

COURT OF COMMON PLEAS, PIKE COUNTY, OHIO

Joshua G. Cummins

Appellant,

-vs-

Case No. 2015CIV000012

UCO No.: 1365914001-0000

Schumacher Homes of Circleville, Inc.

and

Director, Ohio Department of

Job and Family Services

Appellees.

DECISION AND

JOURNAL ENTRY

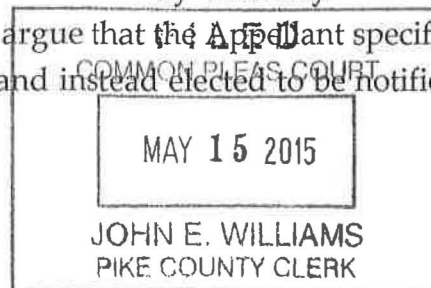
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This cause is before the Court pursuant to the appeal of the employee-claimant filed on January 14, 2015, wherein the Appellant-Claimant appeals the final decision of the unemployment compensation review commission, which final decision, the record shows, was mailed on December 17, 2014, disallowing the Appellant-Claimant's request for review.

By Journal Entry filed on April 27, 2015, the Court ordered supplemental briefs from the parties concerning the issue whether appropriate notice had been given to the claimant-appellant of the telephone hearing held by the Hearing Officer of the Unemployment Compensation Review Commission on October 16, 2014. Such telephone hearing was held upon the appeal of the appellant-claimant's former employer, Schumacher Homes of Circleville, Inc., which is an appellee in the present proceedings.

Each party has filed a timely supplemental brief. The supplemental brief of Appellee Schumacher Homes of Circleville, Inc. incorporates the supplemental brief of Appellee Director, Ohio Department of Job and Family Services. The Court has considered the supplemental brief of each party, as well as the initial brief of each party.

Concerning the issue of the notice given to the Claimant-Appellant of the telephone hearing of October 16, 2014, the Appellees argue, essentially, that the notice of hearing sent by email to the Appellant was sufficient. The Appellees point out that the Appellant acknowledges that the email notice was received into the Appellant's email. The Appellees concede that "[T]he notification requirement provided for in Ohio Adm. Code ("OAC") 4146-5-02 is applicable to notifications sent by ordinary mail to the individual's post office address," but the Appellees argue that the Appellant specifically requested that he not be notified by ordinary mail and instead elected to be notified by email.



The Appellant argues in his supplemental brief that, although he "marked the box to receive e-mail notification from the Ohio Department of Job and Family Services in order to receive pay stubs of the unemployment payments," he "never specifically requested not to be notified thru ordinary mail," and the Appellant further indicates that the application for benefits form that he Appellant completed did not state that notice of hearings and other important matters would be sent only through email. The appellant further indicates in his brief that he did not read the email notice of the telephone hearing of October 16, 2014, until after the hearing had already been held, and that he had no knowledge of the telephone hearing until after the hearing had been held. It is clear from the record that the Appellant did not participate in the telephone hearing on October 16, 2014. In his initial brief in this appeal, the Appellant asserts facts concerning his discharge from employment, which, if established at a hearing, would certainly be relevant to a determination of whether he was discharged without just cause in connection with work and is entitled to an award of unemployment insurance benefits. Such assertions of the claimant-Appellant were not heard by the Hearing Officer on October 16, 2014, due to the absence of the Appellant at the hearing.

The Appellees have submitted two exhibits in connection with their supplemental briefs concerning the sufficiency of the notice of hearing sent to the Appellant's email. "Exhibit 1" is a copy of an "Application Summary," which is submitted as purported support for the Appellees' factual argument that the "Appellant specifically requested that he not be notified by ordinary mail and instead elected to be notified by email." "Exhibit 2" is a copy of a Judgment Entry of the Summit County Court of Common Pleas rendered in an action styled *Ellen R. Jacobs v. Director, Ohio Department of Job and Family Services, et al*, submitted as purported authority for the Appellees' argument of law that appellant's request that he receive correspondence by email precludes the appellant from obtaining relief from the adverse decision of the Hearing Officer based upon an asserted insufficiency of notice of hearing sent by email to the claimant-Appellant.

