JUN 2012

COMMON PLEAS COURT
WARREN COUNTY OHIO
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12 JUN 12 AM 8:30

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IN THE COURT OF COMMON PLEAS
COUNTY OF WARREN, STATE OF OHIO

DOUGLAS C. HUNTER,	)	
	)	
Plaintiff,	)	**CASE NO. 11CV80378**
	)	
-vs-	)	
	)	
STATE OF OHIO UNEMPLOYMENT COMPENSATION REVIEW COMMISSION, et al.,	)	
	)	
Defendants.	)	**ENTRY GRANTING PERMANENT JUDGMENT ON MAGISTRATE'S DECISION**

A Magistrate's Decision having been filed herein on **May 18, 2012** and no objections to the Decision having been filed within fourteen (14) days from that date, the Court **ORDERS** the Decision adopted as a permanent judgment of this Court.

JUDGE NEAL B. BRONSON

C: Attorney Robin Jarvis
Douglas Hunter, pro se

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JAMES L. SPAETH, CLERK
WARREN COUNTY, OHIO
COMMON PLEAS COURT
BY _____
DEPUTY

IN THE COURT OF COMMON PLEAS
COUNTY OF WARREN, STATE OF OHIO

DOUGLAS C. HUNTER,	)	
	)	
Appellant,	)	**CASE NO. 11CV80378**
	)	
-vs-	)	
	)	
STATE OF OHIO, UNEMPLOYMENT COMPENSATION REVIEW COMMISSION, et al.,	)	
	)	**MAGISTRATE'S DECISION**
Appellees.	)	

Douglas C. Hunter brings the above-referenced administrative appeal of a decision of the Ohio Unemployment Compensation Review Commission dated April 11, 2011, finding that he was discharged for just cause and denying him unemployment compensation benefits.

I. PROCEDURAL POSTURE

Appellant filed his application for benefits July 21, 2010. On August 16, 2010, Ohio Department of Job and Family Services issued a determination that Appellant's employment was terminated for just cause and disallowed benefits. Appellant appealed this determination on August 21, 2010. ODJFS issued a redetermination on September 13, 2010 affirming its initial determination. Appellant appealed on September 13, 2010, and ODJFS transferred the matter to the UCRC on October 1, 2010.

On April 4, 2011 a hearing was held before an UCRC hearing officer, who issued a decision April 11, 2011 concluding that Appellant had been terminated from his employment with just cause and disallowed Appellant benefits. On April 24, 2011, Appellant sought further review by the UCRC, which was disallowed by decision dated August 17, 2011.

On August 22, 2011, Appellant filed a timely notice of appeal to this Court.

II. THE RECORD ON APPEAL

The record reflects that Appellant was a fraud investigator for the Bureau of Workers' Compensation Special Investigations Department from December of 1999 to July 20, 2010 when his employment was terminated for 1.) neglect of duty, 2.) insubordination, and 3.) dishonesty. The BWC has a progressive disciplinary system. "Neglect of Duty," which according to the BWC's submission to ODJFS, is defined as "Failure to perform duties of position or performance at substandard levels," and is punished progressively as follows: 1.) written reprimand, 2.) minor suspension, 3.) medium suspension, and 4.) major suspension or removal.

"Insubordination" is defined as "failure to follow a supervisor's direction or a written policy of the employer." "Dishonesty" is defined as "intentionally making false or untrue statements regarding work-related matters to management, fellow employees or the public." Sanctions for both of these offenses are determined by the BWC based upon the severity of the incident.

Upon Appellant's application, and upon an inquiry from ODJFS, the BWC submitted that Appellant had 1.) failed to properly secure evidence from an undercover investigation (insubordination); 2.) failed to answer questions in a truthful manner (dishonesty); and 3.) reviewed the cases of other employees while at work (neglect of duty).

Also in response to ODJFS's inquiry, the BWC provided the following list of prior disciplinary action taken against Appellant:

2005: Insubordination. Failure to follow written policy.
Written reprimand.

2008: Insubordination. Failure to follow written policy.
Written reprimand.

2009: Insubordination. Failure to follow policy. 3 day working suspension.

