

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

LORETTA L BROWN,

CASE NO.: 2012 CV 03063

Plaintiff(s),

JUDGE FRANCES E. MCGEE

-vs-

OHIO DEPT OF JOB AND FAMILY SERVICES et
al,

Defendant(s).

**DECISION, ORDER AND ENTRY
OVERRULING APPELLANT LORETTA
L. BROWN'S ADMINISTRATIVE
APPEAL OF THE OHIO
UNEMPLOYMENT COMPENSATION
REVIEW COMMISSION'S DECISION**

Appellant/Plaintiff, Loretta Brown appealed the March 28, 2012, Decision of the Director of the Ohio Unemployment Compensation Review Commission to this Court of Common Pleas. In this appeal, she argued that she was denied her right to be heard on a dispute involving an alleged overpayment of compensation.

In the March decision, the Director affirmed a hearing officer's February 16, 2012, dismissal of an administrative appeal involving Brown. The hearing officer's February decision found that Plaintiff's attempt to appeal a December 28, 2011, judgment was not filed in a timely manner.

Transcript of the proceedings was filed June 11, 2012. *Plaintiff's Brief* was filed July 17, 2012. *Plaintiff's Supplemental Brief* was filed July 30, 2012. *The Brief of Appellee, Director, Ohio Department of Job and Family Services* was filed on August 7, 2012. *Plaintiff's Reply Brief* was filed August 27, 2012.

The matter is properly before the Court.

I. FACTS

On December 28, 2011, the Director of the Ohio Job and Family Service Department issued a decision or determination concerning an alleged dispute between the Plaintiff and the department regarding compensation received by the Plaintiff. Attached to the decision were instructions for properly perfecting an appeal of this decision.

Specifically included in the instructions was the statement that if the appeal was to be perfected by electronic means, i.e. by fax or e-mail, the document must be received by the director within twenty-one days of the date it was mailed to the disputing party. If the appellant, however, chose to use the United States Postal Service, then the document had to be post-marked within twenty-one days of the date it was mailed to the disputing party. The last day to file an administrative appeal of the director's decision was January 18, 2012. (See hearing officer's report)

Ms. Brown alleged that she filed her administrative appeal of the December 28, 2011, decision by fax within the time requirements and on January 18 2012; however, she could not provide any verification of her claims. The Plaintiff further alleged that receipt of the document by the director on January 19, 2012 was due to systemic problems that prevented her fax transmission from being completed on January 18th when she completed the act of filing her appeal. She acknowledged that she filed her appeal a second time and after the January 18, 2012, deadline. That document was received by the director on January 19, 2012 (*See Decision of Brie A.F. Lewis, Hearing Officer*).

On January 23, 2012, the Director issued a redetermination or decision dismissing the Plaintiff's claims for being untimely filed. *See Decision of Brie A.F. Lewis, Hearing Officer*. On January 27, 2012, the Plaintiff appealed this decision. *Id.* During the pendency of this appeal and on January 30, 2012, jurisdiction of this case was transferred to the Unemployment Compensation Review Commission. *Id.* On February 16, 2012, the Plaintiff was given a hearing on this dispute.

The hearing was conducted via telephone with the Plaintiff as the sole witness in the dispute. (See *Transcript*.) The sole issue for review was whether the Plaintiff filed her appeal of the December determination in a timely manner. *Id.* On February 17, 2012, the hearing officer issued a determination that affirmed the Director's initial decision and dismissed her appeal. As a part of the notice of dismissal, the Plaintiff was advised that she had twenty-one (21) days to appeal this decision. See *Decision, Supra*. On March 7, 2012, the Defendant perfected her appeal.

On March 28, 2012, the Director of the Ohio Unemployment Compensation Board mailed a decision to Plaintiff that overruled her appeal of the hearing officer's decision. Instructions for perfecting an appeal of the Director's decision were contained within the contents of the decision. The Defendant then filed an appeal of this decision to the Montgomery County Court of Commons Pleas.

II. Standard of Review

O.R.C. Chapter 119 governs the process and procedure for deciding administrative appeals in general. O.R.C. Sec. 119.12 outlines the standard of review for administrative appeals and states the following:

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative and substantial evidence and is in accordance with law.

This court sits not as a trial court but as an appellate court and must perform a two-step review to determine if the administrative agency's Order (i) is supported by reliable, probative and substantial evidence, and (ii) is in accordance with Ohio law. See, *Mathews v. Ohio State Liquor Control Comm'n*, 10th District No. 04AP-46, 2004-Ohio-3726; *VFW Post 8586 v. Ohio Liquor Control Comm.*, 83Ohio St. 3d 79, 697 N.E.2d 655 (1998); *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St. 3d 570, 589 N.E.2d 1303 (1992); *Harris v. Lewis*, 69 Ohio St. 2nd 577, 578, 433 N.E.2d 223 (1982); *Arlen v. State*, 61 Ohio

St.2d 168, 175, 399 N.E.2d 1251 (1980); *Henry's Café, Inc. v. Board of Liquor Control*, 170 Ohio St. 233, 235-236, 163 N.E.2d 678 (1959).

A reviewing court may not substitute its judgment for that of an administrative agency. *Bingham v. Ohio Veterinary Med. Licensing Bd.*, 9th Dist. C.A. No. 18510, 198 Ohio App. LEXIS 532, 6-7 (February 11, 1998); *Kisil v. Sandusky*, 12 Ohio St. 3d 30, 34, 465 N.E.2d 848 (1984). As long as the administrative agency's order is supported by reliable, probative, and substantial evidence and is in accordance with law, it is immaterial that the reviewing court, if it were the original trier of fact, may have reached a different conclusion. *See Farrao v Bureau of Motor Vehicles*, 46 Ohio App.2d 120, 122-3 (syllabus), 346 N.E. 2d 337 (5th Dist. 1975). Regarding the penalty imposed through an administrative order, the Supreme Court has held that "the court of common pleas has no authority to modify a penalty that an agency was authorized to and did impose, on the grounds that the agency abused its discretion." *Henry's Café, Inc. v. Board of Liquor Control*, 170 Ohio St. 233, 236, 163 N.E. 2d 678 (1959).

More specifically, the standard of review for an appeal of a decision of a review commission is in O.R.C. Sec. 4141.282 (H). That section holds:

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, reasonable, 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.

Under this standard of review, the court of common pleas is neither giving the parties a trial *de novo* nor making a rubber stamp decision of the board of review. *Kilgore v. Board of Rev.*, 2 Ohio App. 2d 69, 206 N.E.2d 423 (4th Dist. 1965). If the reviewing court finds that the administrative agency's order is supported by the law and evidence, then the court cannot substitute its judgment for that of the commission. *Roberts v.*

Hayes, 2003 Ohio 5903. See *Tzangas, Plakas & Mannos v. Ohio Bur. Of Emp. Serv.*, 73 Ohio St. 3d 694, 653 N.E. 2d 1207 (1995).

III. Review of the Record

As part of its *de novo* review of this administrative appeal, the Court has read all of the documents filed by the parties including the decisions of the administrative agency, its rules, appropriate transcripts and arguments of the parties at the various stages of administrative review. Pursuant to O.R.C. Sec. 119.12, the Court finds as a matter of law that the Order of the Director of the Department of Job and Family Services in this matter is supported by reliable, probative and substantial evidence.

IV. Law and Analysis

Title 41 of the Ohio Revised Code provides the guidelines for an appeal of a decision by director of the bureau of unemployment compensation. The important sections are O.R.C. Section 4141.281 (A) and 4141.281 (D).

O.R.C. Sec. 4141.281 (A) provides that:

Any party notified of a determination of benefit rights or a claim for benefits determination may appeal within twenty-one calendar days after the written determination was sent to the party or within an extended period as provided under division (D)(9) of this section.

O.R.C. Sec. 4141.281 (D) provides that:

...The director, commission, or authorized agent must receive the appeal within the specified appeal period in order for the appeal to be deemed timely filed, except that: if the United States postal service is used as the means of delivery, the enclosing envelope must have a postmark date or postal meter postmark that is on or before the last day of the specified appeal period; and where the postmark is illegible or missing, the appeal is timely filed if received not later than the end of the fifth calendar day following the last day of the specified appeal period.

These statutes are codified in the agency's regulations and are included in the director's decision thus making the issue to be resolved simple and non-technical. The

issue to be resolved in this case is when did the director or his agent receive the Plaintiff's appeal of the December 28, 2011 decision concerning the compensation dispute? In other words, on what date was the Plaintiff's appeal received by the director or his agent?

In the case sub judice, the Plaintiff has maintained that focus of her appeal should be when she sent her appeal to the unemployment compensation board rather than when it was received by the agency. She has consistently alleged that she filed the appeal within the time parameters; and she has consistently argued that if it is found that her appeal was untimely, that the error should be excused. Her specific excuses are that she was unable to file the appeal earlier due to health concerns and/or that she was locked out of the system just before the deadline ran. Neither excuse is permissible because each of these impediments to a timely filing occurred prior to the statutory deadline for filing an appeal. And, there is no evidence at the time that these alleged impediments occurred that the Plaintiff sought an extension of time within the set guidelines of the Ohio Revised Code. See O.R.C. section 4141.281 (D).

The statutes and the Ohio Administrative Code require the trier of fact to use a strict liability standard in determining whether an administrative appeal has been perfected in a timely manner. If the appellant used electronic means to perfect an appeal, then a review of when the director received the document is sufficient. If the appellant used the United States Postal Service to perfect the appeal, then a review of the postmark on the envelop is sufficient.

The Court finds as a matter of law that the Plaintiff used electronic means to perfect her appeal. Thus, the Court is required to look only at when the director or his agent received the appeal documentation. The Court further finds that the director received the documentation out of time and that his order of dismissal was made in accordance with the law.

V. CONCLUSION

WHEREFORE, in the Administrative Appeal filed by Loretta Brown against the Director of the Ohio Department of Job and Family Services, upon consideration of the entire record and briefs submitted by the parties, the Court finds that the Director's Order to dismiss the Plaintiff's appeal is supported by reliable, probative and substantial evidence. Further the Court finds that this Order was made in accordance with law. Thus, as a matter of law, this Court finds that Plaintiff's appeal is not well-taken and must render a verdict in favor of the Defendant. Plaintiff's appeal is DISMISSED with prejudice.

SO ORDERED:

JUDGE FRANCES E. MCGEE

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So Ordered

Frances S. McGehee