**IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO**
**CIVIL DIVISION**

| | | |
|---|---|---|
| Michael G. Perri, | : | |
| Appellant, | : | **Case No. 13CVF-631** |
| vs. | : | **JUDGE SERROTT** |
| Ohio Department of Job & Family Services, et al., | : | |
| Appellees. | : | |

**DECISION AND ENTRY REVERSING THE ORDER OF APPELLEE DIRECTOR, OHIO DEPARTMENT OF JOB & FAMILY SERVICES**
**AND**
**NOTICE OF FINAL APPEALABLE ORDER**

Rendered this 1st day of May, 2013

**SERROTT, J.**

This case is before the Court on an administrative appeal from the Order of the Ohio Unemployment Compensation Review Commission affirming the Hearing Officer's decision disallowing his claim for unemployment benefits on the grounds that he was terminated for just cause. The matter has been fully briefed and is ready for consideration. The relevant facts and procedural history are as follows.

## I. FACTS

Appellant was employed by Appellee The Sutphen Corporation until his termination in August, 2012. On October 1, 2012, the Director of the Ohio Department of Jobs & Family Services issued a "Redetermination" disallowing Appellant's application for determination of benefit rights. Appellant filed an appeal from the Redetermination, and a telephone hearing was conducted before a Hearing Officer for

the Unemployment Compensation Review Commission on October 31, 2012. During the hearing, Appellant testified as follows.

Appellant began his employment with The Sutphen Corporation as an electrician on July 6, 2004. The incident giving rise to his termination occurred on a Friday night in July, 2012, during the second shift. Appellant's co-worker, Rick Beekman, entered the area where Appellant was working and turned the volume up on a radio. (Hearing Transcript, pp. 16-17). Appellant then retrieved ear plugs that he had personally purchased and placed them into his ears. Mr. Beekman then walked back over to the radio and turned the volume up even more. Appellant testified that Mr. Beekman then walked away "yelling out at me that, I had ear plugs on, that's what they were for." (Id. at 17).

Appellant claims that Mr. Beekman turning the volume up a second time rendered the noise isolation of the ear plugs ineffective. He attempted to find the supervisor, who was not in the area. He then went to the radio and turned the volume down. (Id.). Mr. Beekman, who was in an adjacent area, "yelled out to not touch the volume dial on the boom box." (Id.). Appellant admittedly said, "well what are you gonna do about it?" (Id.). Appellant asserts Mr. Beekman continued to yell at him, and he again asked "what are you gonna do?" (Id. at 18).

At that point, Mr. Beekman started marching towards Appellant "very aggressively as though he was going to assault" him. (Id.). The following testimony was then developed:

> **Appellant:** I don't know what his intention was. So I, I walked up to him and we were standing face-to-face and, I said what are you gonna do, and he was screaming at me. And, Rick Beekman doesn't have very good oral hygiene, his—all of his teeth are kind of

gone, and he was spitting—he was excited and he was spitting in my face. And it actually spit into my mouth.

**Hearing Officer:** What did you do?

**Appellant:** I put my hands up and, and, walked away from him. I told him to get away from me. I told him to go ahead and play the boom box as loud as he wanted to but to just (inaudible) away from me.

**Appellant's counsel:** Mike if you could clarify what you meant by put your hands up because you're motioning in front of me, but the hearing officer can't see your hand motion. So explain what you meant by put your hands up.

**Appellant:** I just placed them up as though he had a gun on me so to speak.

**Hearing Officer:** Did you, did you touch him at all at that point?

**Appellant:** In order to keep him from pursuing me as I tried to (inaudible) get away from him.

**Hearing Officer:** So did you, did you touch him at any point?

**Appellant:** Um, my --- we were close enough that my hands may have, may have touched his shirt, but it was no physical force of any kind. It was just like, you know, you know, stay away from me, that sort of thing.

**Hearing Officer:** Did, uh, after you put your hands up, did he move back?

**Appellant:** No, he did not. I walked away and he pursued me, and I yelled at him twice to stay away from me and he continued to pursue me. And he, the whole time, he was yelling at me to, his words were to swing on him. He stated that two to three times. And I just told him to get away and I went back to my work station.

(Id. at 18-20).

The supervisor, Jerrold Cannon, eventually came back into the work area, and Appellant immediately asked him to have Mr. Beekman turn down the volume of the radio. Appellant contends Mr. Cannon turned the radio volume down himself and told Mr. Beekman to keep it at that level. (Id. at 20). Appellant further indicated that he told Mr. Cannon that he and Mr. Beekman had had a "shouting match" and that Mr. Beekman had spit all over his face. (Id. at 21).

Appellant acknowledged that The Sutphen Corporation has an express policy prohibiting abusive language, fighting, and threatening other employees. He opined that his behavior did not violate the policy as Mr. Beekman was the one who had threatened him about touching the volume dial and as he had no intention of causing Mr. Beekman any harm. (Id. at 22-23).

Mr. Cannon testified as follows with regard to his recollection of the incident. Mr. Cannon retired from the company in 2007, but continued to work there as a supervisor on a part-time basis. The night of the incident was actually his last day on the job. (Id. at 28). Mr. Cannon recalls Appellant stating that he had asked Mr. Beekman to turn the radio down, Mr. Beekman refused, and so Appellant turned it down himself. (Id. at 28-29). Mr. Cannon's testimony continued as follows:

> **Mr. Cannon:** And then—[Appellant stated] Beekman started hollering and screaming and got in his face and that he held his hands out to hold him at a, a safe distance away and that was about the extent of [the conversation with Appellant.] I did have a one-on-one verbal with each of 'em about, they should have came to me and I would of taken care of it, both sides of it. But they did not.
>
> **Hearing Officer** Okay. Did Mr. Beekman indicate that [Appellant] had pushed him at all?

> **Mr. Cannon:** He did not indicate that, * * * [He said that Appellant] turned his radio down and he shouldn't a done that. But I don't recall [Mr. Beekman] telling me that [Appellant] shoved him. [Appellant] did say he put his hands out in front of him to hold him back at a safe distance.

(Id. at 29).

The Sutphen Company presented the testimony of Mark Clark, its Production Coordinator and Safety Director. According to Mr. Clark, the Monday after the incident, Mr. Beekman indicated there had been a confrontation about the radio and that Appellant had "pushed him away." (Id. at 6-7). Mr. Clark questioned Appellant about the incident the next day, and Appellant "basically stated that they did get in an argument * * * and they were both like within inches of each other and [Appellant] said that [Mr. Beekman] was, you know, while he was speaking his saliva was coming out and [Appellant] stated that he was just trying to move [Mr. Beekman] away, but [Mr. Beekman] took it as a push." (Id. at 7-8).

On cross-examination, Mr. Clark testified:

> **Appellant's counsel:** [Appellant] said he just put his hands up to keep the fellow away from him correct?
>
> **Mr. Clark:** That's what [Appellant] stated, yes.
>
> **Appellant's counsel:** Alright, and he stated the guy was in his face and literally spit was coming out of his mouth right?
>
> **Mr. Clark:** What I understand, they were both in each other's face, correct.
>
> **Appellant's counsel:** Alright, well, I'm asking what [Appellant] said, did he say the guy was in his face and was yelling at him and there was literally spit coming out of his mouth?

> **Mark Clark:** Yes, and I got the same statement from [Mr. Beekman] also. [Appellant] was doing the same.

(Id. at 14).

The Hearing Officer questioned Appellant regarding Mr. Clark's testimony:

> **Hearing Officer:** Mr. Clark testified that you had said that you were trying to move Mr. Beekman away by---when you put your hands up.
>
> **Appellant:** That's incorrect. I was just trying to escape from his spittle.
>
> **Hearing Officer:** Did you tell Mr. Clark that you had tried to move him away with your hands?
>
> **Appellant:** I did not.

(Id. at 22).

During his cross-examination, Mr. Clark admitted that Appellant had previously complained about the volume of the radio and had received worker's compensation for hearing loss caused, in part, by the volume of the radio:

> **Appellant's counsel:** [Appellant] complain[ed] to you in the past about the volume of the boom box in, in this area?
>
> **Mr. Clark:** Yea, well, basically, in all areas he's complained about it.
>
> **Appellant's counsel:** Alright. And did he explain to you that the boom box was being played basically very loudly so it could be heard over the machines that run in the factory?
>
> **Mr. Clark:** That's his opinion, yes.
>
> * * *
>
> **Appellant's counsel:** Alright, and [Appellant] had filed a Workers' Comp claim for hearing loss, due to

> the sounds of the factory machines as well as the boom box being played correct?
>
> **Mark Clark:** Well he filed a Workers' Comp on the boom box specifically. His attorney at the time got it switched to also to agree to the machinery.
>
> **Appellant's counsel:** Alright, and, the Workers' Comp people agreed that he had hearing loss and ordered that, you know, basically a hearing aid be purchased, correct?
>
> **Mr. Clark:** I don't know about a hearing aid.
>
> **Appellant's counsel:** But you were aware of at least the Workers' Comp claim for hearing loss specifically due to the boom box being filed due to your position as safety, your safety responsibilities in your position correct?
>
> **Mr. Clark:** Yes, I did.
>
> **Appellant's counsel:** Alright. And it is correct that even though he complained about the boom box being played very loudly the company had never insisted the boom box be either turned off completely or be lowered in its volume, correct?
>
> **Mark Clark:** No (inaudible) several incidents we've had, different people check at second shift along with his supervisor and they all agreed, in fact, I got written statements from all of 'em that at no time was the boom box, as you say, radios were played loud.

(Id. at 11-12).

Mr. Clark testified that the employee handbook and the union agreement contain a policy prohibiting abusive, threatening, and profane language against an employee as well as fighting, threatening, intimidating or attempting to inflict bodily harm to any fellow employee on company premises. (Id. at 8). The consequence for a violation of the policy is a suspension subject to discharge. (Id. at 8). Mr. Clark gave Mr. Beekman

a verbal warning, while Appellant was placed on suspension and then discharged on August 5, 2012. (Id. at 9).

Based on the testimony and evidence presented at the hearing, the Hearing Officer issued a Decision noting the following findings of fact:

> [Appellant] had complained in the past about the noise level of the work area and noise level of the radio. In July, 2012, [Appellant's] co-worker, Mr. Beekman, turned on the radio. [Appellant] put in ear plugs. Mr. Beekman again turned up the volume level on the radio. [Appellant] turned down the volume. Mr. Beekman told [Appellant] not to touch the volume. Appellant responded, "what are you going to do about it?" Mr. Beekman walked back toward the radio. Appellant again stated, "what are you going to do about it?" Mr. Beekman and [Appellant] began arguing and were close to one another. [Appellant] placed his hands on Mr. Beekman and tried to move him away.
>
> Mark Clark, Production Coordinator and Safety Manager, was informed of the incident. Mr. Clark interviewed Mr. Beekman and [Appellant] about the incident. Mr. Beekman indicated that [Appellant] had pushed him away. [Appellant] informed Mr. Clark that [Appellant] had "tried to move him away" and put his hands on Mr. Beekman.

(Decision, November 2, 2012, pp. 3-4).

The Hearing Officer determined that Appellant had been discharged for just cause in connection with work, reasoning:

> [Appellant] testified that he did not push Mr. Beekman, but merely put his hands up and may have touched Mr. Beekman's shirt. However, Mr. Clark testified that [Appellant], when interviewed, had stated that he put his hands on Mr. Beekman to try to move him away from [Appellant]. While [Appellant] asserts that he did not violate the policy, the Hearing Officer finds that [Appellant] provoked an argument with Mr. Beekman by turning down the volume, stating, "what are you going to do about it?" several

> times and by getting close to Mr. Beekman's face. [Appellant] could have walked away from Mr. Beekman. Instead, [Appellant] stood close to Mr. Beekman and argued with him. Further, [Appellant] put his hands on Mr. Beekman, violating policy and engaging in conduct that could be construed as threatening.
>
> Based upon the information that The Sutphen Corporation had at the time of the separation, the Hearing Officer finds that The Sutphen Corporation was justified in discharging [Appellant].

(Id. at p. 4).

Appellant filed objections to the Hearing Officer's decision. In a two to one vote, the Unemployment Commission upheld the ruling and issued an order disallowing Appellant's application for unemployment benefits.

## II. STANDARD OF REVIEW

In reviewing unemployment compensation cases, "[a]n appellate court may reverse the board's decision if the court finds the decision unlawful, unreasonable, or against the manifest weight of the evidence." *Wash. County Eng'r v. Adm'r*, 4th Dist. No. 95CA34 (Sept. 25, 1996) (citing *Tzangas, Plakas & Mannos v. Adm'r*, 73 Ohio St.3d 694 (1995), paragraph one of the syllabus). "This standard applies to courts of common pleas and courts of appeals." Id. (citing *Tzangas, Plakas & Mannos*, 73 Ohio St.3d at 696). "In its review, a court determines whether 'some competent, credible evidence' supports the board's conclusion." Id. (quoting *Central Ohio Joint Vocational Sch. Dist. Bd. of Edn. v. Adm'r*, 21 Ohio St.3d 5, 8 (1986)). "The resolution of purely factual questions, including the credibility of conflicting testimony and the weight given to the evidence, is primarily within the province of the board." Id. (citing *Tzangas, Plakas & Mannos*, 73 Ohio St.3d at 697).

"[A]ppellate courts are obligated to defer to the board's findings and have no authority to make their own findings." Id. "A court may not substitute its judgment for that of the Administrator or the board." Id. (citing *Simon v. Lake Geauga Printing Co.*, 69 Ohio St.2d 41, 45(1982)). "Under the foregoing standard, reviewing courts are not permitted to make factual findings or determine the credibility of witnesses, which are instead reserved for decision by the Review Commission." *Quartz Scientific, Inc. v. Dir., Bur. of Unemployment Comp.*, 11th Dist. No. 2012-L-090, 2013-Ohio-1100, ¶9 (citing *Irvine v. Unemployment Comp. Bd. of Rev.*, 19 Ohio St.3d 15, 17 (1985)). "The decision of the Review Commission may not be reversed simply because reasonable minds might reach different conclusions from the same evidence." Id. (citing *Tzangas*, supra, at 697). "Where the board might reasonably decide either way, the courts have no authority to upset the board's decision." *Irvine v. State, Unemployment Comp. Bd. of Review*, 19 Ohio St.3d 15, 18 (1985).

## III. LAW AND ANALYSIS

"The Unemployment Compensation Act was intended to provide financial assistance to an individual who had worked, was able and willing to work, but was temporarily without employment through no fault or agreement of his own." *Tucker v. Home Health Connection*, 10th Dist. No. 03AP-1262, 2005-Ohio-848, ¶13 (quoting *Salzl v. Gibson Greeting Cards*, 61 Ohio St.2d 35, 39 (1980). "Generally, 'the basic eligibility for unemployment benefits depends upon the establishment of an 'employment' relationship followed by 'involuntary unemployment.'" Id. (quoting *Mathieu v. Dudley*, 10 Ohio App.2d 169, 174 (10 Dist. 1967)).

"R.C. 4141.29 sets forth the statutory authority for an award of unemployment benefits[.]" *Rubin v. Dir., Ohio Dep't of Job & Family Servs.*, 10th Dist. No. 11AP-674,

2012-Ohio-1318, ¶7. "R.C. 4141.29(D)(2)(a) establishes that a claimant who quits his or her work without just cause or has been discharged for just cause in connection with his or her work is not entitled to unemployment compensation benefits. The claimant has the burden to prove his or her entitlement to benefits." Id. "The term 'just cause' has been defined 'in the statutory sense, [as] that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act.'" Id. at ¶8 (quoting *Irvine*, supra at 17). "The determination of whether just cause exists necessarily depends upon the unique factual considerations of the particular case." *Irvine* at 17.

The Unemployment Compensation Act "protects those employees who cannot control the situation that leads to their separation from employment," and "[c]onsistent with that purpose, courts have repeatedly held that a discharge is considered to be for just cause where an employee's conduct demonstrates some degree of fault, such as behavior that displays an unreasonable disregard for his employer's best interests." *Niskala v. Dir., Ohio Dep't of Job & Family Servs.*, 9th Dist. No. 10CA0086-M, 2011-Ohio-5705, at ¶11-12. "The Ohio Supreme Court has specifically held: 'When an employee is at fault, he is no longer the victim of fortune's whims, 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. Thus, fault is essential to the unique chemistry of a just cause termination.'" Id. at ¶13 (quoting *Tzangas*, 73 Ohio St.3d at 697-698). Thus, "[t]o show he is entitled to unemployment compensation, the employee must provide evidence that his discharge was without just cause by demonstrating he was without fault in the incident resulting in his termination." Id.

Additionally, "[t]he violation of a work rule which may well justify the discharge of an employee * * * does not necessarily amount to misconduct sufficient to deny

unemployment compensation benefits under the statute." *LaChappelle v. Dir., Ohio Dep't of Job & Family Servs.*, 184 Ohio App.3d 166, 2009-Ohio-3399, ¶21 (6th Dist.). "Whether the employee violated a company rule is not determinative for unemployment eligibility." Id.

The Court has carefully considered the underlying record, the parties' arguments, and the relevant law. The Court is cognizant that deference must be afforded to the Hearing Officer's factual findings—if supported by the evidence—and that the Court may not substitute its own judgment or make its own factual findings. However, this does not equate to a "rubber stamping" of the underlying decision. As noted by the Tenth District Court of Appeals, "[a]lthough this court generally defers to the experts at the agency level * * * '[t]here would be no point in having various tiers of review in administrative cases if the only duty of each reviewing body were to approve without question the decision which came before." *Collins v. Ohio State Racing Comm'n*, 10th Dist. No. 03AP-587, 2003-Oho-6444, ¶22 (quoting *Residents of Baldwin Rd. v. Ohio Dept. of Edn.*, 10th Dist. No. 02AP-257, 2002-Ohio-5522).

In examining whether the underlying order was unlawful, unreasonable, or against the manifest weight of the evidence, the Court will first note that the Hearing Officer's decision was based, in part, on the wrong legal standard. The Hearing Officer's final conclusion was that "[b]ased upon the information that The Sutphen Corporation had at the time of the separation, the Hearing Officer finds that The Sutphen Corporation was justified in discharging" Appellant. However, there is a distinction "between termination for the kind of 'cause' sufficient to end an employment contract and termination for 'just cause' which can make an employee ineligible for unemployment compensation." *LaChappelle v. Dir., Ohio Dep't of Job & Family Servs.*,

184 Ohio App.3d 166, 2009-Ohio-3399, ¶21 (6th Dist.). "[T]he mere fact that [an employer] had cause to discharge [an employee] does not mean that [the employee] was discharged for just cause for purposes of unemployment compensation law." *Talley v. Coe Mfg. Co.*, 11th Dist. No. 2002-L-015, 2003-Ohio-1395, ¶42.

The Hearing Officer was required to consider and weigh all of the relevant evidence concerning Appellant's termination. In the realm of employment law, the information Appellant's employer possessed may have given it lawful grounds to terminate his employment. But that is not then determinative as to whether Appellant qualifies for unemployment benefits. Appellant bore the burden of proving his termination was without "just cause," and this necessarily implies an opportunity to present evidence disproving his employer's basis for termination. Therefore, the Court finds that the Hearing Officer's conclusion, which amounts to a deferral to The Sutphen Corporation's belief that Appellant had violated company policy, is not in accordance with the law. See e.g., *Collins*, supra at ¶26 (the resulting decision from the Racing Commission was not an administrative resolution of evidentiary conflicts as it deferred to the racing stewards' expertise).

The Hearing Officer's decision is also based, in part, on a factual finding not supported by the evidence. The Hearing Officer ruled that "Mr. Clark testified that [Appellant], when interviewed, had stated that he put his hands on Mr. Beekman to try to move him away." However, Mr. Clark's actual testimony was that Appellant "told him he was just trying to move [Mr. Beekman] away, but [Mr. Beekman] took it as a push." Significantly, Mr. Clark was then asked if it was correct that Appellant "said he just put his hands up to keep the fellow away from him," and he responded: "That's what [Appellant] stated, yes."

