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THIS IS A FINAL
APPEALABLE ORDER

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IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Lucas County TASC, Inc.,

* Case No. CI12-3431

Appellant,

* Judge Ruth Ann Franks

-vs-

*

* OPINION AND JUDGMENT ENTRY

Richard Parish, et al.

*

Appellees.

*

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This cause is before the Court upon Appellant Lucas County TASC, Inc.'s Appeal of a decision rendered by the State of Ohio's Unemployment Compensation Review Commission. Upon consideration of the certified administrative record and applicable law, the Court affirms the decision of the Commission.

I. Facts

This is an administrative appeal wherein Appellant Lucas County TASC, Inc.¹ ("TASC")

¹ Lucas County Treatment Alternatives to Street Crime, Inc.

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appeals a decision of the State of Ohio's Unemployment Compensation Review Commission ("UCRC") finding that Appellee Richard Parish ("Parish") has established the necessary monetary requirements for a valid Application for Determination of Benefit Rights. The UCRC's finding was based on its determination that Parish was an "employee" of TASC.

Procedural Facts

On January 17, 2012, Parish filed an Application for the Determination of Benefit Rights, seeking unemployment benefits after the expiration of his term of service as a project director.² As project director, Parish was responsible, pursuant to an Agreement for Professional Services ("the contracts"), for the coordination of project activities between various entities participating in the Reentry Coalition of Northwest Ohio ("RCNWO") project. On January 27, 2012, Parish's application for benefits was denied because he did not have at least twenty qualifying weeks of employment that was subject to unemployment compensation law.

Parish then requested a redetermination of the decision, but the Director of the Office of Unemployment Compensation affirmed the denial of his application on February 17, 2012. Parish also appealed this decision, and a hearing officer of the UCRC conducted a telephonic hearing on the matter. On or about March 14, 2012, the hearing officer reversed the Director's decision, finding that Parish was an employee of TASC, and not an independent contractor as TASC had argued. Based on this determination, the hearing officer found that Parish had established the necessary monetary requirements for a valid application for determination of benefit rights. Accordingly, the matter was remanded to ODJFS to determine the reason for

² Appellee Director of Job & Family Services ("ODJFS") indicates, in its brief, that it accepts TASC's statement of the case. Therefore, the procedural facts are taken from TASC's recitation of the same.

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background checks which were required of all TASC employees. Additionally, Parish used business cards that identified him as the project director for the RCNWO project, and containing an email contact of "Director@RCNWO.org."

Moreover, TASC indicates that, at the time the parties entered into the contracts, each was free to include any lawful terms, including the creation of an independent contractor relationship. If Parish was unwilling to bind himself under such terms, he should not have done so. And, despite "spectacularly detailed" contracts, the inclusion of details does not undermine the express contractual relationship and transform the terms of the agreement.

TASC asserts that these facts unequivocally demonstrate that Parish was an independent contractor at all times while serving as project director for the RCNWO project. In addition to these facts, TASC argues that Parish understood and specifically acknowledged his status as an independent contractor when he executed the contracts and when he presented invoices for payment for his services from the grant money being administered by TASC.

In response, ODJFS concedes that Parish's contracts indeed specified that he was an independent contractor, and not an employee of TASC. However, ODJFS characterizes this status only as a "legalistic contortion," because TASC controlled nearly every facet of how Parish performed his work. For instance, TASC required that Parish develop an operation plan including specific action steps as well as short and long term strategies to implement the plan. Parish was told to organize RCNWO biweekly membership and Executive Committee meetings and to maintain RCNWO membership and subcommittee attendance lists. Parish was also instructed to update RCNWO's website, to update the membership contact database, to set up an email group, and to "hold specific meetings with specific individuals at specific times regarding

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specific issues."

ODJFS also points out that TASC provided office space for Parish, paid his travel expenses, supplied him with a cell phone and equipment for work use, and required him to observe a dress code when he was working. Essentially, ODJFS argues that despite Parish's broad project objective of taking steps to improve RCNWO's mission of effecting successful re-entry of former prisoners into the population, Parish's contracts "micro-managed" what, how, when, and with whom Parish was to perform. ODJFS cites to an extensive list of items from Parish's contracts which portray this "micro-management" and demonstrate that Parish was essentially not an independent contractor, but an employee.³

Accordingly, ODJFS asserts that this Court is obligated to affirm the decision of the USCS because, at the very least, Parish's employment status is factually a "close call," and deference must be given to the hearing officer's factual findings.

II. Standard

The standard of review to be applied by the court of common pleas in appeals from decisions of the board of review is prescribed by statute. R.C. 4141.28(O) provides, in pertinent part:

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

³ ODJFS also devotes much time and space asserting a "policy" argument, based on secondary legal resources, about the dangers of "mis-classifying" employees and its ramifications to "government coffers." The Court disregards such argument and declines to make any policy statements regarding this issue. Obviously, the Court's review of this matter is limited as prescribed by statute.

This standard of review applies to all levels of appellate review in unemployment compensation cases, but its application does not result in a de novo review standard. Tzangas, Plakas & Mannos, Attorneys v Administrator, Ohio Bureau of Employment Services, 73 Ohio St. 3d 694, 1995-Ohio-206, 653 N.E.2d 1207. On review of purely factual questions, the common pleas court is limited to determining whether the Review Commission hearing officer's determination is supported by the evidence in the record. Thompson v Aeroquip Inoac Co., 6th Dist. No. S-02-022, 2003-Ohio-1859 citing Angelkovski v. Buckeye Potato Chips Co., 11 Ohio App.3d 159, 162, 463 N.E.2d 1280 (10th Dist.1983) (overruled on other grounds). But, while appellate courts are not permitted to make factual findings or to determine the credibility of witnesses, they do have the duty to determine whether the board's decision is supported by the evidence in the record. Irvine v. Unemp. Comp. Bd. of Review, 19 Ohio St.3d 15, 482 N.E.2d 587, 590 (1985). Factual findings supported by some competent, credible evidence going to the essential elements of the controversy must be affirmed. Thompson, citing C.E. Morris v. Foley Constr. Co., 54 Ohio St.2d 279, 376 N.E.2d 578 (1978). But, the common pleas court has a duty to reverse the Review Commission's determination if it is unlawful, unreasonable or against the manifest weight of the evidence. Id. (citations omitted).

III. Discussion

Subjudice, the UCRC found that Parish's work as a program director under the contracts constituted covered employment as an employee, not an independent contractor. Specifically, the UCRC's reasoning for this finding states in its entirety:

Although [TASC] argues that [Parish] was an independent contractor, the facts presented weigh against that argument. Considering the factors above, the plain language of the contracts

combined with the credible testimony of the claimant demonstrate that [TASC] exercised considerable direction and control over [Parish's] performance of work.

Certainly [TASC] did not require [Parish] to clock in or out or work a particular number of hours per week; nor did [TASC] withhold taxes from [Parish's] pay. However, these factors and the language in the contracts indicating that [Parish] is an "independent contractor," are outweighed by the considerable specific requirements [TASC] imposed upon [Parish] regarding meetings, dates, reports, records, and other work product. Simply stated, the words "independent contractor" are not magic words, and their use at the end of the contract does not transform an employment contract into an independent contractor contract.

As an initial matter relative to its analysis of this appeal, the Court notes that R.C.

4141.01 (B)(1) defines "employment" as:

service performed by an individual for remuneration under any contract of hire, written or oral, express or implied, including service performed in interstate commerce and service performed by an officer of a corporation, without regard to whether such service is executive, managerial, or manual in nature, and without regard to whether such officer is a stockholder or a member of the board of directors of the corporation, unless it is shown to the satisfaction of the director that such individual has been and will continue to be free from direction or control over the performance of such service, both under a contract of service and in fact. The director shall adopt rules to define 'direction or control.'

Accordingly, the express language of the statute requires an employer to show that its workers are free from direction or control "both under a contract of service and in fact." See, Miracle Home Health Care, LLC v. Ohio Dep't of Job & Family Servs., 10th Dist No. 12AP-318, 2012-Ohio-5669. The main feature of an employer-employee relationship is the employer's right to control or direct the means or manner of doing the work. Butts v OBES, 7th Dist. No. 98 CO 7, 1999 Ohio App. LEXIS 3914 (Aug. 19, 1999), citing Hanson v. Kynast, 24 Ohio St. 3d 171, 173,

494 N.E.2d 1091 (1986). If there is merely a right to control and direct the end result of the work, then the relationship is that of principal-independent contractor. Id.

Subjudice, the hearing officer's decision cites to O.A.C. 4141-3-05 (B), which contains a list of twenty factors that may be used in determining whether there is sufficient direction or control over a claimant to constitute an employer-employee relationship. The code's language notes that the presence of each of the factors indicates some degree of direction and control, but the same is dependent upon the occupational and factual context in which the services are performed. The code also indicates that the factors are designed only as guidelines for determining the existence of control, and must be considered in totality. The factors include whether:

- (1) The worker is required to comply with the instructions of the person for whom services are being performed, regarding when, where, and how the worker is to perform the services;
- (2) The person for whom services are being performed requires particular training for the worker performing services;
- (3) The services provided are part of the regular business of the person for whom services are being performed;
- (4) The person for whom services are being performed requires that services be provided by a particular worker;
- (5) The person for whom services are being performed hires, supervises or pays the wages of the worker performing services;
- (6) A continuing relationship exists between the person for whom services are being performed and the worker performing services that contemplates continuing or recurring work, even if not full time;
- (7) The person for whom services are being performed requires set hours during which services are to be performed;

(8) The person for whom services are being performed requires the worker to devote himself or herself full time to the business of the person for whom services are being performed;

(9) The person for whom services are being performed requires that work be performed on its premises;

(10) The person for whom services are being performed requires that the worker follow the order of work set by the person for whom services are being performed;

(11) The person for whom services are being performed requires the worker to make oral or written progress reports;

(12) The person for whom services are being performed pays the worker on a regular basis such as hourly, weekly or monthly;

(13) The person for whom services are being performed pays expenses for the worker performing services;

(14) The person for whom services are being performed furnishes tools, instrumentalities, and other materials for use by the worker in performing services;

(15) There is a lack of investment by the worker in the facilities used to perform services;

(16) There is a lack of profit or loss to the worker performing services as a result of the performance of such services;

(17) The worker performing services is not performing services for a number of persons at the same time;

(18) The worker performing services does not make such services available to the general public;

(19) The person for whom services are being performed has a right to discharge the worker performing services;

(20) The worker performing services has the right to end the relationship with the person for whom services are being performed without incurring liability pursuant to an employment contract or agreement. The director shall make a determination,

based on the factors listed in this rule, as to whether or not an employment relationship exists for purposes of Chapter 4141. of the Revised Code.

Bearing these "guidelines" in mind, the Court turns to the hearing officer's findings of fact to determine if they are supported by some competent, credible evidence. See, Thompson. The hearing officer's decision, quoted herein on pp. 6-7, stated that consideration of these factors along with the facts presented, the plain language of Parish's contracts, and his "credible testimony" demonstrated that TASC in fact exercised considerable direction and control over Parish's work.

The majority of the hearing officer's factual findings describe the terms of Parish's contracts with TASC. Special attention is given to the specific detail with which Parish's duties are listed and explained. Additionally, the hearing officer noted that Parish was not required to "clock in or clock out," or to work during specific hours; he was paid an hourly rate and he experienced no profit or loss as a result of his performance under the contracts; and TASC did not withhold taxes from Parish's pay. Further, TASC provided office space in which Parish could work, although he was not permitted access to the office outside of TASC's normal working hours. TASC also provided him with equipment, a cellular phone, and travel expenses. Parish was not prohibited from conducting other work , as long as it did not create a conflict, and both parties had the right to end the working relationship.

