[Cite as *Burroughs v. Ohio Dept of Adm. Servs.*, 2013-Ohio-3261.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Jeffrey Burroughs,	:	
Appellant-Appellant,	:	
		No. 12AP-522
v.	:	(C.P.C. No. 11CVF-05-5950)
Ohio Department of Administrative Services,	:	(REGULAR CALENDAR)
	:	
Appellee-Appellee.	:	

D E C I S I O N

Rendered on July 25, 2013

Law Offices of Tony C. Merry, LLC, and *Tony C. Merry*, for appellant.

Michael DeWine, Attorney General, and *James M. Evans*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Appellant, Jeffrey Burroughs, appeals from a judgment of the Franklin County Court of Common Pleas, affirming the denial of his application for disability benefits by appellee, Ohio Department of Administrative Services ("DAS").

I. Facts and Procedural History

{¶ 2} In 1997, the Ohio State Highway Patrol hired appellant as a trooper. In 2004, while employed full time as a trooper, appellant received permission from his supervisor to begin teaching classes on a part-time basis at Delaware Area Career Center ("Career Center"). In 2006, appellant received permission to engage in additional part-

time employment as an instructor at Columbus State Community College ("Columbus State"). Although appellant's employment as a trooper remained his full-time occupation, he continued to work for both Columbus State and the Career Center on a part-time intermittent basis.

{¶ 3} In early June 2010, appellant reported to his supervisor that he was experiencing neck and arm pain while performing his duties as a trooper, and that he had been suffering from these symptoms for some time. On June 11, 2010, his supervisor became concerned about appellant's symptoms and he sent appellant home with instructions to seek treatment. Appellant was subsequently diagnosed with "riducular paresthesies with cervical pain and headaches with multilevel stenosis most relevant at C3-4, C4-5, C5-6, and C6-7 with degenerative disc osteophytes." (R. 105.) On June 29, 2010, appellant applied to DAS for disability benefits. During the application process, appellant completed a written health questionnaire wherein he was asked: "Have you engaged in any occupation for wage or profit since the onset of your disability?" Appellant answered: "No." (R. 102.)

{¶ 4} Although appellant was no longer working as a trooper, he continued to work at the Career Center on a part-time basis. According to appellant, a fellow employee at the Career Center suggested that appellant investigate whether DAS rules permitted him to continue working at another position while his disability application was pending. Appellant contacted DAS by telephone and he was told that DAS rules prohibited him from working for another employer while his disability application was pending. Appellant did not work either for the Career Center or Columbus State subsequent to July 28, 2010.

{¶ 5} On August 6, 2010, DAS approved appellant's application for disability benefits. Appellant's application for an extension of benefits was approved on October 12, 2010.

{¶ 6} On January 21, 2011, DAS issued a letter pursuant to Ohio Adm.Code 123:1-33-11(A)(2) and (3) "correcting and superseding the previous decision" wherein DAS informed appellant that it intended to deny his claim in accordance with Ohio Adm.Code 123:1-33-11(A)(2) and (3). The letter states "[a]n employee's benefits will be terminated if the employee engages in any occupation for wage or profit except as provided in rule

123[:]1-33-07[.] And employee's benefits will be terminated if the employee engages in any act of fraud or misrepresentation involving the disability claim. Administrative Rule 123[:]1-33-05 (I)[.] The director shall initiate all necessary steps to recover disability benefits paid in error."

{¶ 7} Appellant appealed the denial of his claim and requested a hearing. On February 6, 2011, a hearing officer conducted an evidentiary hearing on the matter. Thereafter, on March 17, 2011, the hearing officer issued a report wherein he recommended the denial of the appeal based upon the following: (1) appellant engaged in an occupation for wage or profit subsequent to the onset of disability in violation of Ohio Adm.Code 123:1-33-11(A)(2), and (2) appellant committed fraud in violation of Ohio Adm.Code 123:1-33-11(A)(3), when he failed to disclose his part-time employment. The director, on April 29, 2011, adopted the hearing officer's report and recommendation and remanded the case to the "Disability Services Unit for appropriate action."

{¶ 8} Appellant appealed the decision of the director to the Franklin County Court of Common Pleas pursuant to R.C. 119.12. The court subsequently continued the proceedings on the appeal for a period of time due to appellant's pending bankruptcy. However, on May 24, 2012, the court reversed the decision of the director as to fraud, but affirmed the decision to deny benefits based upon on the fact that appellant had engaged in an occupation for wage or profit subsequent to the onset of disability. In his decision, the judge made the following observation: "the result is unfair, but this Court must apply the law and the rule as written. Any change in the law to lead to a more just result must come from either a rule change or a statutory change." (Footnote omitted.) (Trial court's Decision and Judgment Entry and Notice of Final Appealable Order, 7.)

II. Assignments of Error

{¶ 9} Appellant appeals from the judgment of the trial court asserting the following six assignments of error:

> [I.] The trial court erred as a matter of law in deferring to the Director's interpretation of OAC § 123:1-33-11(A)(2) because there is no interpretation to which any court can reasonably defer.
>
> [II.] The trial court erred as a matter of law by failing to construe OAC § 123:1-33-11(A)(2) in accord with Ohio's rules of statutory construction and with the common law.

> [III.] The trial court erred as a matter of law in failing to consider the temporal requirement in the regulation that prohibited engaging in an occupation only while receiving disability benefits.
>
> [IV.] The trial court erred as a matter of law in placing the burden of proof on Appellant to establish that he did no work for Columbus State after June 11, 2010.
>
> [V.] The trial court abused its discretion in holding that the hearing officer's conclusion that Burroughs performed work for Columbus State after June 11, 2010 was supported by substantial, reliable and probative evidence.
>
> [VI.] The trial court erred as a matter o flaw in concluding that the Director was entitled to recoup from Burroughs $27,500 in disability benefits previously paid.

III. Standard of Review

{¶ 10} In an administrative appeal, pursuant to R.C. 119.12, the trial court reviews the agency's order to determine whether it is supported by reliable, probative and substantial evidence and is in accordance with the law. To some extent, this standard of review permits the court of common pleas to substitute its judgment for that of the administrative agency. The court must, however, "give due deference to the administrative resolution of evidentiary conflicts." *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111 (1980).

{¶ 11} On appeal to this court, the standard of review is more limited. Unlike the court of common pleas, a court of appeals does not determine the weight of the evidence. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.,* 63 Ohio St.3d 705, 707 (1992). In reviewing the court of common pleas' determination that the agency's order is or is not supported by the requisite quantum of evidence, the appellate court's role is limited to determining whether the court of common pleas abused its discretion. *Hartzog v. Ohio State Univ.*, 27 Ohio App.3d 214, 216 (10th Dist.1985). "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 157 (1980).

{¶ 12} However, when the question is whether the administrative agency's order was in accordance with the law, the court of appeals' review is plenary. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.*, 63 Ohio St.3d 339 (1992).

IV. Analysis

{¶ 13} As a preliminary matter, we note that appellant's fourth and fifth assignments of error challenge the trial court's decision as to factual issues, whereas the remaining assignments of error challenge the trial court's legal conclusions. Accordingly, for purposes of clarity, we will consider appellant's fourth and fifth assignments of error out of order.

{¶ 14} In appellant's fifth assignment of error, appellant argues that the trial abused its discretion when it determined that the record contained reliable, probative and substantial evidence in support of the hearing officer's conclusion that appellant engaged in an occupation for wages subsequent to the onset of disability. In the fourth assignment of error, appellant argues that the trial court erred by shifting the burden of proof to appellant on this critical factual issue.

{¶ 15} The disputed administrative rule in this case is Ohio Adm.Code 123:1-33-11, entitled "[n]otice of disqualification from receipt of disability leave benefits." The rule provides in relevant part:

> (A) An employee's benefits will be terminated if the employee:
>
> * * *
>
> (2) *Engages in any occupation for wage or profit* except as provided in rule 123:1-33-07 of the Administrative Code.

(Emphasis added.)

{¶ 16} The primary factual dispute in this case is whether appellant engaged in work as an instructor for Columbus State after the onset of his disability on June 11, 2010. The hearing officer found that appellant did, in fact, work as an instructor both at Columbus State and at the Career Center after the onset of disability. The hearing officer's report contains the following relevant findings:

> 20. On December 29, 2010, DAS received a letter from * * * a Human Resources Specialist at Columbus State.

* * *

> 22. [The paycheck history shows] that Columbus State issued a paycheck in the amount of $614.63 on June 15, 2010. It issued another paycheck in the amount of $614.63 on June 30, 2010. It issued another paycheck in the amount of $1696.60 on July 15, 2010. These checks were issued around the same time that Mr. Burroughs was applying for disability leave benefits through DAS.
>
> 23. The Delaware Area Career Center also provided information to DAS about its employment of Mr. Burroughs. In a letter dated December 29, 2010, that employer provided the following information:
>
> In regards to one Jeffrey A. Burroughs, case 0136734, he has been employed at the Delaware Area Career Center Law Enforcement Academy performing the duties of a part time classroom instructor. According to our records the last dates he preformed [*sic*] duties here was 4 hours on 07-01-10, 4 hours on 07-08-10, and 2 hours on 07-28-10 at the rate of $25.00 dollars per hour.
>
> After 07-28-10 it was realized that he would not be allowed to work while his disability claim was pending.

(Appellant's Appendix, 131-32.)

