

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

FRANKLIN COUNTY AUDITOR,	:	
	:	
Appellant,	:	
	:	Case No. 11CVF-11-14472
vs.	:	
	:	(JUDGE FRYE)
CHRISTOPHER A, NOEL, <i>et al.</i> ,	:	
	:	
	:	
Appellees.	:	

**DECISION AND FINAL JUDGMENT**  
**AFFIRMING THE ORDER OF THE OHIO UNEMPLOYMENT**  
**COMPENSATION REVIEW COMMISSION**

***I. Introduction***

Christopher A. Noel was hired by the Franklin County Auditor as a staff accountant on November 22, 2010. On April 20, 2011, the Auditor terminated Mr. Noel’s employment. Mr. Noel filed an application for unemployment benefits, which the Director of the Unemployment Compensation Review Commission allowed. The County Auditor sought a redetermination. It held that Mr. Noel was discharged by the Auditor for just cause. Mr. Noel then appealed and on August 26, 2011, Hearing Officer Lewis held an oral, telephonic hearing on Mr. Noel’s appeal.

Hearing Officer Lewis issued a four-page Decision finding that the Auditor had terminated Mr. Noel’s employment without just cause. The decision recorded that Mr. Noel had been progressively given guidance about how to complete tasks in the months of January, February and March, but never warned that his job was in jeopardy because of his job performance. Thus, while the employer claimed Noel’s work performance demonstrated unsuitability for the position and therefore “fault,” that conclusion was unsupported by the evidence presented.

The Auditor filed a request for review of the Hearing Officer’s decision which the Commission disallowed. The Commission notified the parties of that decision by mail on October 19, 2011. From that decision the Auditor filed this appeal.

The Auditor presents a single issue for this court's review framed as "Whether the Decision of the Unemployment Review Commission was unlawful, unreasonable, or against the manifest weight of the evidence." The Auditor set forth essentially two arguments in support, namely that: 1) there was "overwhelming evidence" that Mr. Noel committed major violations of the Treasurer's Office Employee Handbook (pp. 6-7 Appellant's Brief); and that 2) Mr. Noel was "either unwilling or unable to complete required work." (Brief at p. 8.) Having reviewed the case, the decision below is **AFFIRMED.**

## ***II. Standard of Review and Applicable Law***

In *Williams v. Ohio Dept. of Job & Family Servs.*, 129 Ohio St.3d 332, 2011-Ohio-2897, ¶¶ 15 – 24, the Court set forth the law that applies to this case. To summarize, a determination whether an employee was discharged for "just cause" is the focus of proceedings at the Commission, and on appeal a court may not reverse the Commission merely because a different view of the evidence is arguable. "Just cause" is viewed from the standpoint of an ordinarily intelligent person, while having in mind that the law's "purpose is 'to enable unfortunate employees, who become and remain involuntarily unemployed by adverse business and industrial conditions, to subsist on a reasonably decent level and is in keeping with the humanitarian and enlightened concepts of this modern day.'" (*Id.*, ¶ 22) The unemployment laws do not exist to protect employees from themselves, but from economic forces over which they have no control. (*Id.*, ¶ 24). See also, *Bennett v. Dept. of Job & Family Servs.*, 10th Dist. Case No. 11AP-1029, 2012-Ohio-2327, at ¶¶ 5 – 6, discussing *Tzangas*, *Irwin*, and other prominent decisions in this area of the law.

## ***III. Discussion***

Hearing Officer Lewis' Decision set forth Finding of Facts in detail. The Decision states:

Claimant was hired as a staff accountant on November 22, 2010. Claimant worked in the reconciliation office of the Franklin County Treasurer's office. Claimant's job duties changed during the course of his employment, as additional tasks were added to his responsibilities. Claimant took on additional reconciliations beginning in January of 2011. His supervisor

gave him some guidance on how to complete the additional reconciliations, but claimant had ongoing questions. His supervisor had to provide further guidance to him on how to complete the reconciliations for the months of January, February, and March. He was not warned that his job was in jeopardy because of his job performance or warned that there were any specific problems with the completion of his job duties. Claimant's supervisor, on April 15, 2011, assigned him an additional new project.