2010: Insubordination: Engaged in verbal altercation. 5 day working suspension.

2010: Neglect of duty. Carelessness with agency information. 5 day working suspension.

2010: Insubordination. Failure to secure evidence. False statements. Removal.

Under the BWC's progressive disciplinary system, disciplinary actions taken against an employee expire after one year and thereafter may not be considered when imposing sanctions.

On November 16, 2010, in response to the UCRC's fact-finding questions, the BWC noted that Appellant's 2005 written reprimand was not a part of his active progression, and the 2010 5 day working suspension should not have been listed as part of his disciplinary history.

This matter was originally set for a hearing before the UCRC hearing officer on February 14, 2011. On February 10, 2011, the BWC's legal counsel Monique A. Hall requested a continuance or stay, writing as follows:

> This communication is in regards to the February 14, 2011 hearing in the matter of Douglas C. Hunter (claimant) and the Ohio Bureau of Workers' Compensation (BWC) (employer). BWC received subpoenas for the attendance and testimony of two employees, named Jennifer Saunders and Kimberly Pandilidis. We are hereby providing notice to the Commission that these BWC employees will be made available by telephone for the hearing.
>
> Moreover, in light of a civil action recently filed by the appellant against BWC (*Doug Hunter v. Ohio Bureau of Workers' Compensation*, Franklin County Court of Common Pleas, Case No. 10-CV-1888), as well as ongoing arbitration hearings, BWC respectfully advises the Commission that the testimony of the witnesses must be limited and narrowed in scope in order to avoid discussion or comments regarding the pending lawsuit and the allegations. As such, the witnesses will be unable to provide testimony related to the pending proceedings.
>
> To the extent the Commission finds the limitation on testimony impractical, BWC respectfully requests that the hearing be continued and stayed pending the resolution of the above-referenced civil action. Otherwise, the subpoenaed witnesses intend to provide limited testimony via phone.

As a result of this request, the hearing was reset for April 4, 2011. Neither party sought a further continuance or stay.

At the April 4, 2011 hearing, the hearing officer heard testimony from Brad Nielsen, the BWC labor relations officer; Appellant; Rebecca Roach, former BWC fraud analyst; Jennifer Sounders, assistant director of the special investigations team; and Kim Pandilidis, assistant special agent in charge. At the commencement of the hearing, the following colloquy took place between Appellant and the hearing officer:

> Hearing Officer:... Anyone have any questions about the hearing procedure, Mr. Hunter, any questions?
>
> Mr. Hunter: I guess my question is that since Mr. Nielsen is an attorney, if he's here as a representative for the employer as an attorney or as a witness?
>
> Hearing Officer: He can do both.

Nielsen clarified some inaccuracies in the information the BWC had earlier provided to both ODJFS and the UCRC concerning Appellant's disciplinary history. Appellant had two suspensions in his active record (within one year) at the time of his termination. The first was imposed in November of 2009 and was a three day suspension for interviewing the subject of an investigation without another investigator present. This suspension was later modified to a one day suspension in arbitration. The second was imposed in December of 2009 and was a five day suspension for engaging in a verbal altercation with another BWC employee. This was later modified to a two day suspension in arbitration. At the time of the hearing, Appellant's termination was in the process of arbitration, with final briefs due on April 15, 2011.[1]

According to Nielsen, it is the BWC's policy that when an investigator in the Special Investigations Department receives more than two suspensions, it is cause for removal. SID agents who commit an act of dishonesty are always removed, because such agents are considered *quasi*-law enforcement officers, whose testimony could potentially send a

[1] Attached to Appellant's brief is a partial transcript of the arbitration hearing which, by order dated March 6, 2007, was stricken.

fraudulent workers' compensation claimant to prison; thus, the BWC requires absolute integrity from SID agents.[2]

The testimony at the hearing concerning the three alleged grounds for removing Appellant may be summarized as follows.

On January 24, 2009, Appellant was the case manager performing an undercover investigation of an injured worker receiving temporary total disability benefits from the BWC, who was suspected of operating a karaoke business at a neighborhood bar. Fraud analysts Rebecca Roach and Bev Hasty went into the bar to engage the subject in a conversation while appellant remained in the parking lot providing backup security. Inside the bar, Roach and Hasty's conversation with the subject was surreptitiously taped by means of a hidden audio/video digital recorder. The subject also gave Roach some business cards.

After leaving the bar, Roach and/or Hasty gave Appellant the tape and, apparently, he took it to his residence, this being the weekend. On January 25, 2009, Appellant made a working copy of the tape. On January 26, 2009, Appellant deposited the tape in a secured mail drop at a local BWC service center. Appellant documented his deposit of the tape in the Fraud Management System, a computer program designed to maintain the chain of custody of evidence. However, Appellant failed to document receiving the tape, how the tape was secured between January 24 and 26, and making a copy of the tape, thereby compromising the chain of custody.

Roach retrieved the tape on February 3, 2009, but made some error in attempting to document that fact on the FMS. Roach notified her supervisor who directed her to post a detailed notation to the evidence log.

The BWC chose not to pursue a fraud case against the subject. In closing out the case in early 2010, it appeared that the business cards given to Roach were missing. As a result, the Inspector General initiated an investigation. Appellant was interviewed on April 19, 2010 about the undercover operation, and repeatedly stated that he could not remember if he had been given the tape, or what he did with it between January 24 and 26, 2009.[3]

[2] An official copy of the BWC's progressive discipline policy does not appear in the record.
[3] A transcript of the Inspector General's interview with Appellant does not appear in the record, although Appellant did introduce a transcript of the IG's interview with Hasty, Claimant's Ex. Q.

Between April 19 and June 22, 2010, Appellant spoke with Roach and Hasty about the tape.

As union steward, Appellant had investigated instances of disparate treatment regarding BWC employees who he believed were receiving preferential treatment. Appellant requested numerous case files for review, which the BWC provided for him. Between May 28 and June 22, 2010, and no longer a union steward, Appellant reviewed the cases of numerous workers during working hours, and e-mailed Roach to enlist her assistance in reviewing these cases. It will be noted that, apparently, the BWC has no rule prohibiting one investigator from reviewing the cases of another. The BWC documented Appellant's review of these cases during this time period with a series of 52 screen shots from Appellant's computer (although the exact amount of time Appellant spent on this activity is undetermined), along with an e-mail chain between Appellant and Roach.

On June 22, 2010, as part of an internal investigation, Appellant was interviewed and asked approximately 130 questions. Appellant's response to some 30 of these questions was "I don't know," or "I can't remember." Specific to the cause for his removal, Appellant responded that he did not know the location of the tape between January 24 and 26, 2009. When asked if he had ever requested anyone to review other investigator's case files, Appellant answered, "No."[4]

Appellant offered the following defenses and/or explanations to the BWC's allegations. With respect to the tape from the undercover investigation, Appellant argued that he was not the "evidence collector" or the "evidence custodian," as Roach initially possessed the tape and would have been the one to testify about it in a court proceeding.

Appellant further argued that the BWC has no policy which proscribes reviewing the case files of other investigators, and this is often done as a means to examine how others work their cases.

Appellant testified that his answers regarding the location of the tape were true; after some 18 months he could not recall the details of the weekend of January 24 and 25, 2009. As for his answer to the question of whether he had ever asked anyone to review the case files of another investigators, Appellant testified that his response of "No" was taken out of context; he

[4] A transcript of Appellant's interview of June 22, 2010 does not appear in the record, although Appellant did introduce a transcript of the June 24, 2010 investigatory interview of Hasty, Claimant's Ex. R.

believed he was being questioned about examining files for evidence of disparate treatment, for the purpose of bringing union grievances.

On April 11, 2011, the hearing officer issued a decision finding that Appellant had been terminated with just cause and was ineligible for unemployment compensation benefits. The decision is reproduced below, in relevant part.

