IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

VICKIE ADAMS et al,

Plaintiff(s),

-vs-

DIRECTOR DOUGLAS E LUMPKIN OHIO DEPARTMENT OF JOB et al,

Defendant(s).

CASE NO.: 2009 CV 06887

JUDGE GREGORY F. SINGER

DECISION ORDER AND ENTRY

This matter comes before the Court on administrative appeal from the Unemployment Compensation Review Commission ("UCRC"). The UCRC issued at least twelve separate decisions which affect the unemployment benefits of Appellants who were formally employed by either Delphi Automotive Systems Services, LLC ("Delphi") at the Needmore Road facility, or General Motors Company ("GM") at the Moraine Assembly Plant. Appellants filed its Brief in Support of Appeal and Assignments of Error ("Appellants Brief") on December 1, 2011. Appellants seek to put all twelve decisions before the Court for review. Appellee GM filed its Brief of Appellee General Motors Company ("Appellees Brief") on March 2, 2012. Appellee Ohio Department of Job and Family Services ("ODJFS") adopted GM's brief in whole on March 5, 2012. Appellants filed their Reply Brief in Support of Appeal and Assignments of Error on April 16, 2012. GM filed a final Sur-Reply Brief on April 24, 2012.

I. SUMMARY OF FACTS

Several years ago, GM announced plans that it would close both the Delphi and GM-Moraine facilities by spring of 2008. (Appellants Brief, p. 4, 11). The Delphi closing would affect approximately 700 employees. (*Id*. at 4). GM, Delphi, and UAW Local 696 (representing the employees at the Delphi facility)

negotiated a transition agreement, "2008 Transition Agreement", which placed approximately 350 employees in new positions and placed the remaining employees on standby status and were set to receive standby pay. (*Id*., Ex. 1) According to the 2008 Transition Agreement, when production ceased at the Delphi facility, the remaining employees on standby status became General Motors employees at the "appropriate entry level wages and benefits" or "at the appropriate GM Skilled Trades wage and agreed-upon benefit levels." (*Id*. at 5). After the 2008 Transition agreement became effective, GM offered the remaining employees on standby status the 2008 Special Attrition Plan ("SAP").

The GM-Moraine facility closure affected all employees that were employed at that facility. (*Id*. at 11). At all times relevant, the Appellants affected were represented by IUC/CWA Local 798. (*Id*.) In June 2008 the GM-Moraine facility was closed and GM offered the Moraine Appellants the same SAP which was offered to the Delphi Appellants. (*Id*.)

The 2008 Special Attrition Plan governs the special attrition of certain employees from GM. (*Id*., Ex. 2). The SAP is split into four forms: (A) a Special Attrition Program, (B) Special Attrition Program Conditions of Participation Release Form, (C) Memorandum of Understanding, and (D) Pension Letter. (*Id*.) The plan itself contains four options, the first three of which are varying forms of retirement plans. The fourth option states:

> "Voluntarily Quit GM effective September 1, 2008 and receive a lump sum payment (less applicable taxes) as follows: . . . I understand under this Option I will sever all ties with GM and Delphi except any vested pension benefits. As such I understand that I will not be directly eligible for any health care, life insurance, or other benefits (other than vested Basic pension benefits) from GM or Delphi or their benefit plans."

(*Id*., Ex. 2, p. 2-4). The plan further requires that the employee acknowledge that these options are determined by the written provisions of the Memorandum of Understanding – 2008 Special Attrition Program, the 2007 GM-UAW National Agreement, the 2007 GM-UAW Pension Plan and other applicable benefit programs, and the June 24, 2008 letter relating to the Mutually Satisfactory Retirements. (*Id*., Ex. 2, p. 3-4). As a condition of participation, the employee is required to sign the Conditions of Participation Release Form, and may not rely upon prior representations, promises or agreements relating to their employment, separation from service, or retirement which are contrary to the SAP document or the memorandum of understanding. (*Id*.)

The second document, the Conditions of Participation Release Form, explains that in choosing one of the separation options, the employee is also making other commitments. (*Id*., Ex. 2, p. 5-6). For example, the release form acknowledges that the employee is receiving benefits "greater than the benefits to which [they] would otherwise be entitled and that such benefit package is available only under the terms of the 2008 Special Attrition Program for [the] facility to those employees who meet all eligibility criteria for the option [they] have selected and who agree to separate on the applicable date." (*Id*.) Furthermore, the release goes on to require that the employee is not suffering from a disability from work, and cannot claim disability pay or benefits. (*Id*.) It also explains that no other promises or representations have been made and that the four documents constitute the entire and only agreement between the employee and GM. (*Id*.) Finally, the Release Form states the following:

> "*In consideration for participating in the 2008 Special Attrition Program*, I hereby release and forever discharge GM, Delphi, the UAW and their officers, directors, agents, employees, stockholders, and employee benefit plans from all claims, demands, and causes of action, (claims) known or unknown which I may have related to my employment or the cessation of my employment or denial of any employee benefit. This release specifically includes, without limitation, a release of any claims I may now have under the Employee Retirement Income Security Act of 1974 (ERISA); the Age Discrimination in Employment Act (ADEA), which prohibits discrimination based on age; Title VII of the Civil Rights Act of 1964 which prohibits discrimination in employment based on race, color, national origin, religion or sex; the Equal Pay Act; state fair employment practices or civil rights laws; and any other federal state or local laws or regulations without limitation on claims for breach of employment contract, either express or implied, and wrongful discharge. This release does not waive claims that arise only after the execution of this release." (emphasis added).

The Appellants involved in this action all elected to separate from GM under the SAP available as of September 1, 2008. Those employees with less than 10 years of service received a lump sum payment of $70,000 before taxes, those with 10 or more years of service received $140,000 before taxes. (Appellees Brief, p. 5).

Additionally, the Appellants involved in this action all filed separate applications for unemployment benefits. (Appellants Brief, p. 10). Some of the applications were reviewed by ODJFS and were initially granted, others were immediately denied. (*Id.*) Ultimately, ODJFS issued various determinations, generally finding that the lump sum payments the Delphi and Moraine employees received under the SAP should have been considered deductible separation pay, which exceeded their weekly benefit amount for an extended period of time. (*Id*.) Those Appellants who received unemployment benefits were required to pay those benefits back under the ODJFS determination. (*Id*.)

The Appellants appealed their determinations, which were transferred to the UCRC for a mass hearing and disposition on May 15, 2009, and a telephone hearing for others who were unable to attend on June 16, 2009. Based on these hearings, the UCRC issued 12 different Group decisions, all under Docket Number M2009-054-0001, which generally affirmed ODJFS' findings. In decisions concerning Appellants who were once employed by Delphi, the UCRC first found that each of these Appellants became GM employees on the day the Delphi facility was closed. (Appellees Brief, p. 9). In all applicable decisions, the UCRC found that each of the Appellants, whether they were from Delphi or GM-Moraine, were governed by the UC Tech Memo 10-08, which dictated that the separation payment would be allocated after the employee's separation from GM. (*Id*., at 15). Finally, the UCRC determined that any Appellant which had received unemployment benefits based on the previous ODJFS determination would be required to pay that amount back, since such would be unjust enrichment. (*Id*.)

Appellants argue that the UCRC made three errors in their decision(s). First, Appellants argue that any amount of money received by Appellants constitutes "separation pay", but not remuneration as the UCRC found. (Appellants Brief, p. 18). Appellants argue that in order for the SAP distribution to be remuneration, Appellants would have had to have provided some type of services in exchange. (*Id*., p. 19). Instead, Appellants argue that the separation pay was a purchase of assets, essentially "buying out" any and all claims Appellants may have against Delphi or GM. (*Id*., p. 27). Thus, Appellants argue that the separation pay cannot be deducted from any unemployment benefits due to Appellants. (*Id*., at 28).

Second, Appellants argue that if the Court determines that the separation pay is remuneration, the UCRC improperly allocated the buyout money to each week following their separations, at their normal wage until exhausted. (Appellants Brief, p. 10). Here, Appellants argue that the UCRC was improper when it relied on the UC Tech Memo 10-08 (which allocated payments beyond last day's work) rather than UC Tech Memo 20-07 (which allocated payments to the last day of work for separations occurring after August 5, 2007), as related to the Delphi employees. (*Id*., p. 31). Additionally, Appellants argue that UC Tech Memo 10-08 is wholly inapplicable to the employees from GM-Moraine because it was negotiated by GM and the International Union, UAW rather than IUE/CWA. (*Id*., p. 40). Therefore, Appellants conclude that the separation pay should have been allocated before Appellants' separation from employment, allowing them to receive unemployment benefits. (*Id*.)

Third, Appellants argue that the UCRC improperly determined that the Delphi Appellants were employees of GM at the end of production and close of the Delphi facility. (*Id*. at 42). Appellants support this argument by various excerpts of testimony in which Delphi employees testify that although they worked for Delphi, "[they've] always considered [themselves] a GM employee[s]." (*Id*., p. 43). Additionally, Appellants argue that they have never actively worked for GM or any entity other than Delphi, thus these Appellants cannot be governed by the UC Tech Memos which were promulgated by GM.

Finally, Appellants make several arguments in regard to Decisions #5 -11. Appellants argue that the UCRC improperly denied appeals to the Appellants in Decision #5, citing that various procedural missteps which led these individuals to misfile their appeals. (*Id*, p. 48-49). Additionally, Appellants argue that Decisions #6 through #11 should be considered and decided in addition to the Decisions properly filed before the Court because they arise from the same Docket number and involve, essentially, the same decision as Appellants. (*Id*., p. 11).

In opposition to Appellants, Appellees GM and ODJFS (adopting GM's brief) assert that Appellants arguments are largely dictated by the documents presented to the UCRC. First, GM argues that the 2008 Transition Agreement and the SAP govern the determination as to whether Delphi Appellants were GM employees at the time of the facilities' closing. (Appellees Brief, p. 8-9). GM also points out that although there may be conflicting testimony as to whom the Appellants emotionally or inherently believed they were working for, none of the Appellants argue that their standby pay was paid by someone other than GM or a GM affiliate. (*Id*., p. 9). Additionally, GM argues that the UCRC was correct in determining that the separation pay was deductable from the Appellants unemployment benefits, because Appellants accepted the SAP in consideration of those assets which the Appellants would have been entitled to had they chosen to voluntarily quit. (*Id*., p. 13). Finally, GM asserts that the Commission did not error when it distributed the pay after the Appellants' separation, as it was instructed to do so under the default rule and according to UC Tech Memo 10-08, to which each Appellant is subject. (*Id*., p. 16).

In reviewing the UCRC's determination on the disputed Decisions, GM argues that Decision #5 was properly denied appeal, since each Appellant governed by that decision was properly instructed as to how to file an appeal and each failed to do so. (*Id*., p. 16-17). GM also argues that Decisions #6-11 should not be considered by this Court since those decisions were not included in the record in any form, and those

individuals were not named as appellants in this appeal. (*Id*., p. 17). Therefore, GM asks this Court to affirm the decision of the UCRC.

II. LAW AND ANALYSIS

A. Standard of Review

The applicable standard of review as set forth in R.C. §4141.282(H) is as follows:

> 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. §4141.282(H). "Determination of purely factual questions is primarily within the province of the referee of the board … [and this Court] is not permitted to make factual findings or to determine the credibility of the witnesses." *Irvine v. Unemployment Comp. Board of Review*, 19 Ohio St.3d 15, 17-18, 482 N.E.2d 587, 590 (1985). Even in close cases, the Commission's decision should not be reversed. *Id*. "The duty or authority of [this Court] is to determine whether the decision of the board is supported by the evidence of the record." *Id*.

B. Decision #5

First, the Court will consider whether Decision #5 should be included or excluded from the Court's ruling. Decision #5 was issued by the UCRC on July 24, 2009, and it was determined that each of the Appellants were time-barred from bringing their claims. R.C. §4141.281 provides:

> (A) APPEAL FILED
> Any party notified of a determination of benefits rights or a claim for benefits determination may appeal within twenty-one (21) 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.
>
> ***
> (D)(9) EXTENSION OF APPEALS PERIODS
> The time for filing an appeal or a request for review under this section or a court appeal under section 4141.282 of the Revised Code shall be extended . . .
>
> When the last day of an appeal period is a Saturday, Sunday, or legal holiday, the appeal period is extended to the next work day …
>
> When an interested party provides certified medical evidence stating that the interested party's physical condition or mental capacity prevented [them] from filing a review…
>
> When an interested party provides evidence, which evidence may consist of testimony from the interested party, that is sufficient to establish that the party did not actually receive the determination or decision within the applicable appeal period under this section, … then the

> appeal period is extended to twenty-one days after the interested party actually receives the determination or decision …
>
> When an interested party provides evidence, which evidence may consist of testimony from the interested party, that is sufficient to establish that the party did not actually receive a decision within the thirty-day appeal period provided in section 4141.282 of the Revised Code, and a court of common pleas finds that the interested party did not actually receive the decision within that thirty-day appeal period, then the appeal period is extended to thirty days after the interested party actually receives the decision.

This decision affected Vickie Adams, Janice Gaffney, Grover Stephens, Betty Anderson, Kevin Hacker, Jason Thorpe, Dante Durrough and Arthur Poling, Jr. In each case, an initial determination was filed denying unemployment benefits and requiring reimbursement of benefits to which some of these individuals were not entitled. The UCRC denied appeal of these individuals for failure to comply with the statute.

In the case of Grover Stephens, the UCRC found that his Initial Determination was issued on November 28, 2005, thus he was required to file his appeal by December 19, 2005. Mr. Stephens did not file his appeal until February 11, 2009. The reason for Mr. Stephens delay was unknown at the time of the hearing. Therefore, the UCRC found that Mr. Stephens' appeal was not timely. The Court finds that this determination is not against the manifest weight of evidence.

In the case of Kevin P. Hacker, the UCRC found that his Initial Determination was mailed on December 5, 2008. Mr. Hacker did not file his appeal until December 29, 2008. Mr. Hacker explained that he was being enrolled in school and did not realize that he was immediately required to file his appeal. However, the UCRC found his appeal was untimely and that none of the statutory exceptions applied to him. The Court finds that this is not against the manifest weight of evidence.

