

DANIEL M. HARRIGAN

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SUMMIT COUNTY
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IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

CITY OF AKRON)

Appellant,)

-vs-)

DIRECTOR, ODJFS, et al.)

Appellee.)

CASE NO. CV 2013 04 2202

JUDGE PARKER

ORDER

This matter is before the court upon the administrative appeal filed by appellant, the City of Akron ("City"). The City appeals the decision of the Employment Compensation Review Commission ("Commission") which granted unemployment benefits to appellee, John Gardner ("Gardner"). Gardner was employed by the City at the time of the claim. Both the City and appellee, the Director, ODJFS ("Director") filed briefs in this matter.

I. Factual Background

The basic facts are not in dispute. Gardner became employed with the City in September 1988 in the classified civil service position of Firefighter/Medic. As a Firefighter/Medic, Gardner was a member of the union, Akron Firefighters Association, Local 330 ("the Union"). Gardner injured his knee, which was not work-related, in 2009. As a result, Gardner worked light duty from October 21, 2009 until October 6,

2010, at which point Gardner's light duty expired pursuant to union contract because Gardner did not make a medical improvement. Gardner then applied for permanent disability and pursuant to a provision in the Transitional Work Program of the Union contract that permitted employees to return to work while a claim for a disability pension is processed. Gardner worked a second period of light duty work from June 27, 2011 to December 3, 2011. After that period of time expired, Gardner used his remaining accrued leave time as was permitted under the Union contract. In June 2012, the City offered Gardner a demoted position of Safety Communications Director, but he could not pass the typing test. Gardner had exhausted his accrued time on August 17, 2012. Beginning August 18, 2012, Gardner worked on sick leave without pay. The City notes that during this time, Gardner continued to receive all of his benefits.

On October 1, 2012, Gardner applied for unemployment benefits. The Director, ODJFS, concluded that Gardner was on a leave of absence from employment as required by contract, met the weeks and wages requirements, and the facts supported Gardner's ability and availability to work. Consequently, the Director, ODJFS allowed Gardner's application for benefits beginning September 18, 2012 and ending December 24, 2012, when Gardner accepted a second offer by the City for the position of Safety Communications Director, having been able to meet the new conditions of the position.

The City timely appealed. The Director transferred jurisdiction to the Review Commission. After a hearing by the Hearing Officer at the Review Commission, the hearing officer issued a Decision finding Gardner eligible for unemployment by finding that Gardner had been discharged from employment due to

lack of work. The City requested further review by the Review Commission, which was disallowed. The City has appealed the Review Commission's decision.

II. Standard of Review

An appeal of a decision rendered by the Review Commission is governed by R.C. 4141.282(H), which provides, in pertinent part: "...If the court finds that the decision is 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, such court shall affirm the decision of the commission." See *Tzangas, Plakas & Mannos v. Adm'r, Ohio Bur. of Emp. Servs.*, 73 Ohio St.3d 694, 696, 1995-Ohio-206 (1995).

A reviewing court is not permitted to make factual findings, determine the credibility of witnesses, or substitute its judgment for that of the commission; where the commission might reasonably decide either way, the courts have no authority to upset the commission's decision. *Irvine v. Unemployment Comp. Bd. of Review*, 19 Ohio St.3d 15, 17, 19 Ohio B. 12 (1985). "Every reasonable presumption must be made in favor of the [decision] and the findings of facts [of the Review Commission]." *Ro-Mai Industries, Inc. v. Weinberg*, 176 Ohio App.3d 151, 2008-Ohio-301, 891 N.E.2d 348 at ¶ 7, quoting *Karches v. Cincinnati*, 38 Ohio St.3d 12, 19 (1988). A judgment supported by some competent, credible evidence will not be reversed as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.*, 54 Ohio St.2d 279 (1978).

III. Assignments of Error and Arguments Presented

The City presents two assignments of error. In its first assignment of error, the City argues that Gardner did not meet the eligibility requirements of R.C. 4141.29(A)(4) for unemployment benefits as Gardner was not “able to work,” “available to work,” or “actively seeking suitable work”. The City argues that, based upon the medical documentation from Gardner stating that Gardner had permanent restrictions that prohibited him from performing the essential functions of the Firefighter/Medic position, he was not able to work. The City further argues that, due to such restrictions, Gardner was not available to work as Firefighter/Medic, nor was he able to perform the work of the Safety Communications Technician position. Gardner failed the typing test and failed to look for any other position during the period of time after being offered the same position with time to pass the typing test. Thirdly, the City argues that Gardner did not actively seek suitable work during the time he applied for unemployment benefits and when he started in the Safety Communications Technician position (October 1, 2012-December 24, 2012). In its second assignment of error, the City argues that the Hearing Officer’s Decision as to these issues was unlawful, unreasonable and against the manifest weight of the evidence.

The Director replies that Gardner could work with restrictions, but couldn’t work as a firefighter/medic. Gardner was able to work light duty during the six-month period while he was being considered for permanent disability, but subsequently was required to exhaust his personal compensation time, at which point he was placed upon sick leave without pay. The Director argues that during the time that Gardner was on sick leave without pay, he was unemployed. The Director also argues that no testimony

was elicited during the hearing and no documentation was offered as to whether Gardner actively sought work from October 1, 2012-December 24, 2012 and that this fact should not be considered. Finally, the Director contends that the statute did not require Gardner to be discharged but only that he not provide services or receive any remuneration during the relevant period of time.

IV. Analysis

R.C. 4141.29 (4) provides that no individual is entitled to benefits for any week unless the individual: "(a) (i) Is able to work and available for suitable work and *** is actively seeking suitable work". The Director found that Gardner was able to work light duty assignments, but due to the union contract, was prohibited from returning to light duty work; and, beginning August 18, 2012, Gardner was on sick leave without pay. Thus, the hearing officer determined that Gardner could continue to work light duty work, but since the union contract prevented him from doing so, he was separated from the City due to a lack of work.

Under the unique circumstances in this case, the court finds no error in finding that Gardner met the requirements for unemployment. There was evidence to support the findings that Gardner was able to work light duty assignments and could have returned to work but for the union contract provision that he was permitted six months of light duty. After that time, he exhausted his accrued leave times. He was placed on unpaid leave until it was arranged for him to be employed as a Safety Communications Director. The issue of whether Gardner actively sought work was neither raised nor addressed before the hearing officer and thus cannot be considered herein. There is no dispute that Gardner was permanently separated from work as a firefighter/paramedic

due to his medical restrictions. For the foregoing reasons, the City's First Assignment of Error is overruled.

In its second assignment of error, the City argues that the hearing officer's decision as to these issues was unlawful, unreasonable and against the manifest weight of the evidence. The City argues that the hearing officer incorrectly determined that Gardner could have worked light duty since light duty work was not available as of December 3, 2011 and thus the hearing officer erred as a matter of law in finding Gardner was involuntarily unemployed and that he was separated due to a lack of work. The Director counters that he was involuntarily placed on unpaid sick leave and therefore was separated from employment.

The City also argues that Gardner is not entitled to unemployment benefits because he was off work subject to terms of a collective bargaining agreement. The City argues that Gardner's light duty assignment was negotiated with the Union and that he continued to receive benefits of employment from the City after he exhausted his accumulated leaves. The City argues that the unemployment claims are not intended for employees who continue to receive benefits of employment. Additionally, the City contends that the collective bargaining agreement falls within the common law exception to the prohibition of waiver of unemployment compensations claims and thus the Commission erred by affirming the Hearing Officer's conclusion that Gardner was eligible for unemployment benefits. The Director counters that the provisions of the collective bargaining agreement are not binding on the Review Commission and further, the Review Commission based its decision on the information presented.

In examining the factual considerations of a particular case to determine whether just cause exists, determinations arising from collective bargaining agreements do not bind the Commission in any way. *Youghioghny & Ohio Coal Co. v. Oszust*, 23 Ohio St. 3d 39, 491 N.E.2d 298 (1986), syllabus. "The legislature has not provided that the determination as to eligibility for unemployment compensation may be made on the basis of private arrangements for the settlement of grievances." *Id.* at 41. Rather, "the board of review has a statutory duty to hear the evidence, develop a record, and apply the law." *Id.* Thus, the collective bargaining agreement was not binding on the Review Commission.

The City thirdly argues that even if Gardner could be considered discharged for purposes of the Unemployment Compensation Act, there was just cause and as Ohio law provides that no individual discharged for just cause may receive unemployment benefits, the Commission erred by affirming the Hearing Officer's conclusion that Gardner was eligible for unemployment benefits. The Director contends that he was involuntarily put on sick leave without pay and therefore was not at fault for his position.

Upon due consideration of the record, the court finds no error in the hearing officer's reasoning that Gardner exhausted all of the light duty work available to him under the union contract. While Gardner was able to work light duty assignments, none was available to him at the time he sought unemployment benefits. Thus, the court finds no error in the hearing officer's decision that Gardner was entitled to unemployment benefits due to lack of work for the period beginning August 18, 2012.

V. Conclusion

Based upon the foregoing, the court finds that the decision of the Review Commission finding that Gardner was entitled to unemployment benefits was not unlawful, unreasonable or against the manifest weight of the evidence. For this reasons, the court hereby affirms the April 3, 2013 decision of the Employment Compensation Review Commission.

IT IS SO ORDERED.



JUDGE TOM PARKER

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