The employer's attendance progressive discipline policy provides that employees will receive (for employees with less than 6 months service): (1) 2 occurrences – counseling; (2) 3 occurrences – verbal reprimand; (3) 4 occurrences – written reprimand; (4) 5 occurrences – 3-day suspension; and then (5) 6 occurrences – discharge. An absence of more than 4 hours is to equal 1 occurrence. An absence of less than 4 hours is equal to 1/2 occurrence. Claimant was absent from work on December 9, 2010, February 16, 2011, and March 7, 2011. He received 1 occurrence for each absence. Claimant was tardy on April 11 and 12, 2011, and received 1/2 occurrence for each tardy. Claimant received a written reprimand on April 15, 2011 for 4 occurrences. Claimant did not receive a counseling or verbal reprimand prior to receiving the written reprimand.

The employer also has a policy that classifies certain policy violation as "Major Offenses," which may warrant immediate discharge. Among the listed offenses is "excessive absenteeism," "falsification of job application," and "refusal to follow outlined procedures in a timely manner." "Excessive absenteeism" is not defined by the policy.

On April 4, 2011, claimant called his supervisor and stated that his grandmother had passed away on April 3, 2011. Claimant requested, and was granted, bereavement leave. He was absent from work April 4-6, 2011 on bereavement leave. Claimant's grandmother did not actually pass away until April 5, 2011. Claimant did not have any paid time off to use, and he used one day of his bereavement leave to visit his grandmother on the day before she passed away.

Claimant stated on his job application that he had separated from his previous employment because of "relocation." At some point during claimant's employment, the employer learned that claimant had been receiving unemployment benefits following separation from his previous employer. The employer did not question claimant about the circumstances of his separation from employment with his previous employer after learning that claimant had been receiving unemployment benefits. The employer did not contact his previous employer to determine the reason for claimant's separation from employment. The employer, based on information that claimant had been receiving unemployment benefits, assumed claimant had been dishonest about the reason for separation from employment with his previous employer.

In April, claimant's supervisor made comments to claimant about where claimant lived in relation to where his children lived. Claimant found the comments objectionable and on April 18, 2011, he complained to

her supervisor about the comments. On April 19, 2011, claimant had an unexcused absence from work. On April 20, 2011, claimant was discharged for alleged attendance violations, poor work performance, and falsification.

Despite the Auditor's taking issue with the Hearing Officer's findings of fact, a thorough review of the record demonstrates that the Hearing Officer's factual findings as adopted by the Commission are supported by some competent, credible evidence (*Williams*) in the record (*Tzangas; Irvine*). Thus, this court must affirm the findings of fact and cannot reverse the decision's facts merely because reasonable minds might reach different conclusions based on the evidence in the record. (*Williams; Tzangas; Irvine*).

The Auditor argues (Brief at p. 7) that Mr. Noel committed a major violation of the Employee Handbook justifying immediate termination by providing false information about his use of bereavement leave when his grandmother died. However, the court reads the Handbook provision as providing for essentially progressive discipline: "falsification of information relating to bereavement leave will lead to disciplinary action up to and including termination." It does not provide for immediate termination regardless of circumstances, or without consideration of the nature and extent of any misuse of the bereavement policy.

As the Hearing Officer found, Mr. Noel used one day of his bereavement leave to visit his grandmother on the day before she passed away. This was in contravention of the use of bereavement leave for up to three days after the person has passed away. The Hearing Officer discussed Mr. Noel's falsification of bereavement leave but found it did not rise to the level of misconduct serious or severe enough to warrant immediate discharge. As support, the Hearing Officer observed that the employer failed to take disciplinary action upon discovery of this falsification. (see, Tr. P. 28, L. 1-4, "I was not terminated because of that.") This court notes further that the Auditor summed up reasons for terminating Mr. Noel's employment at the hearing: "Just briefly, the expectations of the employer were made at the beginning of employment, the claimant was provided a position description along with a Handbook which he acknowledged receipt. Claimant did not perform the required work as he was unwilling to perform his assignments efficiently and sufficiently as he violated by the Handbook along with

falsification of work document and some other documents.” (Tr. P. 32 L. 23 – P. 33 L. 3).

The falsification relied upon at the hearing concerned falsifying documents but the record contains no bereavement document falsified by Mr. Noel. Additionally, the Hearing Officer found it significant that the Auditor did not follow its written disciplinary process when addressing Mr. Noel’s work attendance, and observed that fairness requires an employee not be subject to more severe discipline than that provided in company policy. (citing *Eagle-Pitcher Industries Inc. v. OBES* (1989), 65 Ohio App. 548 and *Peterson v. ODJFS*, 2004 Ohio App. LEXIS 176 citing *Mullen v. OBES*, 1986 Ohio App. LEXIS 5278).

The Auditor’s Employee Handbook provided for progressive discipline for attendance issues and set forth a disciplinary process for major offenses. Although not mentioned specifically as a major offense, Mr. Noel’s bereavement falsification (from what the court can glean from the record) may constitute a major offense even though not listed in the Handbook as an example of a major offense. But, the Hearing Officer’s finding that the employer did not treat it as a major offense upon its discovery is further supported by the fact that the Auditor did not follow its Handbook’s procedures for imposing discipline for a purported major offense.

The Handbook provides a series of steps that the employer must take prior to any discipline other than a consultation or verbal reprimand. The Handbook states that “Prior to...the following procedure shall apply...” The procedure includes a number of steps. First, if the employee is present at work, the Supervisor of the employee shall confer with the employee about the facts. Second, after that conference, if termination is recommended, the Employer’s designee will schedule a pre-disciplinary hearing. Third, if after receiving the report and recommendation from the pre-disciplinary hearing, the Treasurer decides the removal is warranted, he or his designee shall notify the employee in writing.

Although the Auditor discovered Mr. Noel’s falsification, the Auditor followed none of the pre-disciplinary steps it bound itself to in its Employee Handbook. The court cannot find that the Hearing Officer and Commission erred in determining that such conduct did not rise to the level of misconduct serious or severe enough to warrant immediate discharge. Again, the Auditor took no action upon discovery of this incident

and it was not unreasonable for the Hearing Officer to disallow the attempt to elevate the incident in importance retroactively. Moreover, viewed more generally, it is not unreasonable to conclude that a one day work absence to visit one's grandmother on her death bed does not reflect an unreasonable disregard for his employer's best interests – one of the catch phrases applied in this area of the law.

The Auditor offers that Mr. Noel falsified his employment application when he “lied on his employment application regarding the reason for leaving his most recent former employer.” (Brief at p. 8.) The Hearing Officer found that the Auditor's belief that Mr. Noel falsified his application was based on an assumption induced by hearsay which the Auditor failed to investigate with Mr. Noel's former employer, with Mr. Noel, or in any other manner supported by credible reliable evidence in the record. (see Tr. P. 14 , L. 12 – P.16, L. 10). In short, the “lie” was premised upon nothing more than a hunch based on hearsay.

The Hearing Officer found that the Auditor's employee handbook provided for the use of a progressive disciplinary procedure, which the Auditor failed to follow. The Hearing Officer set forth the disciplinary procedures that should have been implemented but faulted the Auditor for effectively collapsing a number of steps without offering any reasonable explanation for its failure to follow its duties to Mr. Noel set forth in the handbook. (see Tr. P. 7, L. 21 – P. 12, L. 8). The Hearing Officer found that the discipline for Mr. Noel's fifth and last absence upon which the Auditor relies for just cause termination, mandated a 3-day suspension, not discharge. This is especially telling in that the April 15, 2011 written reprimand explicitly stated, “Further violations of the policies of the Franklin County Treasurer's Office ***will be subject to progressive discipline...***” (Record, Reprimand Letter) (emphasis added.)

Finally, the Auditor argues with the Hearing Officer's finding that Mr. Noel's job requirements changed after he was hired, and that Mr. Noel's job performance showed unsuitability for his position. The evidence in the record contains some credible evidence supporting the finding that job responsibilities changed in the course of his employment but that Noel was adequately performing the required work. (see, Tr. p. 23, L. 1 – p. 26, L. 3)

The Hearing Officer contrasted Mr. Noel's credible testimony with the Auditor's presentation of essentially hearsay and unsworn documents. The Hearing Officer was

expected to make credibility determinations. A fact finder is free to believe all, some or none of a witnesses' testimony. *D'Souza v. State Med. Bd. of Ohio*, 10<sup>th</sup> Dist. No. 09-AP-97, 2009-Ohio-6901, ¶17; *Bennett, supra*, at ¶ 19. Furthermore, the Hearing Officer found that the Auditor failed to demonstrate that Mr. Noel was adequately warned that his job was in jeopardy due to job performance or given any real opportunity to improve deficiencies in his job performance.

Indeed, prior to the April 15, 2011 Written Warning the Treasurer appears not to have even been aware of any work-performance problems. When asked by the Hearing Officer whether anything else happened between April 15, 2011 and Mr. Noel's termination on April 20, 2011, the answer was, "Well between those dates the situation was brought to the Treasurer's attention about his performance over the you know past six months and the Treasurer had decided that you know he was not satisfied with his performance regarding attendance, his work product and his honesty." (Tr. p. 7, L. 14-20) (see also, Tr. p. 14, L 1-13) (see also, Tr. P. 13, L.3-7.) Statements like "Well I wasn't there, but I'm sure..." are not reliable as the Hearing Officer found.

The record does not support the Auditor's argument that the Hearing Officer made findings of fact inconsistent with the manifest weight of the evidence. The Hearing officer had a basis to conclude that no credible, reliable evidence in the record truly refuted the credible evidence provided by Mr. Noel concerning his job performance, that his job duties changed, and that he was not treated in the manner set forth in the Employee Handbook.

The Employee Handbook was provided to Mr. Noel on November 22, 2010. (Tr. p. 32, L. 2-8). Mr. Noel acknowledged that he had a duty not to violate the rules in it. (L. 6, 7). That fact was elicited by the Auditor's counsel when cross-examining Mr. Noel. However, the Auditor does not appear to acknowledge that such duties were mutual. As the record amply demonstrates and the Hearing Officer found, the Auditor's failure to follow its own Handbook was unfair to Mr. Noel. Had the Auditor followed its own Handbook's procedures, Mr. Noel may have received a 3 day suspension for his excessive absences, would have received job performance counseling, and would have had a pre-disciplinary hearing where he could have presented his view of his job performance.

The Handbook given Mr. Noel on his first day of employment should have been followed by his employer up to his last day of employment. The discharge was not appropriate. Credible evidence supports the Review Commission decision that termination was without just cause, and that decision must be upheld.

## **FINAL JUDGMENT**

The court **AFFIRMS** the Order of the Ohio Unemployment Compensation Review Commission in Docket No: H-2011-020185 in all respects, and denies the Franklin County Auditor's appeal.

Costs are taxed against Appellant.

**\*\*\* This is a Final Appealable Order. \*\*\***

**IT IS SO ORDERED.**

***Clerk of Courts – Mail copy to:***

Mr. Christopher A. Noel  
2810 Cedar Street  
Portsmouth, OH 45662



Franklin County Court of Common Pleas

**Date:** 10-24-2012  
**Case Title:** FRANKLIN COUNTY AUDITOR -VS- CHRISTOPHER NOEL  
**Case Number:** 11CV014472  
**Type:** DECISION

It Is So Ordered.

  
Richard A. Frye

/s/ Judge Richard A. Frye

Court Disposition

Case Number: 11CV014472

Case Style: FRANKLIN COUNTY AUDITOR -VS- CHRISTOPHER NOEL

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes