

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

VECTREN ENERGY DELIVERY OF OHIO, INC.,	:	CASE NO. 2013 CV 06149
	:	
Appellant,	:	JUDGE MICHAEL L. TUCKER
	:	
v.	:	DECISION, ORDER AND ENTRY
	:	AFFIRMING THE UNEMPLOYMENT
KENNETH R. BYRD, et al.,	:	COMPENSATION REVIEW
	:	COMMISSION IN PART AND
Appellees.	:	REMANDING THIS MATTER FOR
	:	ENTRY OF AN AMENDED DECISION

This matter comes before the court on the notice of administrative appeal filed on October 8, 2013 by Appellant, Vectren Energy Delivery of Ohio, Inc. (“Vectren”). On November 15th, the court entered a briefing schedule requiring that Vectren’s brief be submitted on or before December, 20, 2013; that any briefs in response be submitted on or before January 21, 2014; and that Vectren submit a brief in reply, if any, on or before January 31, 2014.

Vectren timely filed its brief on December 20th. Appellee, the Director of the Ohio Department of Job and Family Services (“Appellee,” unless otherwise indicated), timely filed a brief in response on January 15th, and Vectren timely replied on January 30th.

Kenneth R. Byrd, the other appellee in this case, has not submitted a brief for his part. As the applicable deadlines have passed, the court may now enter its decision.

FACTS

On or about December 18, 2006, Vectren engaged Mr. Byrd as a Service Technician, Level

Three. (R. of Proceedings Before Ohio Unemployment Comp. Review Comm'n 5-6, 128.)¹ Vectren subsequently imposed a disciplinary suspension of Mr. Byrd's employment, effective April 1, 2013, based upon alleged improper conduct. *Id.* at 5-6, 59-60, 128-130. Specifically, Vectren accuses Mr. Byrd of contriving to obtain overtime pay by soliciting others to submit false reports of gas leaks, and it accuses him of misusing a corporate credit card for personal purposes. *Id.* at 16-18; Appellant's Br. 8. Effective April 29, 2013, Vectren terminated Mr. Byrd's employment. (R. at 16, 37, 128-129, 183.)

With respect to Mr. Byrd's alleged scheme to obtain overtime pay, Vectren claims that it "received [approximately 13] suspicious telephone calls reporting gas leaks" in or around January, 2013.² (Appellant's Br. 3; R. at 34, 129; *but see* R. at 16-18, 152-153.) The calls were suspicious, according to Vectren³, because: (a) 11 of them originated from one telephone number associated with Mr. Byrd's ex-wife; (b) both of the remaining two came from one other telephone number; (c) each of the 13 came from a different caller, based on the name provided by the caller on each occasion; (d) each of the 13 related to a different address; (e) all 13 addresses were intersections, "as opposed to home addresses"; and (f) "no repair was needed in response to any of the * * * reports." (*See* Appellant's Br. 3-4, 8; R. at 128-132.) In addition, Vectren notes that Mr. Byrd responded to five of the 13 calls, including three placed from his ex-wife's telephone number and both placed from the other number. (Appellant's Br. 3; R. at 129, 131.) A co-worker of Mr. Byrd's

¹ Citations to the record rely on the pagination generated when using Adobe software to view the PDF copy of the transcript of the record that the Ohio Unemployment Compensation Review Commission filed with this court on November 13, 2013. The transcript itself is not otherwise paginated, except to the extent that documents included in the transcript were themselves originally paginated.

² The exact number of allegedly suspicious telephone calls has apparently not been established, with Vectren itself citing an inconsistent number. (*See* Appellant's Br. 3 n.3, 8; R. at 17-18, 34, 129, 131-132, 153.) Similarly, the exact period during which Vectren allegedly received the suspicious calls remains unspecified. (*See* Appellant's Br. 3; R. at 17-18, 34, 129, 131-132, 153.) Vectren submitted an unverified document to the Commission listing calls received from July 22, 2011 through January 6, 2013, but otherwise it makes no reference to calls received before January, 2013. (*See* Appellant's Br. 3-4; R. at 129, 131-132.)

³ In testimony under oath, Vectren's representative testified that the calls originated from a telephone number associated with Mr. Byrd's "ex-wife." (R. at 129-130.) The court can only presume that references in Vectren's briefs to Mr. Byrd's "wife" were not intended to mislead, as the factual distinction would seem to be significant. (*See e.g.* Appellant's Br. 3-4; Appellant's Reply 3-4.)

responded “to the remaining eight calls.” (Appellant’s Br. 3.)

With respect to Mr. Byrd’s alleged misuse of a corporate credit card, Vectren explains that Mr. Byrd’s ex-wife “informed [it] that Mr. Byrd had used [the] card to purchase fuel” for a vehicle that she and Mr. Byrd owned. (*See* Appellant’s Br. 4-5; R. at 130.) Vectren states that an investigation of this allegation revealed “several instances where Mr. Byrd’s company vehicle was not at the location where gas was purchased” and “several instances where more gas was purchased than his [company] vehicle could hold.” (Appellant’s Br. 5; R. at 132-133.) In total, Vectren claims to have “found 11 instances of fraudulent gas purchases” attributable to Mr. Byrd. (Appellant’s Br. 5; R. at 130.)

Mr. Byrd applied on April 11, 2013 to the Ohio Department of Job and Family Services (“ODJFS”) for unemployment compensation benefits, after his disciplinary layoff but before his termination. (R. at 5-6, 16, 37, 59-60, 128-130, 183.) On May 2, 2013, ODJFS issued a notice of determination (No. 226043468-1) in which it concluded that the “[f]acts available [did] not establish misconduct [on the part of Mr. Byrd] in connection with [his] work.” *Id.* at 10. As a result, it allowed Mr. Byrd’s application for a “one-year benefit period.” *Id.*

Vectren appealed on May 21, 2013, and Appellee issued a redetermination in response on June 11th. *Id.* at 59. In the redetermination (No. 226043468-2), Appellee held that a “review of the original facts plus those submitted in the appeal [did] not support a change in the initial determination.” *Id.*

On July 1, 2013, Vectren appealed from the redetermination, and Appellee transferred the matter to the Ohio Unemployment Compensation Review Commission (the “Commission”). *Id.* at 68, 73, 152. A hearing officer for the Commission conducted a telephone hearing in the appeal on July 25, 2013 at which a witness for Vectren testified; Mr. Byrd did not appear. *Id.* at 124. In the resulting decision, issued on August 11, 2013, the hearing officer held that although Mr. Byrd’s

“estranged wife was directly responsible for or involved in making the [aforementioned] suspicious telephone calls,” the “evidence [did] not establish [Mr. Byrd’s] culpability * * *.” *Id.* at 152-154.

Consistent with this holding, the hearing officer affirmed the redetermination. *Id.* at 153.

Vectren requested review on September 4, 2013, and by decision issued on October 1, 2013, the Commission affirmed the hearing officer without analysis. *Id.* at 198, 238. The instant appeal ensued on October 8, 2013.

STANDARD OF REVIEW

According to R.C. 4141.282(A)-(B), “within thirty days after written notice of [a] final decision of the unemployment compensation review commission [has been] sent to all interested parties, [any interested party] may appeal the decision * * * to the court of common pleas” for “the county where the appellant, if an employee, is a resident or was last employed,” or, if the appellant is an employer, where the appellant “is a resident or has a principal place of business.” The common pleas court, under R.C. 4141.282(H), “shall hear the appeal on the certified record provided by the [unemployment compensation review] commission.” If the court “finds that the decision * * * was unlawful, unreasonable, or against the manifest weight of the evidence,” then “it shall reverse, vacate, or modify the decision, or remand the matter.” *Id.* Otherwise, the court “shall affirm” the decision. *Id.*

In hearing such an appeal, a common pleas court may not “make factual findings or * * * determine the credibility of witnesses,” but it has “the duty to determine whether the * * * decision [was] supported by the evidence in the record.” *Tzangas, Plakas & Mannos v. Adm’r, Ohio Bureau of Employment Servs.*, 73 Ohio St. 3d 694, 696, 1995-Ohio-206, 653 N.E.2d 1207 (citation omitted). The court should not, however, “substitute its judgment for that of the [unemployment compensation review] commission. *Atkins v. Dir., Ohio Dep’t of Job & Family Servs.*, 10th Dist. Franklin No. 08AP-182, 2008-Ohio-4109, ¶ 13 (citation omitted).

LAW AND ANALYSIS

A common pleas court should reverse the Commission only when the court finds that the Commission reached an unlawful or unreasonable decision, or a decision unwarranted by the manifest weight of the evidence. R.C. 4141.282(H). Here, on consideration of the question of whether “[Mr. Byrd]’s disciplinary layoff [was] for misconduct in connection with work,” the Commission found that “the evidence [did] not establish [Mr. Byrd]’s culpability for the suspicious telephone calls,” and it held accordingly that Mr. Byrd’s layoff did not disqualify him to receive benefits. (*See R.* at 153.) Though the Commission’s decision appears lawful, reasonable and warranted by the evidence as it relates to Vectren’s allegations against Mr. Byrd regarding false reports of gas leaks, the Commission offered no analysis or discussion of Vectren’s allegations against Mr. Byrd regarding misuse of a corporate credit card. *See id.* The court, as a result, cannot determine whether the Commission’s decision was reasonable in light of all of the evidence on record. Consequently, the court affirms the Commission in part and remands this matter for entry of an amended decision that addresses Vectren’s allegations of misuse of a corporate credit card against Mr. Byrd.

A. As to Vectren’s allegations against Mr. Byrd regarding false reports of gas leaks, the Commission’s decision appears lawful, reasonable and warranted by the evidence.

Vectren argues that the “Commission’s decision to affirm the award of unemployment benefits [to Mr. Byrd] fail[ed] to take into consideration the highly irregular nature of the 13 calls at issue and is, therefore, unreasonable and against the manifest weight of the evidence.” (Appellant’s Br. 8.) On review, the court finds that the Commission did consider the “highly irregular nature of the 13 calls at issue” and that the Commission reached a lawful, reasonable decision in this respect. *Id.* As such, the court affirms the Commission’s decision to the extent, and only to the extent, that the decision addressed Vectren’s accusations regarding false reports of gas leaks.

By Vectren's account, the evidence supports its accusations against Mr. Byrd because:

1. He "profited from five of the * * * false gas leak reports and was paid" at twice his normal rate "for responding to the calls";
2. He "did not provide any explanation as to why his [ex-]wife would have made the false gas leak reports";
3. The "hearing officer * * * ignored the fact that [apart from the calls made from the telephone number associated with Mr. Byrd's ex-wife,] an additional two suspicious calls were made from a second telephone number";
4. A "different name, location of gas leak, and contact telephone number [were] provided during each call";
5. All of the addresses reported during the calls corresponded to intersections, "as opposed to home addresses"; and
6. No "repair was needed in response to any of the * * * reports."

(Appellant's Br. 3-4, 8.) These facts, as characterized by Vectren, could support the conclusion that Mr. Byrd orchestrated or participated in a scheme to enhance his overtime pay by way of a series of false reports of gas leaks. Yet, the inquiry before the court is not whether the available evidence could have supported Vectren's allegations; rather, the inquiry before the court is whether the Commission relied for its decision on at least "some competent, credible evidence." *Houser v. Dir., Ohio Dep't of Job & Family Servs.*, 10th Dist. Franklin No. 10AP-116, 2011-Ohio-1593, ¶ 7 (citations omitted). The record includes enough competent, credible evidence to support the Commission's decision.

Among others, the following facts support the outcome reached by the Commission:

1. Of the 13 suspicious calls to which Vectren refers, Mr. Byrd responded only to five;
2. Of the five suspicious calls to which Mr. Byrd actually responded, only three came from the telephone number associated with his ex-wife;
3. All eight of the remaining eight calls were placed "at * * * time[s] when Mr. Byrd was not on service watch"; and
4. Mr. Byrd's co-worker responded to all eight of the remaining calls.

(Appellant's Br. 3-4; R. at 17-18, 129, 131-132.) Given that one of Mr. Byrd's co-workers responded to eight of the allegedly suspicious calls, the co-worker could as reasonably be suspected of soliciting the false reports as Mr. Byrd. Moreover, Vectren states in its brief that it received the purportedly suspicious calls in January, 2013, but it relies in part on a document produced to the Commission indicating that the five calls to which Mr. Byrd himself responded were received between July 22, 2011 and January 6, 2013. (Appellant's Br. 3; R. at 17, 153.) The document lists two calls in 2011, one call in 2012 and two calls in 2013. (R. at 17.) In light of the sporadic timing of these calls, the court cannot agree with Vectren that the facts "demonstrate a pattern of fraudulent activity that was too irregular to be coincidental." (Appellant's Br. 8.) Indeed, the infrequency of the calls and the lack of apparent coordination with Mr. Byrd's schedule suggest exactly the opposite.

The inquiry raised by Vectren's appeal is whether the Commission based its decision on at least some competent, credible evidence. With respect to Vectren's allegations against Mr. Byrd concerning false reports of gas leaks, the court finds that the Commission relied upon such evidence and to that extent affirms the Commission's decision.

B. As to Vectren's allegations against Mr. Byrd regarding misuse of a corporate credit card, the Commission's decision includes no analysis or discussion.

Vectren also argues that the "Commission * * * unreasonably failed to take into consideration Mr. [Byrd]'s unauthorized use of [its] credit card." *Id.* Although the Commission had relevant evidence before it, including testimony, its decision makes no reference to this allegation. (R. at 152-153.) The court accordingly cannot determine on appeal whether the Commission's decision on this point was lawful, reasonable and supported by the evidence, so it remands the matter to the Commission for entry of a decision that addresses Mr. Byrd's alleged misuse of Vectren's corporate credit card.

In its brief, Vectren avers that Mr. Byrd's ex-wife informed it that Mr. Byrd had used a

corporate “credit card for personal [purposes].” (Appellant’s Br. 4-5; R. at 130.) Its investigation, Vectren says, revealed “several instances where Mr. Byrd’s company vehicle was not at the location where gas was purchased,” as well as “several instances where more gas was purchased than his [company] vehicle could hold.” (Appellant’s Br. 5; R. at 132-133.) Vectren claims to have discovered “11 instances of fraudulent gas purchases” attributable to Mr. Byrd. (Appellant’s Br. 5; R. at 130.)

The record, however, offers only equivocal support for Vectren’s accusation and lends as much support to the opposite position. For instance:

1. Vectren claims that it learned of Mr. Byrd’s alleged misuse of corporate credit from his ex-wife, but Mr. Byrd’s ex-wife made the allegation only after being confronted about her possible involvement in the submission of false reports of gas leaks;
2. Vectren submitted no account statements or other evidence documenting Mr. Byrd’s alleged misuse of a corporate credit card (or cards), submitting instead only an unauthenticated summary of its allegations;
3. Vectren submitted no statements showing the corporate credit account or accounts that Mr. Byrd allegedly misused;
4. Vectren submitted no employment contracts, policy statements or other evidence showing that the use of corporate credit of which it complains was not permitted; and
5. Vectren claims that Mr. Byrd, on more than one occasion, purchased more fuel than his corporate vehicle could hold, yet it presented no evidence as to the make, model and fuel capacity of the vehicle (or vehicles) in question.

(Appellant’s Br. 4-5; R. at 34, 130.)

Such ambiguity notwithstanding, this court may not “make factual findings or * * * determine the credibility of witnesses,” its function being limited to “determin[ing] whether the [Commission’s] decision [was] supported by the evidence in the record.” *Tzangas, Plakas & Mannos*, 73 Ohio St. 3d 694, 696. On the record before it, the court cannot determine whether the Commission’s decision was adequately supported by the evidence, hence it remands this matter for

entry of an amended decision explaining the Commission's conclusions as to the alleged misuse of corporate credit by Mr. Byrd.

CONCLUSION

The Commission's decision appears lawful, reasonable and warranted by the evidence as it relates to Vectren's allegations against Mr. Byrd regarding false reports of gas leaks, but the Commission failed to provide any analysis or discussion of Vectren's allegations regarding Mr. Byrd's alleged misuse of corporate credit for personal ends. Therefore, the court affirms the Commission's decision in part and remands this matter for entry of an amended decision that addresses Mr. Byrd's alleged misuse of a corporate credit card.

SO ORDERED

s/MICHAEL L. TUCKER, JUDGE

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Type: Decision
Case Number: 2013 CV 06149
Case Title: VECTREN ENERGY DELIVERY OF OHIO INC. vs KENNETH R BYRD

So Ordered

Michael L. Tucker