***

FINDINGS OF FACT

Claimant was employed by Bureau of Workers' Compensation from December, 1999 through July 20, 2010. Claimant last served as a fraud investigator for the employer. He last reported to Shawn Fox, Assistant Supervisor. Claimant was assigned to the employer's Governor's Hill office in Symmes Township, Ohio. In this position, claimant was responsible for investigating Workers' Compensation fraud. Prior to transferring to the Bureau of Workers' Compensation, claimant had worked for the state since March, 1992, beginning in the Department of Corrections.

In November, 2009, the employer issued a three day working suspension to the claimant for failing to follow policy with respect to interviewing a suspect. The warning was issued after claimant interviewed a suspect on his own whereas agency policy requires two agents be present. Claimant contends that the suspect volunteered a confession and that he acted reasonably in taking that confession. Claimant's three day working suspension was reduced to a one day suspension pursuant to a union arbitration which became final in November, 2010.

On December 18, 2009, claimant was involved in a verbal altercation with a co-worker, Craig Thompson, in the Lima Service Office during a quarterly meeting. Mr. Thompson initiated the argument and raised his voice towards the claimant. Claimant also raised his voice towards Mr. Thompson. No physical contact was made between the parties but claimant contends he was subject to workplace violence based on Mr.

Thompson's criminal conviction record with respect to domestic violence. Claimant did not report any injuries and the employer issued discipline to both parties. Claimant was served with a five day working suspension which was reduced to a two day working suspension following a union arbitration hearing in November, 2010. Mr. Thompson received a written warning as he did not have any prior discipline.

On January 24, 2009, claimant and two other employees, Rebecca Roach, Fraud Analyst and Beverly Hasty, another Fraud Analyst, performed an undercover investigation of a suspect. Ms. Hasty and Ms. Roach taped the suspect who was performing some work in a bar. The evidence was then turned over to the claimant who made a copy of the evidence on January 25, 2009 and placed notes in the employer's evidence system that he was putting the items in temporary storage on January 26, 2009. Claimant was questioned regarding that investigation b the Office of Inspector General that he did not recall where the surveillance video was from January 24, 2009 until it was placed in temporary storage on January 26, 2009. Claimant did not enter any notes in the system to reflect where the evidence was between January 24, 2009 and January 26, 2009.

The employer asked claimant the same question regarding the location of the evidence between January 24, 2009 and January 26, 2009, during an interview on June 22, 2010 and claimant gave the same response. Claimant was also asked on June 22, 2010 if he had ever asked anyone to review Craig Thompson's cases for him and responded in the negative. During a related interview, Ms. Roach testified that claimant did ask her to review Mr. Thompson's cases. Mr. Thompson was not assigned to Ms. Roach. Also, between May 28, 2010 and June 22, 2010, claimant spent approximately two hours of work time reviewing cases assigned to other fraud investigators which the employer considered to be neglect of duty and misuse of time. At the conclusion of the interview on June 22, 2010, claimant was placed on administrative leave pending further discipline.

On July 16, 2010, a pre-disciplinary hearing was held in which claimant was charged with failing to properly secure evidence, dishonesty, and neglect of duty. On July 20, 2010, claimant was informed that he was being removed from his position.

Claimant filed a union grievance regarding his separation which is currently in the arbitration stage. The arbitrator is scheduled to issue a decision sometime in June or July, 2011. Claimant contends that he did not violate any rules with respect to interviewing a suspect by himself and further contends that he did not initiate the argument with Mr. Thompson in the Lima Service Office. Claimant further contends that he was truthful when questioned by the Inspector General and the employer and that his use of time in reviewing cases of other field investigators was not uncommon or inappropriate.

***

REASONING

Claimant was suspended in 2009 for failure to follow the employer's interviewing policy and was again suspended in early 2010 for his involvement in a verbal altercation with a co-worker in the Lima Service Office. Subsequent to the suspension, the employer discovered that claimant failed to properly handle evidence between January 24, 2009 and January 26, 2009 as he did not document the chain of custody between those dates. Further, claimant misused company time by reviewing cases belonging to other employees during work hours without a legitimate business reason.

Following his suspensions, claimant knew or reasonably should have known that further misconduct would not be tolerated by the employer. Claimant's failure to properly secure evidence, dishonest answer in the June 22, 2010, interview, and misuse of employer's time, represents misconduct that will serve to suspend his unemployment compensation benefits. Therefore, the Director correctly held that the claimant was discharged from employment

> with Bureau of Workers' Compensation with just cause in connection with work.
>
> ****.

III. ASSIGNMENTS OF ERROR

Appellant sets forth seven assignments of error:

1. UNLAWFUL REVIEW OF UNEMPLOYMENT FILED BY ODJFS
2. FAILURE TO PROPERLY NOTIFY HUNTER OF THE EMPLOYER'S REPRESENTATIVE
3. UNREASOBALE [sic] CONCLUSION AND REVIEW OF THE EVIDENCE
4. WEIGHT OF EVIDENCE DOES NOT SUPPORT CHARGE OF FAILING TO HANDLE EVIDENCE AND DOCUMENT CHAIN OF CUSTODY
5. WEIGHT OF EVIDENCE DOES NOT SUPPORT CHARGE OF MISUE [sic] OF COMPANY TIME
6. SPOLIATION OF EVIDENCE BY EMPLOYER
7. WEIGHT OF EVIDENCE DOES NOT SUPPORT CHARGE OF MAKING FALSE STATEMENTS

IV. SCOPE OF THE COURT'S REVIEW

The jurisdiction of the Court of Common Pleas in an unemployment compensation case is provided by statute. Specifically, R.C.4141.282 (H) states:

> The court shall hear the appeal on the certified record provided by the commission. 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.

Thus, the role of the Court upon an appeal from a decision of the Unemployment Compensation Review Commission is limited to determining whether the Review Commission's decision is supported by evidence in the record. *Verizon North, Inc. v. Ohio Dep't of Job & Family Services* (2007), 170 Ohio App.3d 42, 48. The Court may only reverse a decision of the Review Commission if it is unlawful, unreasonable, or against the manifest weight of the evidence. *Kelly v. Lamda Research, Inc.* (Jan. 11, 2002), Hamilton App. No. C-010253, 2002 Ohio 24, 2002 Ohio App. LEXIS 69 at ¶15; *Piazza v. Ohio Bur. of Employment Services* (1991), 72 Ohio App.3d 353, 356; *Jones v. Unemployment Compensation Bd. of Rev.* (1989), 61 Ohio App.3d 272, 275.

In reviewing a decision of the Review Commission, a court must adhere to the principal that decisions of purely factual questions are primarily within the purview of the Review Commission. *Verizon North, Inc., supra.; Guy v. City of Steubenville* (2002), 147 Ohio App.3d 142, 148; *Lombardo v. Ohio Bur. of Employment Services* (1997), 119 Ohio App.3d 217, 222; *Irvine v. Unemployment Compensation Bd. of Rev.* (1983), 19 Ohio St.3d 15, 19. The Court does not make factual findings or determine the credibility of witnesses who appeared before the Review Commission. *McCarthy v. Connectronics Corp.* (July 10, 2009), Lucas App. No. L-08-1293, 2009 Ohio 3392, 2009 Ohio App. LEXIS 2923 at ¶10; *Becka v. Unemployment Compensation Bd. of Rev.* (March 22, 2002), Lake App. No. 2001-L-037, 2002 Ohio 1361, 2009 Ohio App. LEXIS 2933 at ¶10; *Gaston v. Bd. of Rev.* (1983), 17 Ohio App.3d 12, 13. The Court may not weigh the evidence or substitute its judgment for that of the hearing officer as it pertains to factual determinations. *Lombardo, supra.* The fact that reasonable minds might reach different conclusions about the evidence in the record is not a basis for reversal of a decision of the Unemployment Compensation Review Commission. *Tzangas, Plakas & Mannos v. Ohio Bur. of Employment Services* (1995), 73 Ohio St.3d 694, 697; *Irvine, supra at 18; Guy, supra; Fredon Corp. v. Zelenak* (1997), 124 Ohio App.3d 103, 109.

