

COMMON PLEAS COURT  
WARREN COUNTY, OHIO

JAN 23 2013

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JAMES L. SPAETH  
CLERK OF COURTS

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

*CT*

WARREN COUNTY AUDITOR, )

Appellant, )

CASE NO. 12CV81696

-vs- )

BRACIE WELDON, et al., )

Appellees, )

ENTRY GRANTING  
PERMANENT JUDGMENT  
ON MAGISTRATE'S DECISION ✓

A Magistrate's Decision having been filed herein on December 6, 2012 and no objections to the Decision having been filed within fourteen (14) days from that date, the Court **ORDERS** the Decision adopted as a permanent judgment of this Court.

*J. Flannery*  
\_\_\_\_\_  
JUDGE JAMES L. FLANNERY

C: Attorney Robin Jarvis  
Attorney Harrison Green  
Attorney Keith Anderson

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JAMES L. SPAETH, CLERK  
WARREN COUNTY, OHIO  
COMMON PLEAS COURT

BY *Beverly Beth*  
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DEPUTY

COMMON PLEAS COURT  
WARREN COUNTY OHIO  
FILED

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JAMES L. SPAETH  
CLERK OF COURTS

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

WARREN COUNTY AUDITOR, )

Appellant, )

-vs- )

BRACIE WELDON, et al., )

Appellees. )

CASE NO. 12CV81696

MAGISTRATE'S DECISION

The Warren County Auditor brings the above-referenced administrative appeal of a decision of an Unemployment Compensation Review Commission hearing officer which determined that Appellee Bracie T. Weldon was discharged from her employment with Warren County Children Services without just cause and is entitled to unemployment compensation benefits.

I. PROCEDURAL POSTURE

Appellee applied for unemployment compensation benefits on October 13, 2011, which were allowed by the Ohio Department of Job and Family Services. This determination was affirmed on November 23, 2011. On December 5, 2011, Appellant appealed the redetermination and this matter was transferred to the UCRC on December 6, 2011.

Telephonic hearings were held before a UCRC hearing officer on December 29, 2011 and January 13, 2012. On January 19, 2012, the hearing officer issued a decision concluding that Warren County discharged Appellee without just cause, entitling her to unemployment compensation benefits. Appellant sought further review from the UCRC, which was disallowed by a decision issued February 15, 2012.

On March 13, 2012, Appellant filed a timely notice of appeal to this Court.

## II. THE RECORD ON APPEAL

Appellee began work as an on-going caseworker on February 28, 2011, subject to an eight month probationary period. According to Warren County Children Services policy, Appellee was to receive a written evaluation after 120 days.

Appellee had prior experience as a children protective services caseworker in both Kentucky and in Hamilton County, Ohio. Upon being hired in Warren County, Appellee attended 103 hours of training provided by the Department of Job and Family Services. This was followed by "on the job" training.

According to the testimony of Shawna Barger, Appellant's direct supervisor, Appellee's job performance was deficient in several respects. According to Barger, Appellee demonstrated an inability to produce her work in a timely manner. Barger claims that Appellee submitted at least four case review reports late, failed, after five unsuccessful attempts, to complete an interstate placement request, and failed to timely follow up on the placement of an infant in the State of Washington.

According to Barger, Appellee failed to adhere to the employer's conservative dress code, particularly for appearances in court. After Barger discussed this matter with Appellee in May of 2011, Appellee began complaining to other employees, and surreptitiously took photographs of other employees to illustrate their manner of dress.

Barger states that she received a complaint from the Warren County Prosecutor's Office that Appellee was not providing it with information on cases in a timely manner. After Barger discussed this problem with Appellee, Appellee confronted an assistant prosecutor about it in the courthouse of the Juvenile Court.

Barger also states that Appellee's written reports suffered from poor grammar.

According to Barger, she received numerous complaints about Appellee from co-workers, the prosecutor's office, the local mental health agency, a foster parent, a relative/caregiver, and a contracted service provider. Barger claims that Appellee's interaction with her co-workers created a negative work environment.

Barger testified that she met with Appellee every week to review her caseload and at that time discussed various problems. On September 1, 2011, Barger met with Appellee and,

according to Barger, "laid it all out there." Barger, however, gave Appellee no suggestion as to how she could improve her performance.

