the specified appeal period; and where the postmark is illegible or missing, the appeal is timely filed if received not later than the end of the fifth calendar day following the last day of the specified appeal period.

The director and the commission may adopt rules pertaining to alternate methods of filing appeals under this section.

Discussion

The Commission has as a preliminary matter moved to strike miscellaneous filings and a recording filed by Freeman with the Court. These include (1) a letter from Freeman dated July 5, 2012, indicating she had not received a copy of the transcript of the January 30, 2012 hearing and requesting that a copy be filed; (2) a copy of a July 19, 2012 letter from the Commission to

Freeman filed August 6, 2012, related to the Commission's inability to provide the requested transcript; and (3) "letter" filed August 10, 2012, from Freeman explaining the Commission's failure to provide the requested transcript and enclosing an audio tape and audio recorder/player, the tape being a recording Freeman made herself of the January 30, 2012 hearing.

R.C. 4141.282(F)(1) provides that within forty five days after a notice of appeal is filed the Commission shall file with the Clerk of Courts a certified transcript of the record of the proceedings at issue before the Commission. Here the Commissioner filed the transcript of the April 5, 2012 hearing directed to the issue of timeliness of Freeman's appeal but did not file a transcript of the January 30, 2012 hearing, informing Freeman, in its July 19, 2012 letter, that the transcript was "inaudible, inoperable or misplaced."

R.C. 4141.282(F)(2) provides that if the Commission cannot file the transcript then the Court shall remand the matter to the Commission for additional proceedings in order to complete the record on appeal, including a new hearing. As previously stated by this Court, the only issues before it on this appeal are those that were before the Commission at the April 15, 2012 hearing. R.C. 4141.282(H) provides that this Court is to hear the appeal on the certified record provided by the Commission. The Twelfth District Court of Appeals, applying the former version of R.C. 4141.282(H), R.C. 4141.28(O), observed that there is no provision by which either party may supplement the record as certified by what was then the Board of Review. *General Motors Corp. v. Sanders*, 12th Dist.No. CA84-02-022, 1985 WL 8707, *1 (June 28, 1985). The Commission's Motion to Strike is granted.

Regarding the timeliness of Freeman's appeal, it is uncontroverted that it was filed beyond the twenty one day appeal period. Extension of the appeal time is warranted only under circumstances appearing in 4141.281(D)(9), none of which Freeman contends are applicable. The excuse given by Freeman, that she was waiting to find out from ODJFS the amount of her payback to decide if she would appeal, does not support extension of the deadline. The Court finds nothing to show that the Commission's determination that Freeman's appeal was

filed out of time was unlawful, unreasonable or against the manifest weight of the evidence.

Conclusion

Consistent with the above findings and analysis,

IT IS HEREBY ORDERED, that the ODJFS Motion to Strike is granted.

IT IS FURTHER ORDERED, that the Commission's determination is affirmed.


IT IS FURTHER ORDERED, that this Decision and Entry shall constitute the final appealable order in this case as all issues have been determined. Costs shall be taxed to the Appellant.



Richard P. Ferenc, Judge

INSTRUCTIONS FOR SERVICE:

The Clerk shall serve a copy of this Decision and Entry upon the Appellant and counsel for the Appellee by regular U.S. Mail at their respective addresses that appear of record herein.



Richard P. Ferenc, Judge