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

TREE CARE INC.,	CASE NO.: 2015 CV 06130
Appellant(s),	JUDGE TIMOTHY N. O'CONNELL
-vs-	
OHIO DEPARTMENT OF JOB AND FAMILY SERVICES et al.,	**DECISION, ORDER AND ENTRY AFFIRMING THE DECISION OF THE REVIEW COMMISSION**
Appellee(s).	

This matter is before the Court on Appellant Tree Care, Inc.'s ("Tree Care") *Brief*, which was filed on January 25, 2016. On January 28, 2016, Appellee Ohio Department of Job and Family Services ("ODJFS") filed its *Brief*. On March 8, 2016, Tree Care filed its *Reply Brief*.

I. STATEMENT OF THE CASE

Appellee Justin Vaughn ("Vaughn") filed a claim for Unemployment Benefits with ODJFS on June 2, 2015 after termination of his employment with Tree Care. Vaughn was absent from employment on March 15, 2015, March 24, 2015, April 23, 2015, April 24, 2015 and May 6, 2015. Tree Care had an attendance policy that was part of the Employee Handbook. Tree Care discharged Vaughn for violation of its attendance policy on May 6, 2015. Tree Care did not issue Vaughn a written warning prior to his termination. Tree Care asserts that it issued a verbal warning to Vaughn on April 27, 2015, prior to his termination.

ODJFS issued a Determination of Unemployment Compensation Benefits ("Determination") on June 17, 2015 that allowed Vaughn's request for Unemployment Compensation Benefits. Tree Care appealed the Determination on July 7, 2015. Subsequently, the Director issued a Redetermination on July 27, 2015 that affirmed the allowance of benefits.

Tree Care filed a timely Appeal to the Redetermination on August 19, 2015. A hearing was held on September 3, 2015 by telephone. A Decision was issued on September 4, 2015 that affirmed the allowance of benefits. Tree Care requested a review of this Decision on September 24, 2015, which was disallowed on October 21, 2015.

Tree Care then appealed to this Court seeking reversal of the allowance of Unemployment Compensation Benefits. The Court has reviewed the Briefs and the transcript. For the reasons stated herein, the Decision of the Review Commission is AFFIRMED.

II. FINDINGS OF FACT

Appellee, Justin Vaughn, worked for the employer, Tree Care, as a tree climber from October 6, 2014 until his discharge on May 6, 2015. Vaughn was absent from his employment on March 15, 2015, March 24, 2015, April 23, 2015, April 24, 2015, and May 6, 2015.

Tree Care discharged Vaughn on May 6, 2015 for violation of its attendance policy. Vaughn did not receive a final warning prior to his discharge. Further, pursuant to a Doctor's note from Charles H. Huber Health Center Urgent Care dated May 6, 2015, Vaughn was seen in the emergency department/urgent care on 5/6/15 and that he was allowed to return to work on 5/11/15.

III. STANDARD OF REVIEW

The standard of review when considering appeals of decisions rendered by the Review Commission is set forth in R.C. 4141.282 (H). That section states:

> If the court finds that the decision was unlawful, unreasonable, or against the manifest weight of the evidence, it shall reverse and vacate such decision or it may modify such decision and enter final judgment in accordance with such modification; otherwise such court shall affirm such decision.

This standard of review is reiterated in the leading case on Ohio unemployment compensation, *Tzangas, Plakas & Mannos v. Ohio Bur. Of Emp. Serv.*, 73 Ohio St.3d 694 (1995). In *Tzangas*, the Ohio Supreme Court specified, "[t]he board's role as factfinder 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."[1] Although the Commission's decision should not be "rubber-stamped," a reviewing court may not rewrite the Commission's decision merely because it could or would interpret the evidence differently.[2] The parties are not entitled to a trial de novo.[3]

The determination of factual questions is primarily a matter for the hearing officer and the Commission.[4] As the trier of fact, the Commission and its hearing officer are vested with the power to assess the evidence and believe or disbelieve the testimony of the witnesses. Accordingly, the trial court in this Administrative Appeal should defer to the Commission's determination of purely factual issues which concern the credibility of witnesses and the weight of conflicting evidence.[5]

III. CONCLUSIONS OF LAW

Tree Care asserts that it is entitled to a reversal of the decision of the Unemployment Compensation Review Commission. The ODJFS argues to the contrary.

APPELLANT'S ASSIGNMENT OF ERROR: The Commission's decision allowing benefits was unlawful, unreasonable, or against the manifest weight of the evidence.

Appellant Tree Care disputes the findings of fact on which the Hearing Officer relied in his reasoning and Decision. Tree Care argues that the evidence in the record does not support the finding of fact that Appellee Vaughn was terminated without just cause. The testimony of Michelle Brahm, Business Manager for Tree Care, established that Vaughn received a verbal warning prior to his discharge and Tree Care's policy did not require that the final warning be in writing. Further, her testimony established that Vaughn had more than 3 unexcused absences. Thus, there was no

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1 *Id.* at 697.
2 *Kilgore v. Board of Rev.*, 2 Ohio App.2d 69, 72 (1965).
3 *Id.* at 71.
4 *Brown-Brockmeyer Co. v. Roach*, 148 Ohio St. 511 (1947).
5 *Angelkovski v. Buckeye Potato Chips*, 11 Ohio App.3d 159, 162 (1983).

basis for a finding that Tree Care did not have just cause to discharge Vaughn, and he should not be allowed Unemployment Benefits.

ODJFS argues that Tree Care did not follow its own policy by failing to provide Vaughn with a final written warning prior to his discharge. Further, there is no evidence that any warning was given to Vaughn prior to his termination. ODJFS asserts that when a company bypasses its progressive disciplinary policy and terminates an employee, that termination is without cause. ODJFS argues that the Hearing Officer's decision was not unlawful, unreasonable, or against the manifest weight of the evidence and thus it should be affirmed. Because Vaughn was not discharged for just cause, it was proper for the Commission to allow him Unemployment Benefits.

The Hearing Officer found that Tree Care did not present evidence that it issued Vaughn a final warning prior to his discharge on May 6, 2015. The Hearing Officer found that only hearsay evidence was introduced that Tree Care issued a verbal warning to Vaughn prior to his termination. In his reasoning, the Hearing Officer found that the findings of fact established that Appellant Tree Care failed to follow its attendance policy because Vaughn did not receive a final warning prior to his discharge. Because he wasn't dismissed for just cause, the Hearing Officer found that Vaughn was entitled to receive Unemployment Compensation Benefits.

R.C. 4141.29 (D)(2)(a) provides in pertinent part:

> (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 is defined by the courts as, "that which, to an ordinary intelligent person, is a justifiable reason for doing or not doing a particular act."[6] Each case must be considered upon its

[6] *Irvine v. Unemployment Comp. Bd.*, 19 Ohio St.3d 15, 17 (1985), quoting *Peyton v. Sun T.V.*, 44 Ohio App.2d. 10, 12 (1975).

particular merits.[7] In *Tzangas* the Ohio Supreme Court examined the issue of fault and stated as follows:

> "The [Unemployment Compensation] Act does not exist to protect employees from themselves, but to protect them from economic forces over which they have no control. When an employee is at fault, he is no longer the victim of fortune's whims, but 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."[8]

Thus, in reaching his Decision on whether Vaughn should qualify to receive Unemployment Compensation Benefits, the crucial issue for the Hearing Officer was whether Tree Care had just cause in discharging Vaughn. If Vaughn had more than three unexcused absences and had been given a final warning, then it would be reasonable for an "ordinary intelligent person" to find just cause to discharge him from employment, and such discharge would not yield protection under the Unemployment Compensation Act to Vaughn.

As this Court weighs the evidence and reviews the Commission's decision, its power is highly circumscribed. This Court does not afford to the parties a trial de novo.[9] Deference is to be given to the Hearing Officer's findings of fact, so long as "some competent, credible evidence in the record supports it."[10]

If this case were heard de novo, this Court might have come to different conclusions than the Hearing Officer. But the Court is not hearing this case de novo. As the Supreme Court of Ohio has stated, "[t]he fact that reasonable minds might reach different conclusions is not a basis for the reversal of the board's decision."[11] Rather, under R.C. 4141.282, the Court must affirm the Commission's decision so long as it is not "unlawful, unreasonable, or against the manifest weight of the evidence."

The attendance policy for Tree Care states:

"Employees are not permitted to have more than three (3) unexcused

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[7] *Id.*
[8] *Tzangas*, supra at 697-98.
[9] *Kilgore*, supra at 71.
[10] *Williams v. Ohio Dept. of Job and Family Servs.*, 129 Ohio St.3d 332, 335 (2011).
[11] *Irvine*, supra at 18.

> absenteeism's in a twelve (12) month period. Two (2) unexcused absence will result in a final warning, with the third unexcused absence resulting in termination."[12]

Tree Care argues that the Hearing Officer required the final warning to Vaughn be in writing. The Court does not find this argument well-taken as to the Decision issued on September 4, 2015. The Hearing Officer found that:

> "[t]he claimant was discharged for violating the attendance policy. However, the company failed to provide credible evidence the claimant received **any** warnings regarding his attendance prior to discharge. Tree Care, Inc. failed to follow its attendance policy by not providing a final warning and the majority of the claimant's absences were due to illness, a circumstance which was beyond the claimant's control. The Hearing Officer finds the claimant was discharged by Tree Care, Inc. without just cause in connection with work."[13]

The Hearing Officer did not find that a written final warning instead of a verbal warning needed to be given to Vaughn to satisfy Tree Care's attendance policy. The Hearing Officer found that there was no credible evidence presented that Vaughn received **any** warnings prior to discharge, either written or verbal. The Hearing Officer found that the testimony from Brahm about the verbal final warning was hearsay evidence and that there was no evidence that a written final warning was given to Vaughn.[14]

Tree Care argues that it gave Vaughn a final warning before his termination, as testified to by Michelle Brahm. ODJFS argues that there is no evidence that a final warning was given to Vaughn prior to his termination. Brahm testified "*** he was given a verbal warning ***"[15] Ms. Brahm also testified that Vaughn's supervisor gave him the verbal warning, that she did not give it to him.[16] The Hearing Officer questioned Ms. Brahm stating: "[h]ow do you know that's what was said if you weren't there?"[17] Ms. Brahm responded: "I can only tell you it's what he told me and I

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[12] Transcript of Administrative Agency pg. 18.
[13] Decision dated September 4, 2015 (emphasis added).
[14] Decision dated September 4, 2015.
[15] Transcript of hearing pg 5 line 19.
[16] Transcript of hearing pg. 9 line 10.
[17] Transcript of hearing pg. 9.

can only relay the information that I was given."[18] Ms. Brahm went on to identify the supervisor, Jim Brock, and inform the Hearing Officer that said supervisor was still an employee at Tree Care but was handling another situation so he was not going to be a witness at the hearing.[19]

Tree Care also argued that it could fire Vaughn for his excessive absenteeism without giving him a final warning because the attendance policy did not create a written contract and Vaughn remained an at will employee. Tree Care asserts that even if a final warning was not given, that Vaughn remained an employee at will and Tree Care need not follow its attendance policy and could fire him for the excessive absenteeism.

The Hearing Officer had to make a decision based on the admissible testimony before him. Tree Care did not call Vaughn's supervisor as a witness to establish that Vaughn received a final verbal warning prior to his termination. Brahm's testimony was that the supervisor, not her, gave the final verbal warning to Vaughn and that she did not hear it being given.[20] The Hearing Officer found that the testimony about the verbal final warning from Brahm was hearsay testimony and did not find it credible. O.R.C. 4141.281(C)(2) provides that "Hearing officers are not bound by common law or statutory rules of evidence or by technical or formal rules of procedure." The Hearing Officer is allowed to consider hearsay evidence, but the Hearing Officer was entitled to give such weight to this evidence as he saw fit.[21] The Hearing Officer found that there was no evidence that either a verbal or written final warning was given to Vaughn prior to his termination. Failure to provide Vaughn with a final warning prior to his termination would violate Tree Care's attendance policy. Further, the Hearing Officer found that the majority of Vaughn's absences were due to illness, which was a circumstance beyond Vaughn's control.[22] The record before the Court shows that there was a note from Charles H. Huber Health Center Urgent Care dated May 6, 2015 stating that Vaughn was seen in the emergency department/urgent care on 5/6/15 and that he was

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[18] Id.
[19] Transcript of hearing pgs. 9-10.
[20] Transcript of hearing pg. 9
[21] *Stull v. Dir. Ohio Dep't Job & Family Servs.*, Trumball App. No. 2003-T-0029, 2004 Ohio 1516.

allowed to return to work on 5/11/15.[23] Because there was a plausible basis in the testimonial record and evidence to support the Hearing Officer's decision, that decision is not "unlawful, unreasonable, or against the manifest weight of the evidence." Accordingly, Tree Care's assignment of error is OVERRULED. Therefore, the Decision of the Review Commission is AFFIRMED.

This is a final appealable order, and there is not just cause for delay for the purposes of Civ. R. 54. Pursuant to App. R. 4, the parties shall file a Notice of Appeal within thirty (30) days.

SO ORDERED:

JUDGE TIMOTHY N. O'CONNELL

To the Clerk of Courts:
Please serve the attorney for each party and each party not represented by counsel with Notice of Judgment and its date of entry upon the journal.

SO ORDERED:

JUDGE TIMOTHY N. O'CONNELL

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[22] Decision dated September 4, 2015.
[23] Transcript of Administrative Agency pg. 7.

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Type: Decision

Case Number: 2015 CV 06130

Case Title: TREE CARE INC vs OHIO DEPARTMENT OF JOB AND FAMILY SERVICES

So Ordered

Timothy N. O'Connell