This Court's review of the contracts leads to a conclusion that a reasonable person *could* find that the contract provisions alone readily implicate the "direction and control" factors (11),

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(13), and (19) above.⁴ The Court has also reviewed Parish's testimony. He testified that he signed the initial contract with TASC because it was the grant administrator, although he was to perform work for RCNWO. However, Parish stated that he signed the second, or extension, contract under a certain amount of duress because TASC had been "dragging their feet" on the extension and Parish had already performed three weeks' worth of work beyond the contract's end date. Accordingly, Parish was concerned that he would not get paid for that work if he did not sign the second contract.

While Parish understood himself to be an independent contractor, he eventually came to feel that he was working under the control of TASC due to a conversation he had with Johnetta McCollough⁵ approximately one month after executing the first contract. Parish testified that McCollough made it clear to him, through a series of conversations, that he was working "at the direction of" TASC. Parish further stated that, in practice, there was a "narrowing" of the contract language relative to what he could do and how he could do it. Parish described McCollough's increasing control over him not so much as a day-to-day occurrence, but as an imposition of more stringent control than was provided for in the contracts. Parish testified, by way of example, that McCollough seemed to take more control over how he dressed,⁶ where he did his work, and his ability (or "permission," so to speak) to talk to city officials. Indeed, review of Parish's second contract reveals additional terms, not present in the first contract, relative to TASC's expectations

⁴ To be clear, this Court is not expressing its opinion relative to the "correctness" of the UCRC's determination that Parish was an employee. It is simply reviewing whether the UCRC's factual findings are based on some competent, credible evidence, and whether UCRC's application of the law to those findings leads to an unlawful result.

⁵ TASC's Executive Director

⁶ Parish testified that McCollough told him what to wear "through the Board," and that he wore a suit and tie "about 90% of time," but opted for jeans and a sweater or sweatshirt on the rare occasion when he had no appointments.

of Parish. Those included directives that Parish shall "exhibit respectful communication, language, and behavior appropriate to executive leadership role when interacting with key community stakeholders, coalition partners, state partners, and persons returning from prison;" and he shall "communicate and coordinate in a professional and respectful manner with Admin Agent leadership staff to ensure appropriate coordination of activity, contract monitoring, and scope definition and renewal/extension of agreements." Parish testified that McCollough essentially controlled him "through RCNWO's board." Parish held this belief based on his conversations with individual board members in which it became clear that the [RCNWO] board's desires and recommendations were subject to rejection by TASC.⁷ Parish presented no competent evidence to corroborate this latter assertion.

At this point, the Court notes that the hearing officer's decision did not indicate any consideration of or reliance on McCollough's hearing testimony. Likewise, the hearing officer did not express an opinion regarding the credibility of the same. Nonetheless, the Court notes that McCollough passionately denied any control over Parish. Her characterization of TASC's relationship to the RCNWO project is noteworthy, particularly in light of the specificity of Parish's contracts as described herein. McCollough stated:

[TASC] has served as the administrative fiscal agent for the Reentry Coalition for the life of this grant, which has been three years. We contract with a number of independent contractors to deliver reentry services on the part of the coalition because they do not have a 501(c)(3). Our only role in this is to provide [the reentry coalition] with physical space and supervise, the fiduciary to uh govern, to uh pay the expenses and uh manage the grant's

⁷ Parish points to the specific example that McCollough rejected the board's recommendation to keep Parish on the project. On this point, McCollough testified that she "chose not to accept the recommendation," but there was "no particular reason" why.

financials to make sure that people are, submit their invoices, that the invoices are appropriate to the contract, and that they are paid in a timely fashion.⁸

In support of its present appeal, TASC relies on a Seventh District case bearing somewhat analogous facts and circumstances for its finding that a claimant was indeed an independent contractor. In Butts v OBES, *infra*, Butts had entered into a contract with a city's Board of Health through which she would provide services as an independent contractor relative to a lead abatement program that was funded by a grant and administered by the city. The claimant preferred to be an employee, but conceded an independent contractor status when she signed the contracts. Butts was paid hourly and was responsible for the payment of her own taxes and benefits, and she was not subject to the city's personnel manual. She was paid with accounts payable checks as opposed to payroll checks from time to time as she submitted invoices to the city. And all funds received by Butts came from an account containing only grant monies. The city supplied the office space and supplies necessary to run an office for the grant program, and paid for her travel expenses. However, Butts argued that she was not free from the direction or control of the city's Health Commissioner who was the grant's program director.

Although the Butts court noted that many of the factors in O.A.C. 4141-3-05 (B)(1)-(20) "worked in [Butts'] favor," it also observed that all of the factors are tools used by the administrative body, and not necessarily used by courts to determine if reasonable minds could come to the conclusion that Butts was an independent contractor. Moreover, the code is permissive inasmuch as it states that the factors *may* evidence direction or control over a claimant. In its review of the evidence, the Butts court found that reasonable minds could come

⁸ Transcript of Testimony taken March 8, 2012, at p. 24.

to the conclusion that Butts was not controlled or directed by the city. Ultimately, the court held that, even if reasonable minds could come to different conclusion about Butts' status, this did not provide a basis to reverse the administrative decision. As advised by the Ohio Supreme Court in Irvine, reviewing courts should not upset decisions on "close questions about unique factual considerations." Butts at *16, citing Irvine.

Consequently, the Butts case's analogous fact pattern and its "apparent" conclusion that Butts was indeed an independent contractor is only speciously favorable to TASC subjudice. The crux of the Butts opinion was *not* a finding that the claimant was an independent contractor. Instead, it was the court's acknowledgment that the statute prohibits courts from disturbing an administrative decision simply because reasonable minds could come to different conclusions on questions of fact. Like the Butts court, this Court is restricted to the question of whether the certified transcript contains evidentiary support for the hearing officer's factual findings relative to Parish's status. Unlike Butts, this Court must give deference to the UCRC's findings of fact, if indeed supported, that Parish is an *employee*.⁹ Even if Parish's status is a "close call," this Court may not reject the UCRC's findings of fact and undertake a quest for evidence tending to show that Parish was actually an independent contractor.

Based on a careful review of the certified transcript subjudice, this Court finds that it must affirm the UCRC's decision that Parish was an employee of TASC. "Every reasonable presumption must be made in favor of the [decision] and the findings of facts [of the UCRC]." Carter v Univ of Toledo, 6th Dist. No. L-07-1260, 2008-Ohio-1958, citing Karches v. Cincinnati,

⁹ Butts, of course, was reviewing the UCRC's finding that the claimant was (against her wishes) an independent contractor.

38 Ohio St.3d 12, 19, 526 N.E.2d 1350 (1988). The terms of Parish's contracts speak for themselves, and the hearing officer judged Parish's testimony to be credible. There is evidence of record that could readily lead reasonable minds to find that TASC indeed exercised control over Parish under the contracts and in fact. The fact that reasonable minds might reach different conclusions is not a basis for reversing the commission's decision. McGee v. Ohio Dept. of Job & Family Servs., 10th Dist. No. 09AP-680, 2010 Ohio 673, ¶ 9. The statutes governing these appeals are "designed and worded" in a manner that precludes a reviewing court from "disturbing [a] board's decision on close calls." Irvine at 18.

For these reasons, the Court does not find that the decision of the commission was unlawful, unreasonable, or against the manifest weight of the evidence. Accordingly, the decision of the UCRC is affirmed.

JUDGMENT ENTRY

It is therefore, ORDERED, ADJUDGED and DECREED that the Unemployment Compensation Review Commission's March 14, 2012, decision is affirmed.

February 13, 2013



Ruth Ann Franks, Judge

cc: Richard Parish, Pro Se
Richard R. Malone, Esq.
Eric A. Baum, Esq.