

MELISSA HICKS,

Appellant,

-vs-

Case No: 13CVF-05-5442

JUDGE HOGAN

OHIO STATE DEPARTMENT OF
JOB AND FAMILY SERVICES, ET AL.,

Appellees.

DECISION AND ENTRY
AFFIRMING THE APRIL 17, 2013 DECISION
DISALLOWING REQUEST FOR REVIEW

HOGAN, JUDGE

The above-styled case is before the Court on an appeal filed by Appellant Hicks. Appellant appeals the April 17, 2013 Decision Disallowing Request for Review. Said decision ended Appellant's attempt to secure benefits from the Ohio State Department of Job and Family Services (ODJFS). The Appellant named the Director of ODJFS, the Unemployment Compensation Review Commission (Commission) and Appellant's former employer McNees Wallace & Nurick. (Employer) in this appeal. For the reasons that follow, this Court **AFFIRMS** the April 17, 2013 Decision.

I. STATEMENT OF THE CASE

Appellant filed a Notice of Appeal with this Court. The Notice of Appeal asserted that the Decision of April 17, 2013 was unlawful, unreasonable, and/or against the manifest weight of the evidence. Appellant also asserted that it was unfair for ODJFS to allow her former Employer a hearing after the Employer had failed to attend a continued hearing date.

II. STATEMENT OF THE FACTS

Appellant was employed by Employer from July 12, 2010 until her termination on November 1, 2012. Appellant had been employed as a legal secretary for the Employer's intellectual property division. She had at least two supervisors. Attorney Courtney Miller was one

of those supervisors.

Appellant had had a number of issues concerning her interpersonal skills. Those issues were brought to her attention within her first annual review. The review was dated July 18, 2011. She was informed that she needed to work on her relationship with one of her supervisors and that she needed to improve her communication style.

In April of 2012, the Employer issued a written warning to the Appellant due to emails she had sent to fellow employees. She was placed on 90 day probation and warned that any additional issues would result in her discharge. Her next review fell on July 16, 2012. Appellant was removed from probation but she was again cautioned that future unprofessional behavior would result in her termination.

Appellant was terminated because she was involved in a verbal altercation with a co-worker on October 26, 2012. The Appellant raised her voice during that interaction to a level that could be heard by her supervising attorney, Courtney Miller. Mr. Miller was in a nearby closed conference room interviewing a prospective candidate. Mr. Miller testified that he heard the Appellant's voice. The Appellant was then formally terminated on November 1, 2012.

Appellant filed her request for benefits after her termination. On December 11, 2013 the Director issued a Redetermination disallowing the Appellant's request for benefits. Appellant filed an appeal of the Director's Redetermination that triggered the transfer of the matter to the Review Commission. The Commission appointed a Hearing Officer and a hearing was conducted over three separate dates in 2013. The Hearing Officer issued his Decision and mailed that document on March 14, 2013. The Hearing Officer had affirmed the Director; holding that the Employer had discharged the Appellant for just cause.

The Appellant timely appealed that Decision to the Commission. The Commission issued its Decision Disallowing the Request for Review and therefore the Appellant was denied benefits.

That Decision was mailed on April 17, 2013. During most/or all of the administrative process, the Appellant had been represented by counsel. The Appellant timely filed her appeal to this Court *pro se*.

Appellant filed her Brief on July 25, 2013. The Commission filed its Brief on August 7, 2013 and the Employer filed its Brief on August 8, 2013. The Appellant filed her Reply Brief on August 15, 2013.

While reviewing the matter, the Court noted that the official transcript for one of the hearings was not contained within the certified record. The Court ordered that it be produced and the Commission complied. This matter is ready for a review.

III. STANDARD OF REVIEW

R.C. §4141.282(H) sets forth the standard of review that this Court must apply when considering appeals of decisions rendered by the Commission. Please note the following:

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 remand the matter to the commission. Otherwise, the court shall affirm the decision of the commission. R.C. §4141.282(H)

The Ohio Supreme Court stated that “[t]he board’s role as fact finder is intact; a reviewing court may reverse the board’s determination only if it is unlawful, unreasonable, or against the manifest weight of the evidence.” *Tzangas, Plakas & Mannos v. Ohio Bur. Of Emp. Serv.* (1995), 73 Ohio St.3d 694,697. The Hearing Officer and the Commission are primarily responsible for the factual determinations and judging the credibility of the witnesses. *Brown-Brockmeyer Co. v. Roach* (1947), 148 Ohio St. 511; *Angelkovski v. Buckeye Potato Chips* (1983), 11 Ohio App.3d 159,162.

More specifically:

The Commission and its referees are the triers of fact. See *Feldman v. Loeb* (1987), 37 Ohio App.3d 188, 190, 525 N.E.2d 496. Therefore, the common pleas court acts as an appellate court and is limited to

determining whether the Commission's decision was supported by some competent and credible evidence. *Id.* The common pleas court may not substitute its judgment for that of the hearing officer or the board. *Simon v. Lake Geauga Printing Co.*(1982), 69 Ohio St.2d 41, 45, 23 O.O.3d 57, 430 N.E.2d 468.

Hence, this Court will defer to the Hearing Officer's and the Commission's determination of purely factual issues when said issues address the credibility of the witnesses and the weight of the evidence. *Angelkovski v. Buckeye Potato Chips, Id.*, at 162.

This case also deals with the concept of a 'just cause' termination. Please note the following statutory language:

§ 4141.29. Eligibility for benefits:

D) Notwithstanding division (A) of this section, no individual may serve a waiting period or be paid benefits under the following conditions:

(2) For the duration of the individual's unemployment if the director finds that:

(a) The individual quit work without just cause or has been discharged for just cause in connection with the individual's work,

Just cause has been explained as follows:

"Just cause" is not defined by statute. The Supreme Court of Ohio has indicated that there is no "slide rule definition of just cause," but that the phrase could be considered "that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act." See *Irvine v. State Unemployment Comp. Bd. of Review* (1985), 19 Ohio St.3d 15, 17, citing *Peyton v. Sun T.V. and Appliances* (1975), 44 Ohio App.2d 10, 12.

From within this framework, the Court will render its decision.

IV. ANALYSIS:

The Appellant raised three main assignments of errors in her Brief. The Court will address each assignment as asserted by the Appellant.

A) ODJFS failed to file a complete record:

Appellant asserted that the Certified Record filed with this Court was incomplete. Appellant advanced the following language in R.C. §4141.282(F)(1):

(F) DUTIES OF THE COMMISSION (1) Except as specified in division (F)(2) of this section, the commission, within forty-five days after a notice of appeal is filed or within an extended period ordered by the court, shall file with the clerk a certified transcript of the record of the proceedings at issue before the commission. The commission also shall provide a copy of the transcript to the appellant's attorney or to the appellant, if the appellant is not represented by counsel, and to any appellee who requests a copy.

Appellant attached two documents to her Brief. Exhibit A was the Employer's response to the questionnaire issued by ODJFS. Exhibit B was an alleged transcript of the February 4, 2013 hearing that was eventually continued and/or rescheduled by the Hearing Officer.

This Court has reviewed the Certified Record scanned and filed in this matter. The Court was able to locate Exhibit A at page 60 – 66 of the scanned record as filed on July 10, 2013. However, this Court was unable to locate an official transcript from the February 4, 2013 hearing.

In its Brief, the Commission did not address that issue. The Employer, in its Brief, merely claimed that due to the Appellant's supplementation of the record, there is/was no harm. In the Appellant's Reply, the Appellant asserted that she was harmed because it was clear that the Hearing Officer did not rely on the evidence from the February 4, 2013 hearing and if he had, the Hearing Officer would have come to a different conclusion.

Appellant's Brief never requested any specific relief as enumerated in the statute. Appellant seems to request that Exhibit B should be added to the record. The statute provides the following:

(F) DUTIES OF THE COMMISSION

(2) If the commission cannot file the certified transcript of the record of proceedings within forty-five days after a notice of appeal is filed, or within an extended period ordered by the court, then the court shall remand the matter to the commission for additional proceedings in order to complete the record on appeal. The additional proceedings may include a new hearing before the commission or a designated hearing officer.

The Appellant has not requested a remand for the production of the missing transcript. In fact, as noted, the Appellant produced an alleged transcript and referenced the testimony from the February 4, 2013 hearing as evidence in support of her appeal. Her argument that the Hearing Office failed to

rely on the testimony from the February 2013 hearing has no influence as to the application of the statute. In any event, the Hearing Officer Decision does reference the evidence taken during the February 2, 2013 hearing.

This Court ordered the production of an official transcript of the February 4, 2013 hearing and that is now part of the record. The Appellant requested no other relief. This issue is moot.

B) The April 17, 2013 Decision of the Commission was unreasonable, unlawful, and against the manifest weight of the evidence:

Appellant claimed that the Decision was unreasonable, unlawful, and against the manifest weight of the evidence. However, the evidence from the January 2013 hearing established that an email was generated by one of the Appellant's supervising attorneys. That email indicated that said attorney heard Appellant yelling on the date in question. That email did not indicate that anyone else was yelling. That email was generated by Mr. Miller, an attorney at law. The Hearing Officer was entitled to rely on that evidence to establish that the Appellant was yelling and that the level of her voice interrupted the meeting being conducted by her supervisor.

The Hearing Officer also had the following testimony to rely upon to establish that the Appellant was yelling:

[Ms. Moore's Testimony]I, I did speak briefly with Renee um after receiving the, the email from Courtney. We didn't go into in depth on the discussion um only that, to confirm that it happened and she confirmed that there was yelling. (Jan 16, 2013 Hr. Tr. page 9, lines 19 – 22)

* * * * *

We, Courtney relayed that in the email uh and when I subsequently talked to him by phone about the email and let him know that my next steps were um he, he repeated that he could hear, he heard the yelling through the door. Uh when I spoke with Renee and again only spoke with Renee briefly to confirm that the situation had happened um she, she confirmed that Melissa [Appellant] was yelling. (Jan 16, 2013 Hr. Tr. page 22, lines 15 – 20)

It is undisputed that the Appellant had had a number of prior issues with her interpersonal skills during her time with her Employer. The Hearing Officer heard the evidence of all of those issues during the January hearing.

That evidence led the Hearing Officer to believe that the Appellant acted in a way that provided just cause for her termination. Appellant admitted to raising her voice when she testified during the February 4, 2013 hearing. (See, Feb. 4 Hr. Tr. p. 8, lines 8 – 13) During his closing summation at the February 4 hearing, Appellant's counsel conceded that the evidence showed that his client had raised her voice. (See, Feb. 4 Hr. Tr. p. 14, lines 6 – 8) Appellant raised her voice to a point loud enough to interrupt a meeting between her supervisor and another individual whom were conducting an interview behind a closed door. With that evidence, the Hearing Officer could conclude that Appellant's actions were unprofessional.

The rest of the assertion of the Appellant; that her voice was not loud enough to be heard by her reporting supervisor; an allegation that another employee of the Employer may have overheard or witnessed the incident but had not been called to testify; or the claim that she was goaded into yelling by the other employee; are justifications, smoke screens and/or excuses. The fact is that the Appellant had a troubled past with her interpersonal skills and that she admitted to raising her voice on the date in questions. Hence, the Decision of the Hearing Officer and the action of the Commission was reasonable, lawful, and supported by the evidence.

C) It was an abuse of discretion for the Commission to allow the Employer to appear at a subsequent hearing when the Employer did not timely appear or request a postponement of the February 4, 2013 hearing:

The third argument of the Appellant is that it was wrong for the Hearing Officer to ignore the Employer's failure to appear at the second/continued hearing date. The record reflects that the first hearing was conducted on January 16, 2013 and it ran long. With the agreement of the parties a new date was chosen so the parties could continue the hearing. That date was February 4, 2013. Again, it is undisputed that the February 4, 2013 hearing was conducted and it is clear that the Employer failed to appear. That hearing went forward and the Appellant testified to her version of the facts concerning the October 2012 incident.

At the conclusion of the February 4, 2013 hearing the Hearing Officer discussed the possibility of continuing the hearing again. Appellant made use of the following statement of the Hearing Officer:

Okay I'm not inclined to postpone the matter yet again here to to [sic] possibly to hear from Ms. Gannon again.

This Court feels that said language concerned Appellant's desire to have Ms. Gannon testify again. That language was not a comment made by the Hearing Officer concerning his willingness to accept or deny a request from the Employer for another hearing due to the Employer's failure to appear. In any event, no such commitment would be binding on the Hearing Officer.

The record reflected that after the February 4, 2013 hearing was conducted the Hearing Officer had the Commission issue a notice that a new hearing would be held on February 21, 2013 at 7:30 am. The notice was mailed on February 8, 2013. (Page 366 of the scanned Certified Record filed with the Court on July 10, 2013) That hearing was postponed and a Notice was again sent to all the parties. (Page 417 of the scanned Certified Record filed with the Court filed with the Court on July 10, 2013)

On February 15, 2013 the Commission again sent out a notice setting a new March 11, 2013 hearing date. (Page 441 of the scanned Certified Record filed with the Court filed with the Court on July 10, 2013) The new notice was mailed to all of the listed parties. The Certified Record did not contain any formal objection from the Appellant in regard to either of the new dates.

The transcript from the March 11, 2013 hearing is in the record. The Hearing started off with the Hearing Officer explaining that the Employer had called in late for the February 4, 2013 meeting. There was an alleged issue with the weather. The March 11, 2013 hearing transcript does not contain any formal objection from the Appellant or her counsel concerning the rescheduling of the hearings. The March 11, 2013 hearing was conducted and the Hearing Officer issued his Decision on March 14, 2013.

The Certified record does not contain anything formal concerning the Hearing Officer's decision to allow for the new hearing after the Employer missed the February 4, 2013 hearing. When the Appellant received the notice of the new hearing, the Certified Record did not reflect that a formal objection was filed by the Appellant contesting the actions of the Hearing Officer. Moreover, as already stated, the transcript of the March 11, 2013 hearing did not contain any objection from the Appellant and/or her counsel. Clearly, the March 11, 2013 hearing did not proceed over Appellant's objection.

After the adverse decision was mailed on March 14, 2013 the Appellant's counsel filed the next phase of his client's appeal. For the first time, formally, the record reflected that the Appellant lodged an objection to the March 11, 2013 hearing. Oddly, the Appellant's Counsel – at other points within the same document – relied upon the evidence adduced at the March 11, 2013 hearing. That would be the hearing that Appellant asserted should never have happened. The Appellant argued that R.C. §4141.281(D)(6) was not followed. Please note the following language from the statute:

(6) NO APPEARANCE -- APPELLEE

For hearings at either the hearing officer or review level, if the appellee fails to appear at the hearing, the hearing officer shall proceed with the hearing and shall issue a decision based on the evidence of record. The commission shall vacate the decision upon a showing that written notice of the hearing was not sent to the appellee's last known address, or good cause for the appellee's failure to appear is shown to the commission within fourteen days after the hearing date.

The clear language of the statute mandated that a hearing and decision should issue after the Appellee had **failed to appear** for the February 4, 2013 hearing. After a decision is issued, the statutory language then allowed an appellee to file a motion to vacate the decision “upon a showing that written notice of the hearing was not sent to the appellee's last known address, or good cause for the appellee's failure to appear is shown to the commission within fourteen days after the hearing date.” Clearly the Hearing Officer never generated a decision after the missed February hearing.

Therefore, the Employer could never have filed a motion to vacate a decision that was never rendered.

One question that this Court could address is the meaning of an ‘appearance’. The statute does not seem to make any allowance for the situation that occurred in the current administrative appeal. The Employer did ‘appear’ at the first hearing. However, the hearing was not concluded. The Employer did not ‘appear’ at the continued hearing. Is that the same as having never appeared? Yet this Court need not address that question because of the Appellant’s failure to timely object to the rescheduled hearing.

Simpler questions for this Court are: Did the Appellant waive the issue by failing to formally object to the rescheduling of the hearing? Did Appellant waive the issue by failing to object on the record during the March 11, 2013 hearing? This Court holds that the Appellant did waive the issue. The Appellant never formally objected to the new hearings that were schedule. In addition, the Appellant never objected at the March 11, 2013 hearing. It was only after an adverse decision from the Hearing Officer, that the Appellant formally raised the issue. Hence, Appellant waived her objection.

There is no merit in this argument.

D) Appellant’s belief that she was not treated fairly by her Employer:

The Appellant’s brief ended with her allegations that her Employer had not taken her concerns about another employee seriously. Appellant claimed that she had not been treated fairly by her Employer and that it was her apparent belief that her termination was not for cause but more in line with retaliation.

The retaliation claim was first raised in the Appellant’s Brief and Reply filed with this Court. A review of the appeal filed by the Appellant in regard to the Hearing Officer’s Decision failed to establish that retaliation was ever argued in the administrative process. In any event, a

review of the evidence advanced during the administrative process failed to establish the existence of any evidence to support the claim of retaliation. There is no merit to Appellant's retaliation argument.

This Court will not review arguments raised for the first time on appeal if the issue was subject to the jurisdiction of the administrative agency in questions. (See, *Brookwood Presbyterian Church v. Ohio Dept. of Ed.*, 2013-Ohio-3260 at ¶6 (10th Dist.)). The retaliation argument was/is an issue that could have been asserted during the administrative process with the Commission and therefore, it will not be address for the first time now.

V. DECISION:

The April 17, 2013 Decision to Disallow Review was/is reasonable, lawful, and supported by the evidence. The Court **AFFIRMS** the April 17, 2013 Decision.

THIS IS A FINAL APPEALABLE ORDER

JUDGE DANIEL HOGAN

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Franklin County Court of Common Pleas

Date: 09-26-2013
Case Title: MELISSA HICKS -VS- OHIO STATE DEPARTMENT JOB
FAMILY SERVICE ET AL
Case Number: 13CV005442
Type: DECISION/ENTRY

It Is So Ordered.

A handwritten signature in black ink, appearing to read "D. T. Hogan", is written over a blue circular seal. The seal contains the text "COMMON PLEAS COURT" at the top and "ALL THINGS ARE" at the bottom, with a central emblem.

/s/ Judge Daniel T. Hogan

Court Disposition

Case Number: 13CV005442

Case Style: MELISSA HICKS -VS- OHIO STATE DEPARTMENT
JOB FAMILY SERVICE ET AL

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 13CV0054422013-05-2299970000
Document Title: 05-22-2013-MOTION TO FILE AMENDED
COMPLAINT
Disposition: MOTION IS MOOT