However, while courts are not permitted to make factual findings or to determine the credibility of witnesses, they do have a duty to determine whether the unemployment board's decision is supported by the evidence in the record. *Fuller v. Semma Enterprises, Inc.* (April 7, 2008), Butler App. No. CA2006-11-292, 2008 Ohio 1664, 2008 Ohio App. LEXIS 1434 at ¶ 9; *Warren County Auditor v. Sexton* (Dec. 28, 2007), Warren App. No. CA2006-10-124, 2007 Ohio 7081, 2007 Ohio App. LEXIS 6150 at ¶ 25.

V. ANALYSIS

In his first assignment of error, Appellant argues that he was prejudiced because ODJFS relied upon inaccurate information, provided by the BWC, concerning Appellant's disciplinary record. This Court does not have jurisdiction to review decisions of ODJFS in unemployment compensation matters; that function is performed by the UCRC. See R.C.141.281 (C)(1). Appellant's disciplinary history was clarified at the April 4, 2011 hearing and that testimony is reflected in the hearing officer's findings of fact. Appellant's first assignment of error is overruled.

In his second assignment of error, Appellant argues that the hearing officer should have disqualified Brad Nielsen as a witness. Appellant cites Ohio Prof. Cond. Rule 3.7, which states:

> Rule 3.7: LAWYER AS WITNESS
>
> (a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless one or more of the following applies:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case;
>
> (3) the disqualification of the lawyer would work substantial hardship on the client.
>
> (b) A lawyer may act as an advocate in a trial in which another lawyer in the lawyer's firm is like to be called as a witness unless precluded from doing so by Rule 1.7 or 1.9.
>
> (c) A government lawyer participating in a case shall not testify or offer the testimony of another lawyer in the same government agency, except where division (a) applied or where permitted by law.

As an initial matter, this Magistrate would note that the question of whether Rule 3.7 has application to hearings before the UCRC appears to be one of first impression. Although

quasi-judicial in nature, in such hearing any interested party may appear in person, by counsel, or an authorized representative. OAC 4146-19-01. Interested parties or their *non-lawyer* representative appearing at administrative unemployment compensation hearings before ODJFS and the UCRC are not engaged in the unauthorized practice of law. See *Henize v. Ohio Bur. Of Employment Services* (1986), 22 Ohio St.3d 213 at syllabus. The rule forbidding attorneys from being witnesses has been held applicable to hearings before the State Employee Relations Board (SERB). See *State Employment Relations Bd. v. Cleveland Bldg. & Constr. Trades Council* (1995), 106 Ohio App.3d 128; *State Employment Relations Bd. v. Springfield Local School Dist. Bd. of Educ.* (1995), 104 Ohio App.3d 191. Nevertheless, this Magistrate is not compelled to reach the question for the following reasons.

The fact that Nielsen is, or is not, an attorney licensed to practice in the state of Ohio is not demonstrated on the record, but is merely an assertion by Appellant to the hearing officer. Assuming Nielsen is a lawyer, Appellant failed to move to disallow him as a witness, and thus Appellant has not preserved the issue for review. Finally, Rule 3.7 is a rule of ethics, not evidence. A violation of Rule 3.7 does not render an attorney's testimony incompetent and inadmissible. See *Mentor Lagoons, Inc. v. Rubin* (1987), 31 Ohio St.3d 256, 258-59.

Appellant has not demonstrated how he was prejudiced by Nielsen's testimony and/or arguments to the hearing officer. Appellant's second assignment of error is overruled.

Appellant's third assignment of error is lengthy and somewhat abstruse. It appears to take issue with the hearing officer's conclusion that Appellant, following his 2009 suspension, "knew or reasonably should have known that further misconduct would not be tolerated by the employer." Appellant argues, essentially, that the BWC administered its disciplinary process in a disparate manner, and discusses at length the treatment of two other employees. From this proposition Appellant asserts that he could not reasonably "know" what the BWC would "tolerate."

Much of the April 4, 2011 hearing was devoted to Appellant's in depth exploration of his employer's treatment of the disciplinary infractions of other employees. Yet, Appellant asserted to the hearing officer "I'm not arguing disparate treatment." (Transcript at 53). To the extent Appellant is attempting to argue that here, the issue has been waived. Appellant's third assignment of error is overruled.

In Appellant's fourth, fifth and seventh assignments of error, he argues that the weight of the evidence does not support the charges of improper handling of evidence, misuse of company time and dishonesty. As the central issue before the NCRC was whether Appellant

was terminated for just cause, this Magistrate first sets forth the law on just cause in the context of unemployment compensation.

A claimant is not entitled to unemployment compensation if he was terminated from his employment for just cause. R.C. 4141.29 (D)(2)(a).

In an administrative appeal, a reviewing court may reverse the Unemployment Compensation Review Commission's "just cause" determination only if it is unlawful, unreasonable, or against the manifest weight of the evidence. *Guy, supra at 147-48.*

In the context of an unemployment compensation case, in considering the definition of just cause, courts are instructed to look to the two main purposes of the Ohio Unemployment Compensation Act. One purpose is to assist unfortunate individuals who become involuntarily unemployed by adverse business and industrial conditions. A second purpose is to assist an individual who has worked, is able to work, and is willing to work, but is temporarily without employment through no fault of his own. Thus, it has been said that the Act does not protect employees from themselves. *City of Struthers v. Morell* (2005), 164 Ohio App.3d 709, 715. When an employee is at fault, he is no longer the victim of fortune's whim, 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. Fault on behalf of the employee is an essential component of a just cause determination. *Lorian County Auditor v. Ohio Unemployment Compensation Review Comm'n.* (2010), 185 Ohio App.3d 822, 825-26.

Traditionally, just cause, in a statutory sense, is that which, to an ordinarily intelligent person, is a justifiable reason or doing or not doing a particular act. *Guy, supra* at 148. The critical issue in determining whether an employee has been terminated for just cause is not whether an employee has technically violated some company rule, but whether the employee, by his actions, has demonstrated an unreasonable disregard for his employer's best interests. *Brown v. Bob Evans Farms, Inc.* (2010), 190 Ohio App.3d 837, 843. Where an employee demonstrates an unreasonable disregard for his employer's best interest, just cause for the employee's termination is said to exist. *Marano v. Duramax Marine, LLC* (Nov. 21, 2011), Stark App. No. 2011CA00081, 2011 Ohio 6147, 2011 Ohio App. LEXIS 5046 at ¶ 22.

Appellant argues that because Roach was the "collector of evidence," or "evidence custodian," this somehow immunizes him from the responsibility of properly documenting the chain of custody of the evidence in question. This Magistrate fails to understand the argument.

Whether it was improper for Roach to have transferred the tape to Appellant on January 24, 2009 seems to this Magistrate to be beside the point. While the BWC's Evidence Procedure, introduced by Appellant as Claimant's Ex. D, is unclear on this point, it does seem clear, that as an overriding principle, the chain of custody must be preserved by documenting every action taken with respect to a particular piece of evidence.

The evidence at the UCRC hearing, which is undisputed, is that Appellant possessed the tape on January 25, 2009, when he made a copy of it (undocumented in the FMS), and when he deposited it in temporary storage on January 26, 2009 (documented). What remains unaccounted for its how this tape was secured between January 24 and 26, 2009. Thus, the chain of custody was compromised, and this certainly was not in the BWC's best interest.

Appellant is correct in asserting that the BWC has no official rule or policy that forbids one investigator from reviewing the files of another. The question in this case, it seems to this Magistrate, is the purpose of Appellant's review of these particular files. There is evidence in the record, Claimant's Ex. P, that between May 28 and June 22, 2010, Appellant was reviewing the case files of the very agents he had previously investigated for evidence of disparate treatment while union steward, and with the BWC's permission. This being the case, the BWC inferred that Appellant, no longer the union steward, was continuing to spend time searching for evidence of disparate treatment, instead of doing his own work. Such activity is obviously not in the best interest of the BWC.

Appellant claims that his purpose in reviewing these files was his own professional development; to examine other investigators' methodologies with an eye towards learning from them. That, of course, is a question of fact. At the UCRC hearing, little if any testimony was heard about the nature of these cases Appellant reviewed during this period which could substantiate Appellant's position.