Thus, contrary to the Hearing Officer's finding, Mr. Clark never testified that Appellant "stated that he put his hands on Mr. Beekman." There is a critical distinction between physically placing your hands on someone to push, shove, or move him away and holding your hands out to cause the person to move away or to keep him at a distance. Appellant testified that he put his hands up for this latter purpose, and Mr. Clark corroborated that this is what Appellant told him. The Hearing Officer never mentions the testimony from Mr. Cannon, who spoke to both Appellant and Mr. Beekman the night of the incident. When asked if Mr. Beekman indicated that Appellant had pushed him, Mr. Cannon answered: "[Mr. Beekman] did not indicate that, * * * [He said that Appellant] turned his radio down and he shouldn't a done that. But I don't recall [Mr. Beekman] telling me that [Appellant] shoved him. [Appellant] did say he put his hands out in front of him to hold him back at a safe distance." Thus, other than Mr. Clark's hearsay statement that Mr. Beekman accused Appellant of shoving him, there is no actual evidence that Appellant physically placed his hands on Mr. Beekman and pushed him.

The Hearing Officer's decision was also based on her findings that Appellant provoked the argument with Mr. Beekman and engaged in conduct that could be considered threatening. The policy at issue prohibits the use of abusive, threatening, or profane language against a co-worker as well as fighting, threatening, intimidating or attempting to inflict bodily harm to a fellow employee on the company premises. The policy does not specifically prohibit arguments or disagreements between co-workers, however, the trier of fact could reasonably conclude that the shouting match over the volume of the radio violated the policy.

As set forth above, an individual is not entitled to unemployment benefits upon the showing of any fault on his part for the termination. But, the law also holds that "[t]he determination of whether just cause exists necessarily depends upon the unique factual considerations of the particular case." *Irvine*, supra at 17. The "unique factual considerations" of this case cannot be considered by examining the evidence in a vacuum. Appellant did engage in all of the conduct cited to by the Hearing Officer, but he did so in response to Mr. Beekman's actions, which were also in violation of company policy.

Relevant to these facts, "[a] violation of an employer's rules or policy may constitute just cause for discharge where the rule or policy is fair and where it is administered fairly." *Fetzer v. Ohio Bur. of Unemployment Comp.* 6th Dist. No. L-93-055 (Nov. 5, 1993). "In determining whether a policy is fair, a court should look to whether the employee received notice of the policy, whether the policy could be understood by the average person, whether there is a rational basis for the policy, and *whether the policy instituted by the employer was applied to some individuals and not to others.*" *Mustafa v. St. Vincent Family Ctrs., Inc.*, 10th Dist. No. 12AP-305, 2012-Ohio-5775, ¶12. (Emphasis added).

For arguing over the volume of the radio, Appellant was suspended and then discharged while Mr. Beekman was given a verbal warning. The reason for the disparate discipline was that Mr. Clark apparently believed Appellant had pushed Mr. Beekman. However, as set forth above, the outcome of the employer's inquiry into the incident is not dispositive in determining eligibility for unemployment benefits. The purpose of the hearing was not to determine whether the employer possessed information giving it cause to terminate Appellant, but to allow Appellant an opportunity to prove that his

termination was without just cause. The competent and credible evidence in the record demonstrates that Appellant did not push or shove Mr. Beekman. The manifest weight of the evidence establishes that Appellant and Mr. Beekman jointly engaged in a verbal altercation in violation of company policy. Mr. Beekman was only given a verbal warning for his behavior, therefore, in order for the policy to be administered fairly, there would not be "just cause" to discharge Appellant for engaging in the same conduct.

For the reasons stated above, the Court finds that the Commission's order is unlawful, unreasonable, and against the manifest weight of the evidence. Accordingly, the order is hereby REVERSED, and this matter is remanded to the Commission for further proceedings consistent with this opinion.

Pursuant to Civ. 58(B), the Clerk of Courts is hereby directed to serve upon all parties notice of and the date of this judgment. Costs to Appellees.

**IT IS SO ORDERED.**

Franklin County Court of Common Pleas

**Date:** 05-01-2013

**Case Title:** MICHAEL G PERRI -VS- OHIO STATE DEPT JOB FAMILY SERVICES DIRE ET AL

**Case Number:** 13CV000631

**Type:** DECISION/ENTRY

It Is So Ordered.


/s/ Judge Mark Serrott

# Court Disposition

Case Number: 13CV000631

Case Style: MICHAEL G PERRI -VS- OHIO STATE DEPT JOB FAMILY SERVICES DIRE ET AL

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes