IN THE COMMON PLEAS COURT OF MIAMI COUNTY, OHIO
GENERAL DIVISION

CITY OF PIQUA	:	CASE NO. 13-641
APPELLANT	:	JUDGE CHRISTOPHER GEE
VS.	:	DECISION/JUDGMENT ENTRY REVERSING THE DECISION OF
OHIO DEPT. OF JOB AND FAMILY SERVICES, OFFICE OF UNEMPLOYMENT, ET AL.,	:	THE OHIO UNEMPLOYMENT COMPENSATION REVIEW COMMISSION
APPELLEES	:	

Appellant, City of Piqua, ("Piqua"), filed a timely notice of appeal from the decision of the Ohio Unemployment Compensation Review Commission ("the Commission"), which approved unemployment benefits to the claimant, Nicole Bevington. Piqua filed a brief in support of its appeal, and appellee, Ohio Department of Jobs and Family Services ("ODJFS") filed a brief seeking affirmance of the Commission decision. Piqua has filed a reply brief. The claimant did not file a brief in the pending appeal.

The appellee, ODJFS, also filed a motion to strike an exhibit attached to the brief of appellant. The exhibit was an arbitration decision involving Bevington's termination. The arbitration decision was not a part of the record before the Commission. Appellant argued that the arbitration decision was submitted as "a source of authority". However, the decision of the arbitrator is

not res judicata and cannot have any preclusive effect on an unemployment compensation appeal.[1] The court grants the motion to strike. The court will not consider for any reason the arbitration decision that was not a part of the record before the Review Commission.

The Ohio Unemployment Compensation Act defines the scope of matters which can be considered by a court on appeal, and further specifies the standard of review to be applied by a court reviewing the record. R.C. 4141.282(H) states in pertinent part as follows:

> The court shall hear the appeal upon receipt of the certified record provided by the commission. If the court finds that the decision was unlawful, unreasonable, or against the manifest weight of the evidence, it shall reverse and vacate such decision or it may modify such decision, or remand the matter to the commission. Otherwise, such court shall affirm the decision of the commission.

The statutory standards set forth in the Revised Code do not contemplate proceedings de novo. Thus, it is not a trial to the court. In addition, this court is prohibited by law from considering any evidence other than that adduced before the administrative agency.[2]

The Hearing Officer and the Ohio Unemployment Review Commission serve as trier of fact. When a party appeals from the Review Commission's final action, the scope of review of the Common Pleas Court is limited to a determination of whether the Commission's decision was unlawful,

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[1] Youghiogheny & Ohio Coal Co. v. Oszust, Harrison Co. No. 395, (7th Dist., 1985) aff'd and remanded, 23 Ohio St.3d 39, 491 N.E.2d 298, 23 O.B.R. 57 (1986)

[2] Hall v. American Brake Shoe Company, 13 Ohio St. 2d 11, (1968).

unreasonable, or against the manifest weight of the evidence.[3] The determination of factual questions is primarily a matter for the agency.[4] This court should defer to the agency's determination of purely factual issues which concern the credibility of witnesses and the weight of conflicting evidence.[5] Where the agency might reasonably act either way, the courts have no authority to upset the agency's decision.[6] A reviewing court may not reverse an otherwise lawful administrative order when reasonable minds might reach different conclusions based on the same evidence.[7]

The Commission determined that claimant Bevington was not discharged for just cause in connection with her work as required in R.C. 4141.29(D)(2)(a). "Traditionally, just cause, in the statutory sense, is that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act."[8] "The determination of whether just cause exists necessarily depends upon the unique factual considerations of the particular case."[9] The question of fault cannot be rigidly defined, and can only be evaluated upon consideration of the particular facts of each case. "If an employer has been reasonable in finding fault on behalf of an employee, then the employer may terminate the employee with

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[3] Id
[4] Brown-Brockmeyer Co. v. Roach, 148 Ohio St. 511, (1947)
[5] Angelkovski v. Buckeye Potato Chips, 11 Ohio App. 3d 159 (1983).
[6] Irvine v. Unemployment Compensation Board of Review, 19 Ohio St. 3d 15, 18, (1985)
[7] Riley v. The Ohio Bureau of Employment Services 82 Ohio App. 3d 137, (1992)
[8] Irvine v. Unemp. Comp. Bd. of Review, 19 Ohio St.3d 15, 17–18, (1985), citing Peyton v. Sun T.V., 44 Ohio App.2d 10, 12, 73 O.O.2d 8, 9, (1975).
[9] Id

just cause. Fault on behalf of the employee remains an essential component of a just cause termination."[10]

The decision from the Review Commission finds as a fact that Bevington was terminated by the City of Piqua "...for her job performance, and most specifically, for performing outside work on the clock, for being unprofessional/insubordinate, and for sending out too many personal email." However, the "Disciplinary Conference Report" reflects that she was terminated for:

1. Violating "...the city's computer policy" by personal use of the computer excessively and disrupting her work
2. Violating the policy regarding "outside employment" and "ethics" by engaging in Mary Kay sales on work time while using the her work computer and work facilities (the utility payment drop box)
3. "Insubordination" by failing to follow clear directives to limit personal business at work including personal email
4. "Neglect of duty" by untimely or failure to complete assignments
5. "Dishonesty" by pretending to be working when her supervisor entered the room or claiming time worked while engaging in personal business
6. "[I]nefficiency" by failing to correct performance issues following a job improvement plan

[10] Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Serv., 73 Ohio St.3d 694, 698, 1995-Ohio-206, (1995)

7. "[F]ailure of good behavior" by making disparaging remarks regarding other employees and suggesting to another employee that they take a sick day to go to a garage sale. The latter example is also a violation of the ethics policy;

In concluding the City of Piqua discharged Bevington without just cause, the hearing officer for the Review Commission found she

> "never received any formal discipline for outside work, or for being unprofessional/insubordinate. Additionally, the claimant was never informed that she was banned altogether from sending personal emails."

This reasoning by the hearing officer presupposes that the employer was required to impose some form of formal discipline short of termination before it could discharge the claimant. There is no support for this conclusion in the record. The references in the record to the term "progressive disciple" cited by appellee do not recite the terms of any such policy from either the policy and procedure manual adopted by Piqua or from the collective bargaining agreement. The record does contain a copy of Piqua's "Comprehensive Electronic Communication and Social Media Policy", which clearly states that "Any violations of this policy may result in discipline, up to and including termination."

The hearing officer for the Review Commission also found that, before Piqua could fire an employee for cause, it was required to "provide proper and specific notice that if their actions do not change, *then* they are subject to termination." (emphasis added) There is no support in the record for this conclusion and the hearing officer did not cite any authority in the law. Even so,

the claimant was given notice of the possibility of termination when she was provided access to the City's policy and procedure manual and to the "Comprehensive Electronic Communication and Social Media Policy". She was also given notice when she was told to cut back on personal business in the form of emails or phone calls. More significantly, the written warning issued in January of 2013 did not result in any change in behavior. Despite three meetings with Bevington, despite conversation with her supervisor, and despite signing a performance improvement plan, Bevington continued to perform unsatisfactorily and her computer use for personal business increased instead of decreased. The claimant's complete lack of regard for her responsibilities left her employer no choice but termination.

The court finds the decision of the Review Commission was unlawful, unreasonable and against the manifest weight of the evidence. The finding that the claimant was terminated without just cause is not supported by the evidence. The decision of the Ohio Unemployment Compensation Review Commission is reversed. Costs shall be assessed against appellee.

IT IS SO ORDERED.

CHRISTOPHER GEE, JUDGE

To the Clerk:

The clerk is directed to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment upon the journal, the clerk shall serve the

parties in a manner prescribed by Civ. R. 5 (B) and note the service in the appearance docket.

Copies to:
Stacey M. Wall, City of Piqua Law Director, Attorney for Appellant
Robin A. Jarvis, Assistant Attorney General, Attorney for Appellee
Nicole Bevington, Appellee
Ohio Department of Job and Family Services, Office of Unemployment, Appellee
State of Ohio, Unemployment Review Commission, Appellee
Director, Ohio Department of Job and Family Services, Appellee