In the case of Janice Gaffney, the UCRC found that her Initial Determination was issued on December 1, 2008. According to the UCRC's Decision, Ms. Gaffney's reason for the late filing is unknown. In its brief, Appellants explain that Ms. Gaffney faxed her appeal to the Tiffin Processing Center, which was the ODJFS Processing Center handling her particular claim. (Appellants Brief, p. 51). Appellants argue that because Ms. Gaffney faxed her appeal to the processing center handling her claim, which was a division of ODJFS, her appeal should have been accepted and reviewed. (*Id*.) In review of the standard Appeal Form distributed with each determination, ODJFS clearly prints at the top of each form "Return to: Redetermination Unit, PO Box 182292, Ohio Dept of Job and Family Services, Columbus, OH 43218-0000" and lists the appropriate telephone and fax number for the return of the appeal. (*See* Appellants Brief, Ex.

14, p. 2, for example). The fact that Ms. Gaffney did not read the instructions correctly, and submitted her appeal documents to an alternative fax number, does not excuse her from the filing procedures enumerated by statute. Furthermore, this Court is not permitted by statute to make any factual findings, only weigh the evidence which was before the UCRC. This information clearly was not presented to the UCRC. Therefore, the Court finds that the UCRC's determination was not against the manifest weigh of evidence.

In the case of Dante Durrough, the UCRC found that his Redetermination was mailed on January 12, 2009. Mr. Durrough did not file his appeal until February 13, 2009. Mr. Durrough explained to the UCRC that his mother had been recently diagnosed with cancer and was unaware of the lapse in his appeal period. While the revised code provides for an extension in the appeal period based on medical hardship, such medical hardship must be personal, and certified documentation must be presented to the reviewing court. Here, Mr. Durrough's hardship was not personal to him, but affected his mother. Additionally, the UCRC does not mention whether Mr. Durrough provided any certified documentation. Therefore, the Court finds that the UCRC's determination was not against the manifest weight of evidence.

In the case of Arthur Poling, Jr., the UCRC found that his Redetermination was mailed on December 31, 2008. Mr. Poling did not file his appeal until February 12, 2009. Mr. Poling's reasoning for his late appeal was unknown at the time of the determination. Appellants assert that like Ms. Gaffney, Mr. Poling faxed his appeal to the wrong number. (Appellants Brief, p. 52). However, like Ms. Gaffney, fact finding is not permitted by this Court. There are no reasons available on the record, thus, the Court finds that the UCRC's determination was not against the manifest weight of evidence.

In the case of Jason Thorpe, the UCRC found that his Redetermination was mailed on November 28, 2008. Mr. Thorpe did not file his appeal until January 2, 2009. Mr. Thorpe explained that he had sent three earlier appeals from the Workers' Center, the Union Hall and mailed one in, but none were found by the time of the determination. Mr. Thorpe did not present any return receipts, fax confirmations, or the like as proof of his mailings. Therefore, the Court finds that this determination is not against the manifest weight of evidence.

In the case of Vicki Adams, the UCRC found that her Redetermination was mailed on November 28, 2008. Ms. Adams did not file her appeal until January 5, 2009. Ms. Adams explained to the UCRC that she filed an earlier appeal with ODJFS and provided a copy of such with her second filing. Appellants assert that

Ms. Adams appeal should have been considered because, like Ms. Gaffney and Mr. Poling, sent her appeal to the processing center rather than the number listed at the top of the Appeal Form. This mistake precluded her appeal from being reviewed, and like Ms. Gaffney and Mr. Poling, her mistake does not fit within the statutory exceptions enumerated. Therefore, the Court finds that the UCRC's determination was not against the manifest weight of evidence.

Finally, in the case of Betty Anderson, the UCRC found that her Redetermination was initially issued on January 14, 2009. A corrected copy of the Redetermination was mailed on January 15, 2009. The UCRC then found that GM had timely appealed the Redetermination on February 5, 2009, and the Director's Redetermination mailed January 15, 2009 was affirmed. As to the timeliness issues, GM's appeal was timely. Nevertheless, the Court is not aware of on what grounds Ms. Anderson's claim was granted or denied, since neither Appellants nor Appellees argue whether the Director's Redetermination was right or wrong.[1] Therefore, the Court finds that the UCRC's determination was not against the manifest weight of evidence.

In conclusion, the Court finds that each of the Appellants party to the UCRC's Decision #5 was properly dismissed. The Commission's Decision #5 is AFFIRMED.

C. Decisions #6-11

Next, the Court will consider whether Decisions #6 through #11 should be reviewed by this Court. Decisions #6-#11 affect eight separate individuals, who are not named in this appeal, but yet are included in the Docket number. Appellants argue that all of these individuals should be included in the Court's determination because of their status and similarity to the individuals who are included. (Appellants Brief, p. 2, fn. 2). Additionally, Appellants argue that it is due to the UCRC's dysfunction in handling the plethora of claims which causes so many separate decisions, and if the Court fails to exercise jurisdiction over all of these individuals, some may be granted benefits which the other Appellants would not be entitled. (*Id*.; Appellants Reply, p. 3-4).