In unemployment compensation proceedings, the burden of persuasion remains always upon the discharged employee to prove he is entitled to unemployment compensation. *Silkert v. Ohio Dep't. of Job & Family Services* (2009), 184 Ohio App.3d 78, 86. In the instant case, Appellant failed to persuade the hearing officer that his purpose for reviewing these cases was related to his duties of employment.

Appellant argues that he could not reasonably be expected to remember the details of an undercover operation when interrogated about them 18 months after the fact, and therefore his answers -- "I don't know" "I can't remember"-- were not evasive, but a truthful representation of his mental state.

Whether an assertion of lack of memory constitutes a true or false declaration is a question of fact, and moreover, because it involves the declarant's state of mind, must necessarily be proved by circumstantial evidence from which the trier of fact must infer whether the declaration is true or false. See *United States v. Swainson* (6th Cir. 1977), 548 F.2d 657, 662; *United States v. Nicoletti* (7th Cir. 1962), 610 F.2d 359, 363. Circumstantial and direct evidence inherently possess the same probative value. *H. Park Partners, LLC v. Frick* (2009), 181 Ohio App.3d 691, 695. Each is sufficient to support a verdict, provided reasonable minds can reach such a conclusion from the evidence and any reasonable inferences drawn therefrom. *Donaldson v. Northern Trading Co.* (1992), 82 Ohio App.3d 476, 483.

In the instant matter, there is unrefutted evidence in the record that 1.) Appellant made a copy of the tape on January 25, 2009; 2.) Appellant placed the tape into temporary storage on January 26, 2009 and documented that fact; and 3.) between the Inspector General's interview of Appellant and Appellant's investigatory interview, Appellant had ample opportunity to refresh his recollection, and indeed, spoke to Roach and Hasty about the matter. It is not unreasonable to infer that Appellant was being less than truthful when he stated he could not recall the location of the tape between January 24 and January 26, 2009. Perhaps a transcript of the June 22, 2010 investigative interview could have shed more light upon the exact questions asked and Appellant's responses, but no such transcript appears in the record.

Appellant claims that when he was asked whether he had ever asked anyone to review other investigators' case files, and he answered "No," he misunderstood the context of the question. Perhaps this is so, but without a transcript of the interview, the hearing officer had only Appellant's assertion and testimony concerning an e-mail chain between Appellant and Roach. The hearing officer could reasonably infer that Appellant's answer of "No" was untruthful.

Appellant's fourth, fifth, and seventh assignments of error are overruled.

In Appellant's sixth assignment of error, he argues that the BWC committed spoliation of evidence, which is the subject of Appellant's civil action pending in the Franklin County Court of Common Pleas. Appellant maintains that because the UCRC granted the BWC a continuance due to the pendency of that action, the UCRC should have postponed the April 4, 2011 hearing for the same reason.

The record does not reflect that Appellant ever requested that the April 4, 2011 hearing be continued, and there was no mention of spoliation of evidence or the pending civil action at the April 4, 2011 UCRC hearing. Appellant's sixth assignment of error is overruled.

Having thoroughly examined the record on appeal, this Magistrate concludes that the decision of the UCRC hearing officer is neither unlawful, unreasonable, nor against the manifest weight of the evidence.

VI. MAGISTRATE'S DECISION

For the reasons set forth above, the April 11, 2011 decision of the Ohio Unemployment Compensation Review Commission is *affirmed.*

Costs to be assessed to Appellant Douglas C. Hunter.

MAGISTRATE ANDREW HASSELBACH

NOTICE TO PARTIES

The parties shall take notice that this decision may be adopted by the Court unless objections are filed within fourteen (14) days of the filing hereof in accordance with Civil Rule 53 (D)(3)(b).

A party shall not assign as error on appeal the court's adoption of any factual findings or legal conclusions, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R.53 (D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R.53 (D)(3)(b).

MAGISTRATE ANDREW HASSELBACH

CERTIFIED COPY
JAMES L. SPAETH, CLERK
WARREN COUNTY, OHIO
COMMON PLEAS COURT
BY _____ DEPUTY

C: Attorney Robin Jarvis
Ohio Bureau of Workers Compensation
Douglas Hunter, pro se