Barger did not give Appellee a written evaluation after 120 days, as is required by Warren County Children Service's policy, and in fact, had requested an extension. Barger states that well in advance of the September 1, 2011 meeting, she had already decided to request that Appellee be discharged.

On September 26, 2011, Warren County Children Service's director Patricia Jacobs wrote to the Warren County Commissioners requesting that Appellee be terminated. On September 7, 2011, the Commissioners voted for a resolution terminating Appellee's employment, effective September 28, 2011. On September 28, 2011, Appellee was called into a meeting with Barger, Jacobs and the County's human resources manager, wherein she was advised she was terminated, and at that time was given her written evaluation, some three months beyond 120 days.

Appellee's testimony differs from Barger's to a large degree. According to Appellee, her meetings with Barger were no more than 45 minutes, most of which was consumed by review of her active cases. Appellee states that at no time prior to September 1, 2011 was she told that her performance was inadequate, that her job was in jeopardy, nor was she given any advice as to how she could improve.

Appellee claims that on numerous occasions she told Barger she needed additional training on policies and procedures, but Barger told her she would have to seek advice from a co-worker. After 120 days had passed, Appellee asked Barger several times about her written evaluation, only to be told, "I gotta get around to it."

The January 19, 2012 decision of the hearing officer states, in relevant part, as follows:

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#### FINDING OF FACT

Claimant was employed by Warren County Auditor from February 28, 2011 to September 28, 2011 as a Case Worker in the Protective Services Department. Claimant was responsible for monitoring and preparing cases for the department. Claimant was a probationary employee. Warren County Auditor maintains a

written policy stating that probationary period employees are to be given an evaluation during the probationary period. Claimant did not receive an evaluation in June, 2011 as required by the policy. Shawna Barger, claimant's supervisor, requested an extension because she already knew that claimant had performance issues and she would be recommending discharge.

Ms. Barger received complaints from families and the prosecutor's office regarding claimant's performance and interactions. Claimant did not accurately create her reports and did not complete her tasks in a timely manner. Ms. Barger verbally spoke with claimant about her violations of the dress code and her performance, but did not issue any formal disciplinary actions or written warnings. Ms. Barger did not inform claimant that she was in danger of being discharged because of her performance. On September 1, 2011, Ms. Barger informed claimant that she had multiple concerns about claimant's performance.

On September 28, 2011, claimant was presented with a performance evaluation and was informed that she was being discharged.

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#### REASONING

In *Tzangas, Plakas and Mannos, Attorneys v. Administrator Ohio Bur. of Emp. Serv.* (1995), 73 Ohio St.3d 694, the court held that unsuitability for a position constitutes fault sufficient to support a just cause termination, provided (1) the employee does not perform the required work; (2) the employer made known its expectations of the employee at the time of hiring; (3) the expectations were reasonable; and (4) the requirements of the job did not change since the date of the original hiring for that particular position.

Ms. Barger testified that claimant repeatedly violated the dress code policy, failed to follow up on cases in a timely manner, and failed to properly complete her reports. The Hearing Officer finds that claimant failed to perform her required job duties.

Ms. Barger testified that claimant received 103 hours of training for the position, and claimant had previous experience as a case worker in Kentucky. Based upon the testimony at the hearing and the other information in the record, the Hearing Officer finds that the job duties were explained to claimant upon hire. However, the Hearing Officer finds that Warren County failed to inform claimant that she was in danger of being discharged due to her performance. The Hearing Officer finds that claimant was not given an adequate opportunity to correct her performance issues prior to being discharged. Warren County failed to follow its policy when it did not provide an evaluation to claimant in June, 2011. Instead, claimant was presented with a performance evaluation during her termination meeting. Ms. Barger testified that she did not administer an evaluation in June to claimant because she was already aware of claimant's issues and knew that she would be making a recommendation for termination at a later date. Ms. Barger testified that she identified numerous issues in her meeting with claimant on September 1, 2011. However, Ms. Barger's testimony supports that she had already made her decision to terminate claimant's employment, and the Hearing Officer finds that Ms. Barger's discussion with claimant was not intended to assist claimant in performing her job duties. Thus, the Hearing Officer finds that Warren County was unreasonable to expect that claimant adequately perform her job duties without being provided appropriate feedback about her performance during her employment.