[1] Assuming that the determination was against GM (since GM was the party to appeal), it is not understood how said determination might be adverse to Ms. Anderson necessitating her appeal now. The sheer lack of clarity on this particular Appellant forces the Court to affirm the UCRC's determination, as there is no evidence which suggests anything was against the manifest weight.

However, GM argues that this Court has absolutely no subject matter jurisdiction over these individuals since none have been named in the appeal, nor have they been consolidated into one mass appeal. (Appellees Brief, p. 17). Moreover, GM points out that no amendments have been filed to include these individuals (as had been done with other Appellants), and there had been no mention of these individuals until the filing of the brief, these decisions are not part of the evidentiary record, nor have Appellants included any reasons why any of these individuals should be included despite failing to file an appeal within the appeal timeframe.

According to R.C. §4141.282(A), an *interested* party, not merely someone on behalf of an interested party or any third party, must file a written notice of appeal to the court of common pleas. This rule is clear, and Appellants cannot controvert this rule by imagining this to be a class action, or something of the sort. Only individuals who subject themselves to the jurisdiction of this Court may become plaintiffs by filing a notice of appeal. Here, none of the individuals in Decisions #6-#11 have done that. Therefore, this Court will not consider these decisions in its review.

D. Decisions #1-4, 12

Finally, the Court will review the remaining Decisions on the record to determine whether the UCRC's decision was against the manifest weight of the evidence. Here, the Court will not address each Decision on a case by case basis. Rather, the Court views the UCRC's ultimate findings to be similarly situated: (1) at the time of separation, all appellants were employees of GM (whether they were originally employed by Delphi or GM-Moraine) and as employees of GM are governed by UC Tech Memo #10-08; (2) the lump sum or weekly payout was determined to be separation pay, and it was determined that GM had the right to allocate the payment received at the time of separation; (3) any appellant which was granted unemployment benefits in their initial determination was required to repay that amount because they were not entitled to it.

1) The evidence presented at the UCRC mass hearing demonstrates that employees which were once employed by Delphi became GM employees at the termination of production.

Decisions #1, #4, and #12 were issued in regard to employees of Delphi facility on Needmore Road. As explained in part above, individuals being represented by UAW, GM, and Delphi entered into the 2008 Transition Agreement. The first bullet point of this agreement states:

> "All current seniority production employees … of the Delphi Dayton/Needmore Road facility will, with the cessation of production at the Dayton facility, become General Motors employees at the appropriate entry level wages and benefits. Current seniority Skilled Trades employees … of the Dayton Dayton/Needmore Road facility will, with the cessation of production at the Dayton facility, become General Motors employees at the appropriate GM Skilled Trades wage and agreed-upon benefits levels."

(Appellants Brief, Ex. 1). Further in the agreement, GM agreed to the following in terms of all affected Delphi employees: (1) approximately 350 Delphi employees would be placed at two alternative facilities for temporary employment, and (2) all remaining employees who were not placed at one of those two facilities "will remain GM employees, with the operations being managed by the James Group of Ohio." (*Id.*) None of the Appellants were placed at an alternative facility, and thus were maintained on standby status at 40 hours per week from June 2008 to September 1, 2008. In June 2008, GM rolled out the SAP to the Delphi employees. The UCRC noted various witnesses' testimony in which it is disputed whether there existed a consensus regarding the claimants' ability to collect unemployment. It is also noted by UCRC that Tony Currington (ODJFS) testified that there were a couple checks distributed to Appellants by Delphi in exchange for services performed before separation, but after that point all checks came from GM or a GM affiliate.

Appellants arguments on this matter rest on three facts: first, that after production terminated, former Delphi employees received two or three checks from Delphi before receiving checks from GM; second, that the former Delphi employees had never "actively" worked for GM despite being paid by GM; and third, that many of employees considered Delphi as their one and only employer. However, the Court finds, that the UCRC's determination is supported by documentation which clearly defines the transition from Delphi to GM. Appellants in Decisions #1, #4, and #12 were employees of Delphi until production ceased, and each of these individuals went on standby pay. Each of these affected Appellants became employees of GM at the moment they accepted their first standby pay check, regardless of the fact that none had "actively" worked for GM. Therefore, the UCRC's determination that the individuals in Decisions #1, #4, and #12 was not against the manifest weight of evidence.

2) The UCRC did not err in finding that the SAP payments made were remuneration in the form of separation pay.

The second determination at issue which is common to all Decisions remaining is the finding that the separation pay received by Appellants was "remuneration in the form of separation pay." R.C. §4141.31(A) governs when unemployment benefits are reduced. It provides:

> (A) Benefits otherwise payable for any week shall be reduced by the amount of remuneration or other payments a claimaint receives with respect to such week as follows:
>
> (4) [R]emuneration in the form of separation or termination pay paid to an employee at the time of the employee's separation from employment.
>
> If there is no designation of the period with respect to which payments to an individual are made under this section then an amount equal to such individual's normal weekly wage shall be attributed to and deemed paid with respect to the first and each succeeding week following the individual's separation or termination from employment of the employer making the payment until such amount so paid is exhausted.

Id. Further, Ohio Administrative Code 4141-30-01 states:

> Payments made to employees in return for the agreeing to separation from employment ***shall be deducted*** from unemployment benefits otherwise payable to them as provided under section 4141.31 of the Revised Code. Such payments shall be deemed to be remuneration in the form of separation pay.

O.A.C. 4141-30-01 (emphasis added). "Whether lump sum payments are considered 'separation, termination, or retirement pay as contemplated by R.C. 4141.31(A)' is a question of fact for the commission to determine." *Stoll v. Owens Brockway Glass Container, Inc.*, 6th Dist. No. L-02-1049, 2002-Ohio-3822, ¶22, quoting *Flower Mem. Hosp. v. Kansorka*, 6th Dist. No. L-93-074 (Jan. 21, 1994).

Under the Revised Code, remuneration is "all compensation for personal services, including commissions and bonuses and the cash value of all compensation in any medium other than cash." R.C. §4141.01(H)(1). However, remuneration should not be confused with "wages." Wages are remuneration paid to an employee by the employee's employer with respect to employment. R.C. §4141.01(G)(1). Wages are the essential exchange of cash for services performed. Thus, remuneration has a larger scope of applicability, since an individual would not receive "wages" while on leave as the result of an illness or injury, nor would an individual receive "wages" while on paid vacation, since none of these would be being paid with respect to that individual's employment. These individuals would nonetheless be receiving

"remuneration" since there is an exchange of personal service (employee's good attendance, seniority, productive ability, etc.) for cash. Therefore, the payments made to Appellants are not wages.

Thus, the question remains: was the SAP payment to the departing Appellants "separation or termination pay" within the meaning of R.C. §4141.31(A)(4) or the sale of an asset, namely, the sale of the employee's seniority and pension rights? *Ford Motor Co. v. Administrator, OBES*, 59 Ohio St.3d 188, 571 N.E.2d 727 (1991), citing *Budd Co. v. Mercer*, 14 Ohio App.3d 269, 471 N.E.2d 151 (1984); *Krupa v. Western Union Tel. Co.*, 90 Ohio App. 90, 103 N.E.2d 784 (1951) (other citations omitted).

This evaluation begins, where it began for several other courts, with the consideration of the definition of "personal services." The Second District has previously found that the meaning of "personal services" within the unemployment compensation context "is not limited to engaging in some productive activity." *Ashwell v. ODJFS*, 2nd Dist. No. 20522, 2005-Ohio-1928, at ¶44, citing *United Steelworkers of America AFL-CIO v. Doyle*, 168 Ohio St. 324, 154 N.E.2d 623 (1958). The Court goes on to state:

> "When a laid-off employee retains his status as an available employee, retains his seniority, pension rights and any right to severance pay, and registers and reports for state compensation, any compensation he is paid by his employer is for his services. *Id.* Thus, personal service "means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer." *Id.,* at p. 327, quoting *Social Security Board v. Nierotko* (1946), 327 U.S. 358, 66 S.Ct. 637, 641, 90 L.Ed. 718."

Id. Moreover, in analyzing this finding, Judge Tucker determined that personal services do not include compensation to an employee ***solely*** in consideration for the termination of the employment relationship. *Childress v. ODJFS*¸ Case No. 10-CV-01367 and 10-CV-01368 (Montgomery Co. Common Pleas, November 12, 2010). Judge Tucker then finds that *Ford Motor v. Administrator* "requires a factual analysis focusing upon whether the payment to a departing employee represents remuneration … in the form of separation or termination pay or the sale of an asset." He also found that conclusions based on public policy alone, rather than a review of the circumstances surrounding the payment to determine whether the payment represents a sale of an asset or remuneration, are unlawful and unreasonable. *Id*.

Appellants point to Judge Tucker's final determination on the applicability of the Administrative Code Section 4141-30-01, which states:

> "[I]t is noted that O.A.C. §4141-30-01 conflicts with the *Ford Motor* decision. The legislative history of R.C. §4141.31 reflects that the statute has been amended on four occasions since the 1991 *Ford Motor* decision with none of the amendments addressing

> interpreted by the Supreme Court. Therefore, reliance upon O.A.C. §4141-30-01 when making the determination concerning whether a payment to an employee upon termination is remuneration in the form of separation or termination pay would be unlawful and unreasonable."

Id. It is this finding that Appellants argue applies strictly to this case, in that the UCRC cannot rely simply on public policy and this Administrative Code section, but rather must make a factual inquiry into whether the lump sum payment was separation or termination pay, or whether it was a sale of an asset. (Appellants Brief, p. 25). Appellants argue that if this were performed as according to Judge Tucker's findings, the UCRC could have only concluded that the Appellants agreed to sell their assets rather than receive remuneration. (*Id*.)

However, this Court finds that there are two primary distinctions between Judge Tucker's decision in *Childress* and the current case. First, the Court finds that the Decisions presently before the Court and the decisions before Judge Tucker differ in the respect that the UCRC came to different conclusions regarding the various appellants' lump sum payment. In *Childress*, the UCRC initially relied strictly on O.R.C. §4141-30-01 to deny unemployment benefits, and did not analyze the claimants' factual circumstances. *Childress*, p. 6. After remand, the UCRC relied wholly on the decision of *Ford Motor*, rather than analyzing the facts and circumstances of the appellants before them, coming to the same conclusion that the appellants in that case were not entitled to benefits. *Id*., p. 6-7. In current case, the UCRC held a mass hearing and apparently more than one telephone conference for those who could not attend the hearing. From those hearings, the UCRC then found "[t]he employees were not selling any asset or any continuing rights. They were giving up their continuing employment under the agreement between GM and (the IUE-CWA or UAW), in exchange for a separation payment." This statement clearly illustrates that the UCRC made a factual inquiry and came to a factual conclusion based on the applicable law.

Second, rather than finding that the Administrative Code section and *Ford Motor* are in direct conflict, the Court finds that the Administrative Code section creates a rebuttable presumption. The Director of ODJFS derives his power to promulgate rules under R.C. §4141.13(C), which are approved by the UCRC before they become effective. R.C. 4141.13, 4141.14(A). Administrative rules are designed to accomplish ends sought by the legislation enacted by the General Assembly. *Carroll v. Dept. of Adm. Servs.*, 10 Ohio App.3d 108, 460 N.E.2d 704 (1983). Therefore, "[r]ules promulgated by administrative agencies are valid

and enforceable unless unreasonable or in conflict with statutory enactments conveying the same subject matter." *State ex rel. Curry v. Indus. Comm.*, 58 Ohio St.2d 268, 269, 389 N.E.2d 1126 (1979). Here, the administrative code provision does not directly conflict with any statutory provision, but rather the Supreme Court in *Ford Motor* has implemented a requirement on the UCRC to make a factual determination between remuneration as separation or termination pay and the sale of an asset. *See Ford Motor*, p. 191. Instead of entirely striking down this statutory guidance, this Court interprets O.A.C. §4141-30-01 as a rebuttable presumption. Therefore, the UCRC must, in compliance with *Ford Motor*, hold a hearing in which it will determine if the claimants can overcome the presumption that a payment made to an employee for their agreement to separate is a form of remuneration in the form of separation pay.

As according to this finding, this Court finds that the UCRC's Decisions in this case are not against the manifest weight of evidence. According to the various documents put forth at the initial hearings, the Appellants were voluntarily quitting GM effective September 1, 2008, and in exchange receiving a lump sum payment, less applicable taxes. In signing the Conditions of Participation Release Form, each Appellant agreed to separate according to only these terms, and they acknowledged that they would receive benefits greater than which they would ordinarily be entitled. Furthermore, as a condition of participation, each Appellant released and discharged GM, Delphi, and (the IUE-CWA or UAW) from liability related to the cessation of their employment or denial of any employee benefit. In no part of these documents does the term "sale" or "sale of asset(s)" appear, nor does the agreement describe a payment of cash in exchange for benefits accumulated by each employee.

Additionally, testimony which was put forth before the UCRC does not evidence that Appellants were told that the payouts were in exchange for their accumulated benefits. Granted, it was established that in separating from GM, Appellants were going to lose many benefits that they were entitled to as employees. (Appellants Brief, p. 21; T. 36-37). And some Appellants testified that they had been told that they would be entitled to unemployment benefits. (Hearing, March 7, 2011, *see generally*). But regrettably, these employees were destined to lose their employment regardless of the SAP. (T. at 38). Thus, the UCRC found that the documentation was more probative than the witness testimony, and found that the Appellants received separation pay as according to O.A.C. 4141-30-01. It is this Court's opinion that if this were simply a "sale of assets" many of the employees would be doing just that – cashing in their accumulated benefit(s),

seniority status(es), and other perks while maintaining employment. However, these Appellants were not agreeing to sell their assets, they were separating entirely from GM, and have failed to overcome the presumption that payments made in an agreement to separate are remuneration in the form of separation pay. Therefore, the Court AFFIRMS the UCRC's finding in Decisions #1, #2, #3, #4, and #12 that the payments made under the SAP were remuneration in the form of separation and termination pay.

3) The UCRC did not err in finding that Appellants' SAP payments were allocated to the weeks of unemployment.

The final determination at issue which is common to all Decisions is regarding the allocation of the separation pay itself. Appellants argue that each employer, Delphi and GM, had the right to allocate these payments to the Appellants' last day worked rather than after separation from employment. (Appellants Brief, p. 28). Accordingly, Appellants argue that Delphi should have been permitted to allocate the separation payments as it saw fit, which is detailed in UC Tech Memo 20-07. (*Id*.) This memo allocated payments to the last day of work for separations occurring on or after August 5, 2007. (Appellants Brief, p. 31). Such allocation would allow Appellants to both receive the separation payment, but would also allow Appellants to collect unemployment benefits unhindered. Additionally, Appellants argue that the Tech Memo 10-08 is wholly inapplicable to the GM-Moraine Appellants, since this memorandum was negotiated by GM and International Union, UAW. (*Id*., at 40). Since the GM-Moraine Appellants were represented by IUE/CWA, these employees had no part in the negotiations between GM and UAW. (*Id*.) Therefore, Appellants argue that UC Tech Memo 20-07 should control all Appellants.

However, the UCRC determined that a later memo, UC Tech Memo 10-08, governed all Appellants and this memorandum allocated payments received beyond the separation date. (*Id*.) As for the Delphi employees, the UCRC found that since these employees became employees of GM at the time the facility was closed, only GM had the right to allocate payments of the SAP, not Delphi. The UCRC further found that GM did so allocate payments to the weeks following separation, and that once the employer chooses the period of allocation, the UCRC has no jurisdiction to allocate the money differently. As for the GM-Moraine employees, the UCRC found that even though in past situations an employer might allocate funds differently, it has the right to change their position with subsequent separations. Furthermore, the UCRC found it to be of no consequence that the employer told their employees they would be entitled to unemployment benefits,

since that decision is not up to the employer but is left to ODJFS. Thus, it was found that GM did notify ODJFS of its desire to have the payments allocated to the weeks following separation, and that such a choice cannot be changed by the UCRC.

R.C. §4141.31(A) provides that "Benefits otherwise payable for any week shall be reduced by the amount of remuneration or other payments a claimant receives with respect to such week…" Where no allocation is made, the UCRC allocates an amount equal to the claimant's normal weekly wage to each week following the claimant's separation until the payment is exhausted. *See Toms v. Ohio Unemp. Rev. Comm.*, 2nd Dist. No. 2007- CA-08, 2008-Ohio-4398, ¶17.

In consideration of the Delphi Appellants, the Court finds that the UCRC's determination was not against the manifest weight of evidence. As noted in the previous discussion, these Appellants were employees of GM at the moment the Delphi facility ceased production. Being GM employees, the only employer which had the ability to make an allocation of the SAP was GM; Delphi had no ability, right, or involvement in the allocation of the SAP payments. Thus, UC Tech Memo 20-07, being an agreement between Delphi and IUE-CWA, has no applicability in the allocation of the Delphi Appellants' separation payments.[2] Moreover, even if this Court found that the UCRC's decision to follow the instructions of UC Tech Memo 10-08 was against the manifest weight of evidence, the default rule would require the UCRC to allocate the SAP payments in an amount equal to the claimant's normal weekly wage. This allocation would be based on different factual circumstances, but nevertheless the UCRC would come to the same result which was achieved by following Tech Memo 10-08.

In consideration of the GM-Moraine Appellants, the Court finds that the UCRC's determination was not against the manifest weight of evidence. Here, Appellants do not dispute that GM had the right to allocate payments under R.C. §4141.31(A)(5), rather their arguments are centrally based on whether the Appellants were informed that their separation pay was going to be allocated to the weeks following separation. (Appellants Brief, p. 38-40). This Court agrees with the UCRC in that it is truly of no consequence whether an employer chooses to tell a claimant how they've instructed ODJFS to allocated their separation payments. Even so, if all documents on which the UCRC relied were against the manifest weight

of evidence, allocation would fall to the default rule, which would lead the UCRC in making the same allocation. Therefore, the Court AFFIRMS the allocation of payments made in Decisions #1, #2, #3, #4, and #12.

III. CONCLUSION

By the forgoing analysis, this Court **AFFIRMS** Decisions #1, #2, #3, #4, #5, and #12 in Docket Number M2009-054-0001 of the Unemployment Compensation Review Commission.

THIS IS A FINAL APPEALABLE ORDER UNDER CIV. R. 58. PURSUANT TO APP. R. 4, THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.

SO ORDERED:

JUDGE GREGORY F. SINGER

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[2] It should also be noted that if this Court were to follow Appellants' arguments for the GM-Moraine Appellants, UC Tech Memo 20-07 would still be inapplicable to the Delphi Appellants, since UC Tech Memo 20-07 was negotiated by Delphi and IUE-CWA, not UAW (the representative union of the Delphi Appellants).

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Type: Decision

Case Number: 2009 CV 06887

Case Title: VICKIE ADAMS vs DIRECTOR DOUGLAS E LUMPKIN OHIO DEPARTMENT OF JOB

So Ordered