Having reviewed the entire record in this matter, this Court finds nothing at all in the "Application Summary," or elsewhere in the record before the Court, that suggests, much less proves, that the Appellant waived the requirements of Ohio Revised Code §4141.281(D)(6) and of Ohio Administrative Code §4146-5-02 that notice of hearing be mailed to the appellant at his last known post office address.

This Court agrees with the opinion of the Ninth District Court of Appeals, rendered in *Wagner v. Ohio Dept. of Job and Family Services*, 9th Dist. No. 2610212-Ohio-2286, which found that a line for "Correspondence" that says "E-mail" contained in the

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application summary is insufficient to establish that the applicant knowingly waived the applicant's right to received notice at the applicant's last known post office address.

Further, in the present action, as in the *Wagner* case, the Department of Job and Family Services has not directed the Court to any statutory or regulatory provision that *allows* the Department to send notices by electronic mail. Rather, as mentioned above, and as conceded in the Appellants' briefs, OAC §4146-5-02 provides that notice be sent "to the last known post office address of each interested party."

In *Ellen R. Jacobs v. Director, Ohio Department of Job and Family Services*,⁴ *supra*, the trial court attempted to distinguish the facts of that action from the facts in *Wagner* on the basis that the claimant in *Wagner* did not receive the email notification, whereas, in *Jacobs*, the record indicates that the claimant did receive the email notice of Initial Determination, but filed her appeal outside the 21-day time period within which such appeal was required to be filed.

The language of the opinion in *Wagner* makes it very clear, however, that the decision of the Ninth District Court of Appeals in that case was not based upon the fact that the claimant had not received the email notice of eligibility determination. In fact, the appellate court in *Wagner* does not adopt a finding that the claimant had not received the email notice, using instead, language such as "According to Ms. Wagner" and "allegedly" when referring to the claimant's assertion that she had not received the subject emails. The basis of the decision in *Wagner* is that the Department failed to follow the requirements of the Ohio Revised Code and the Ohio Administrative Code relative to the manner in which notice is to be given. Notice by mail sent to the last known post office address is clearly required.

Furthermore, assuming that the request of a claimant, if expressly given, to receive notice of hearing *only* by email could alter the requirements of law that the notice be given by mail to the claimant's last known post office address, there is clearly nothing in the record in the present action establishing that the Appellant requested not to be notified by mail to his last known address, even if the record would support a finding that the claimant requested to receive communications *also* by email. The record does not support a finding that the claimant-Appellant knowingly and expressly waived the requirements of law with respect to notice of hearing.

Notice and an opportunity to be heard are requirements of due process of law and are fundamental to the concept of fairness. The principles of due process apply to applications for unemployment compensation benefits. *Howard v. Electronic Classroom of Tomorrow*, 10th Dist. No. 11AP-159, 2011-Ohio-6059. Although the burden of persuasion

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remains always on the discharged employee, the burden of proof of some single fact – in the present action, whether the Appellant knowingly waived his right to be notified by mail sent to his last known address and requested to be notified *only* by email – lies on the person who wishes the court to believe in its existence. *Silkert v. Ohio Dept. of Job and Family Services.*, 184 Ohio App.3d 78, 2009-Ohio-4399; *Wagner v. Ohio Dept. of Job and Family Services, supra.* In the present case, the court finds that the record does not show that the Appellant waived the right to be notified of the telephone hearing of October 16, 2014, by mail sent to his last known postal address.

The Court concludes that the decision of the Unemployment Compensation Review Commission is unlawful and unreasonable, and that such decision of the Unemployment Commission should be reversed and the decision of the hearing officer should be vacated and the cause remanded for rehearing, with each interested party to be notified of the rehearing by mail sent to each such party's last known post office address.

It is therefore ordered that the decision of the Unemployment Compensation Review Commission be, and hereby is, reversed, and that the decision of the hearing officer mailed on October 31, 2014, be, and hereby is, vacated, and that this cause is hereby remanded to the Unemployment Compensation Review Commission for rehearing at the hearing officer level, with directions to notify each interested party of the rehearing by mail to such party's last known post office address.

The Court costs are assessed against the appellee.

This Decision and Journal Entry shall constitute a final, appealable order, and the Clerk of Courts is directed to serve notice of the issuance of this Decision and Journal Entry, and of the date of entry of the same upon the journal, to the Appellant, and to counsel of record for each of the Appellees, by ordinary U.S. Mail.



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