The record supports that the requirements did not change after claimant started in her position as a case worker.

Based upon the above, the Hearing Officer finds that the elements in *Tzangas* were not met. Accordingly, the Hearing Officer finds that claimant's unsuitability for the position did not

constitute fault sufficient to warrant discharge. The Hearing Officer finds that claimant was discharged by Warren County without just cause in connection with work.

### III. ASSIGNMENT OF ERROR

Appellant states a single assignment of error:

The decision of the Unemployment Compensation Review Commission is unreasonable and against the manifest weight of the evidence and should be reversed.

### 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

The issue before the hearing officer was whether Appellee was terminated for just cause.

A claimant is not entitled to unemployment compensation if he was terminated from his employment for just cause. R.C. 4141.29 (D)(2)(a).

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. *Lorain 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 for 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.

Unsuitability for a position constitutes fault sufficient to support a just cause determination. *Tzangas, Plakas & Mannos, supra*, syllabus at ¶3. An employer may properly find an employee unsuitable for the required work, and thus to be at fault when: 1.) the employee does not perform the required work; 2.) the employer made known its expectations at the time of hiring; 3.) *the expectations were reasonable*; and 4.) the requirements of the job did not change substantially since the date of the original hiring for that particular purpose. *Id.*, syllabus at ¶4 (emphasis added).

The UCRC hearing officer in this case found that the first, second and fourth elements of the *Tzangas, Plakas & Mannos* test were met in this case, and that finding is fully support by the record. However, the hearing officer found that the expectations of Warren County were not reasonable, insofar as Warren County expected Appellee to "adequately perform her job duties without being provided appropriate feedback about her performance during her employment." It is obvious from this finding that the hearing officer found Appellee a more credible witness than her supervisor, Shawna Barger. This Magistrate must accept that finding.

This Magistrate would note that the hearing officer seems to place a great emphasis on the fact that Appellee was not given her 120 day written evaluation, as required by policy, and thus, "Warren County failed to follow its own policy." It is correct that some courts have held that *progressive disciplinary systems* create expectations on which employees rely, and fairness

requires an employee not to be subject to more severe *discipline* than that provided for by an employer's policy. *Mullen v. Admin. Ohio Bd. of Employment Servs.*, 8<sup>th</sup> Dist. No. 49891, 1986 Ohio App. LEXIS 5278, \*13. (emphasis added). However, in the present case, Appellee was terminated because she could not adequately perform her job, not because of some violation of a workplace rule. The policy requiring a 120 day written evaluation of probationary employees was not part and parcel of a disciplinary system, and this Magistrate questions whether Warren County's failure to follow this policy, *ipso facto*, requires a finding that Appellee was fired without just cause. See *Williams v. State Unemployment Compensation Review Comm'n.*, 11<sup>th</sup> Dist. No. 2010-T-0094, 2011 Ohio App. LEXIS 2089, ¶¶44-45 (distinguishing between progressive discipline systems and unsuitability for a position).

Nevertheless, it is clear that it was Warren County's intention to provide Appellee with both formal classroom training and "on the job" training as well, and Appellee had a reasonable expectation that part of this training would encompass feedback and constructive criticism from her superior. According to Appellee she did not receive this. Accepting Appellee's version of the facts, which this Magistrate must do, this Magistrate cannot conclude that the decision of the UCRC hearing officer in this case was unlawful, unreasonable, or against the manifest weight of the evidence.

#### IV. MAGISTRATE'S DECISION

The January 19, 2012 decision of the Unemployment Compensation Review Commission in this matter is *affirmed*.

Costs to be assessed to the Warren County Auditor.

  
MAGISTRATE ANDREW HASSELBACH

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JAMES L. SPAETH, CLERK  
WARREN COUNTY, OHIO  
COMMON PLEAS COURT

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BY   
DEPUTY

**NOTICE TO PARTIES**

The parties shall take notice that this decision may be adopted by the Court unless objections are filed within fourteen (14) days of the filing hereof in accordance with Civil Rule 53 (D)(3)(b).

A party shall not assign as error on appeal the court's adoption of any factual findings or legal conclusions, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R.53 (D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R.53.(D)(3)(b).

  
MAGISTRATE ANDREW HASSELBACH

C: Attorney Robin Jarvis  
Attorney Harrison Green  
Attorney Keith Anderson