

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

University of Toledo Chapter of American
Association of University Professors

Court of Appeals No. L-14-1185

Trial Court No. CI0201305282

Appellant

v.

Mary J. Erard, et al.

DECISION AND JUDGMENT

Appellees

Decided: June 30, 2015

* * * * *

Erik G. Chappell, Amy M. Waskowiak and Julie A. Douglas,
for appellant.

Alan Kirshner, for appellee Mary J. Erard.

Mike DeWine, Ohio Attorney General, and Eric A. Baum,
Managing Attorney, for appellee Director, Ohio Department
of Job and Family Services.

* * * * *

SINGER, J.

{¶ 1} Appellant, University of Toledo Chapter of American Association of
University Professors, appeals a judgment from the Lucas County Court of Common

Pleas in an administrative appeal granting appellee, Mary J. Erard, unemployment benefits. We affirm.

{¶ 2} Appellant is a labor organization that represents the faculty at the University of Toledo. Erard began working for appellant in 1992. In 2013, she held the position of Executive Director. On April 10, 2013, she was terminated for misuse of appellant's credit card, transferring money from appellant's bank account to her personal E-trade account, and paying herself for unauthorized overtime, vacation and sick pay.

{¶ 3} She applied for unemployment compensation and on May 3, 2013, appellee, the Ohio Department of Job and Family Services ("ODJFS") denied her application. She appealed the decision and on June 4, 2014, the director of the ODJFS issued a redetermination affirming the original decision. Erard then appealed to the Ohio Unemployment Compensation Review Commission ("UCRC"). Telephone hearings conducted by a UCRC hearing officer took place on July 16 and August 20, 2013. The hearing officer subsequently reversed the director's redetermination finding that Erard was terminated without just cause. Appellant filed a request for review with the UCRC and on October 17, 2013, the UCRC affirmed the hearing officer's decision.

{¶ 4} Appellant appealed the decision to the trial court. The trial court affirmed the UCRC decision. Appellant now appeals setting forth the following assignments of error:

- I. The trial court's decision granting unemployment benefits to Mary Jane Erard was against the manifest weight of the evidence.

- II. The trial court erred when it granted appellee’s motion to strike.
- III. The trial court erred in granting reconsideration of its decision.
- IV. The trial court erred in prematurely granting reconsideration before granting appellant an opportunity to respond.

{¶ 5} In its first assignment of error, appellant contends that court’s decision to affirm the UCRC’s decision was against the manifest weight of the evidence.

{¶ 6} A party dissatisfied with the final determination of the UCRC may appeal to a court of common pleas, which shall hear the appeal on the record certified by the commission. R.C. 4141.282(H). “If the court finds that the decision was unlawful, unreasonable, or against the manifest weight of the evidence * * *” it may reverse the determination. *Id.*

{¶ 7} The Ohio Supreme Court has defined “just cause” as ““that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act.”” *Irvine v. Unemp. Comp. Bd. of Rev.*, 19 Ohio St.3d 15, 17, 482 N.E.2d 587 (1985), quoting *Peyton v. Sun T.V. & Appliances*, 44 Ohio App.2d 10, 12, 335 N.E.2d 751 (10th Dist.1975). Whether just cause for termination of employment exists depends on the unique facts of the case. The determination of purely factual questions is primarily within the province of the hearing officer and the UCRC. *Id.* On review of purely factual questions, the common pleas court is limited to determining whether the hearing officer’s determination is supported by evidence in the record. *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Servs.*, 73 Ohio St.3d 694, 697, 653 N.E.2d 1207 (1995).

Factual findings supported by some competent, credible evidence going to the essential elements of the controversy must be affirmed. *C.E. Morris v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

{¶ 8} The appellate court's standard of review for just cause determinations by the UCRC is identical to that of the common pleas court. *Tzangas* at 696. The appeals court may reverse only if the commission's conclusion was unlawful, unreasonable, or against the manifest weight of the evidence. *Id.*

{¶ 9} During the telephonic hearing, counsel for appellant stated that they were only focusing on the alleged misuse of appellant's credit card for purposes of showing that Erard was terminated with just cause.

{¶ 10} Elaine Miller testified that she was employed as appellant's treasurer during the time of Erard's employment. Appellant had a credit card for union business that was issued in Miller's name, although, Miller never used it. Erard was authorized to use it for business expenses. All credit card statements were sent to Miller's home. Miller testified that she would review the charges monthly and if she saw a charge that appeared to be personal in nature, she would bring it to Erard's attention. Erard was instructed to use the card only for business expenses. She was never threatened with discipline or termination for her personal charges. She often claimed to have used the card for a personal expense by accident and she always assured Miller she would pay the money back. Up until her employment was terminated, Miller testified that she believed Erard had paid back the money she owed. It was only when Miller retired and a new

treasurer was brought in that appellant discovered Erard had been misusing the credit card.

{¶ 11} Erard testified that she never intentionally used the card for personal expenses. She acknowledged a charge to a nail salon was a personal expense but she explained she had used the card on accident. She pointed out that the numerous 2011 restaurant charges were business expenses because she was meeting with other labor officials in an effort to defeat a certain state senate bill that could prove detrimental to her employer. However, appellant's president testified that with the exception of one event, she was never asked to get involved in the issue on behalf of appellant. She testified that a questioned expense from an art gallery was for artwork on the walls of appellant's offices.

{¶ 12} Ohio Adm.Code 4146-25-01 provides:

A request for review to the review commission may be taken by any interested party by filing a request for review from a decision by a hearing officer.

Any written notice stating that the interested party appeals from or desires a review of the decision of the hearing officer on a hearing officer level appeal shall constitute a request for review to the review commission. If the appellant desires to submit additional evidence, the appellant should so state and set forth a brief statement thereof.

{¶ 13} Upon filing a request for review of the hearing officer's decision with the UCRC, appellant included an affidavit sworn by Don Wedding, an executive board member. Wedding's testimony can be summarized as follows. Erard was the only person who used appellant's credit card. In 2013, Wedding and other board members reviewed credit card statements from 2008 until 2012. They noticed numerous charges that were not related to appellant's business. Many restaurant meals were charged, some of them charged on weekends and holidays when Erard was not working for appellant. Erard used the card to pay a home cable company bill. Erard claimed this charge was authorized for high speed internet so she could work at home but Wedding denied this charge was authorized. She used the card to purchase stock reports from a stock investment service although, appellant does not invest in stocks. She purchased items from drugstores for personal use and she purchased art supplies for herself. She also used the card to pay for numerous parking tickets. Erard offered to pay appellant \$711.47 back to cover her personal charges but that amount is only a small fraction of the thousands of dollars in personal charges she made in 2011 and 2012. Treasurer Miller and Erard had a close, trusting relationship. As a result, Miller did not closely monitor Erard's use of the card.

{¶ 14} On October 17, 2013, the UCRC, without comment, affirmed the hearing officer's decision.

{¶ 15} We are required to focus on the decision of the UCRC, rather than that of the trial court. *Hartless v. Ohio Dept. of Job & Family Servs.*, 4th Dist. Pickaway No.

10CA27, 2011-Ohio-1374, 2011 WL 1049539, ¶ 14 quoting *Klemencic v. Robinson Mem. Hosp.*, 9th Dist. Summit No. 25293, 2010-Ohio-5108, 2010 WL 4111156, ¶ 7.

“Every reasonable presumption must be made in favor of the [decision] and the findings of facts [of the Review Commission].” *Ro-Mai Industries, Inc. v. Weinberg*, 176 Ohio App.3d 151, 2008-Ohio-301, 891 N.E.2d 348, ¶ 7 (9th Dist.), quoting *Karches v. Cincinnati*, 38 Ohio St.3d 12, 19, 526 N.E.2d 1350 (1988). Issues regarding the credibility of witnesses are to be resolved by the UCRC and its officers. *McCarthy v. Connectronics Corp.*, 183 Ohio App.3d 248, 2009-Ohio-3392, 916 N.E.2d 871, ¶ 10 (6th Dist.).

{¶ 16} In finding that Erard was dismissed without just cause, the hearing officer reasoned that appellant failed to provide reliable, substantial and probative evidence that she intentionally violated appellant’s policy or that her conduct would result in discharge. Appellant does not have a policy and procedure manual for its employees. The monthly credit card statements were mailed to Treasurer Miller so she was aware of the charges at all times. She testified that she would go over the charges each month with Erard and Erard would be expected to pay any personal charges back. When asked if it was okay for Erard to use the card for personal purchases as long as she paid the money back, Miller responded: “[W]ell it, it wasn’t proper. But it wasn’t dischargeable.”

{¶ 17} The hearing officer also found it significant that Erard’s termination came right after Miller retired and a new treasurer was hired. She stated:

Claimant's conduct did not change over the course of her employment and Ms. Miller as well as other board members were aware of her charges. The employer cannot choose to discharge claimant at a later date because a new treasurer took office and did not like the past conduct. The discipline associated with the act was not within the timeframe related to the act and no credible justification was provided by the employer. Claimant did not misuse the credit card but instead used it as she was given permission to by the treasurer.

{¶ 18} Because we find some competent, credible evidence in the record to support the hearing officer's determination, we cannot conclude that the determination made by the UCRC, and affirmed by the trial court, was unlawful, unreasonable, or against the manifest weight of the evidence. Appellant's first assignment of error is found not well-taken.

{¶ 19} Appellant's next three assignments of error involve a motion to strike which was filed by ODJFS and granted by the trial court. Specifically, the trial court ordered a portion of appellant's brief to be stricken. Appellant first contends that the court erred in granting the motion to strike.

{¶ 20} "A trial court's decision to grant or deny a motion to strike will not be overturned on appeal absent a showing of an abuse of discretion." *State ex rel. Mora v. Wilkinson*, 105 Ohio St.3d 272, 2005-Ohio-1509, 824 N.E.2d 1000, quoting *Samadder v. DMF of Ohio, Inc.*, 154 Ohio App.3d 770, 2003-Ohio-5340, 798 N.E.2d 1141. Abuse of

discretion means the decision is unreasonable, arbitrary or unconscionable. *State ex rel. Crawford v. Cleveland*, 103 Ohio St.3d 196, 2004-Ohio-4884, 814 N.E.2d 1218, ¶ 24.

{¶ 21} In their reply brief, appellant referenced and attached a decision from another judge in the Lucas County Court of Common Pleas from a companion case involving the same parties. ODJFS asked the court to strike this portion of appellant's brief as it was not part of the administrative record.

{¶ 22} The trial court's standard of review is limited by statute to the record as certified by the commission. R.C. 4141.282(H). The commission is solely responsible for producing the record of its proceedings. R.C. 4141.282(F). Thus, the trial court could not consider the decision in the companion case since the decision was never before the hearing officer or the UCRC. We do not accept appellant's argument that the trial court could consider the decision as a mere "legal source," much like a citing authority. Given the fact that the civil companion case involves the same parties and same allegations, it is clear that appellant was attempting to surreptitiously supplement the certified record. Appellant's second assignment of error is found not well-taken.

{¶ 23} Following the court's grant of ODJFS's motion to strike, ODJF filed a motion for partial reconsideration of the court's decision asking the court to vacate the portion of the order that stated:

It is further ordered that the court may or may not assign the "Affidavit of Don Wedding," which is included in the certified administrative record in this case, the same weight it assigns the live

testimony of witnesses who actually appeared before the administrative hearing officer.

{¶ 24} The court granted ODJFS's motion for partial reconsideration. In its third assignment of error, appellant contends the court abused its discretion. We disagree. As discussed above, issues regarding the weight of the evidence and the credibility of witnesses are to be resolved by the UCRC and its officers, not the trial court. *McCarthy v. Connectronics Corp.*, 183 Ohio App.3d 248, 2009-Ohio-3392, 916 N.E.2d 871, ¶ 10 (6th Dist.). Thus, the court did not abuse its discretion in vacating the above portion of its decision. Appellant's third assignment of error is found not well-taken.

{¶ 25} In its fourth assignment of error, appellant contends that the court erred in granting ODJFS's motion for partial reconsideration before appellant could respond. The portion of the order that was vacated was a pure misstatement of the law regarding the trial court's role in administrative appeals. Therefore, error, if any, in not giving appellant time to respond to the motion, is harmless. Accordingly, appellant's fourth assignment of error is found not well-taken.

{¶ 26} On consideration whereof, we find that substantial justice has been done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See also 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.