{¶ 17} The trial court, in reviewing the hearing officer's findings stated:

> In the case at bar, Appellant undisputedly worked ten to fourteen hours while receiving disability and received Columbus State paychecks for working time periods after June 11, 2010. Appellant complains that there is no affirmative proof he "actually worked" those time periods contained in the Columbus State pay roll records. However, the records themselves are direct and circumstantial proof he did perform work during this time period. He was paid every two weeks and would not be paid for work he did not perform. Contrary to Appellant's assertions otherwise, Appellant did not deny he worked during the paycheck time period. Instead, he said he could not remember the exact dates that he worked at Columbus S[t]ate. The record was held open at his request for further proof to be submitted that he did not actually work those dates or to prove the paychecks were for work performed before June 11, 2010. Appellant offered no further proof. The hearing Officer was free to rely on the

> records as substantial, reliable probative evidence that Appellant worked during the time periods reflected in the checks which included June and July, 2010. Finally, the Appellant does not dispute that he performed work at the Delaware Career Center after the onset of his disability.

(Emphasis in original.) (Trial court's Decision and Judgment Entry and Notice of Final Appealable Order, 7.)

{¶ 18} As this court will discuss more fully in connection with appellant's second and third assignments of error, pursuant to Ohio Adm.Code 123:1-33-11(A)(2) and (B), appellant is disqualified from receiving disability benefits if he "engaged in any occupation for wage or profit," on or after the date of disability. There is no dispute that appellant left his position as a trooper due to his disability on June 11, 2010.

{¶ 19} As both the hearing officer and the trial court noted, appellant admittedly taught a class at the Career Center on July 1, 8, and 28, 2010. With respect to appellant's employment at Columbus State, appellant first contends that the trial court shifted to appellant the burden of proving that he did not work at Columbus State during the prohibited period. We disagree.

{¶ 20} It is axiomatic that the term "burden of proof" encompasses both the burden of going forward with evidence (or burden of production) and the burden of persuasion. *See, e.g., Chari v. Vore,* 91 Ohio St.3d 323, 326 (2001); *Xenia v. Wallace,* 37 Ohio St.3d 219 (1988). " 'The term "burden of production" tells a court which party must come forward with evidence to support a particular proposition, whereas "burden of persuasion" determines which party must produce sufficient evidence to convince a judge that a fact has been established.' " *State ex rel. Hardin v. Clermont Cty. Bd. of Elections,* 12th Dist. No. CA2011-05-045, 2012-Ohio-2569, quoting 29 American Jurisprudence 2d, Evidence, Section 171 (2012). "The burden of persuasion never leaves the party on whom it is originally cast." 29 American Jurisprudence 2d, Evidence, Section 171 (2012). Thus, what shifts is the burden of production rather than the actual burden of proof. *Id.*

{¶ 21} The trial court found that DAS had introduced payroll records and correspondence showing that appellant received pay from Columbus State for each of the two-week pay periods from April 30 through July 30, 2010. Such evidence supports an

inference that appellant performed work at Columbus State on or after June 11, 2010. Accordingly, the burden shifted to appellant to produce evidence to rebut the inference.

{¶ 22} Appellant admitted that he received pay during that period of time but he could not remember the dates he had actually performed work. The hearing officer found that the weight of the evidence established that appellant performed work for Columbus State on or after June 11, 2010. In other words, the hearing officer found that the evidence submitted by DAS was more persuasive than appellant's testimony. In reviewing the evidence, pursuant to R.C. 119.12, the trial court determined that there was reliable, probative and substantial evidence to support the finding.

{¶ 23} In short, the record shows that the trial court did not shift the ultimate burden of proof to appellant. For the foregoing reasons, appellant's fourth and fifth assignments of error are overruled.

{¶ 24} Turning to the legal issues in the case, when the question is whether the administrative agency's order was in accordance with the law, the court of appeals' review is plenary. *Univ. Hosp., Univ. of Cincinnati College of Medicine.*

{¶ 25} Appellant's first and second assignments of error are related and we will consider them together. In his first assignment of error, appellant argues that the trial court abused its discretion by deferring to the director's interpretation of Ohio Adm.Code 123:1-33-11(A)(2). In his second assignment of error, appellant argues that the trial court failed to apply fundamental principles of statutory construction in determining the meaning of Ohio Adm.Code 123:1-33-11(A)(2). More particularly, appellant argues that the drafters of R.C. 124.385 and the relevant provisions of the Ohio Administrative Code, did not intend to deny disability benefits to an otherwise qualified employee simply because the employee earned a negligible wage from part-time employment during the period of disability.

{¶ 26} In *Frisch's Restaurants, Inc. v. Ryan*, 121 Ohio St.3d 18, 2009-Ohio-2, we discussed our role in reviewing agency rules as follows:

> "It is axiomatic that if a statute provides the authority for an administrative agency to perform a specified act, but does not provide the details by which the act should be performed, the agency is to perform the act in a reasonable manner based upon a reasonable construction of the statutory scheme." * * * Further, we have "implicitly recognized that no set of statutes

> and administrative rules will answer each and every administrative concern. * * * When agencies promulgate and interpret rules to fill these gaps, as they must often do in order to function, 'courts * * * must give due deference to an administrative interpretation formulated by an agency that has accumulated substantial expertise, and to which the General Assembly has delegated the responsibility of implementing the legislative command.' * * * We accord due deference to the [Bureau's] interpretation, so long as it is reasonable."

Id. at ¶ 16, quoting *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St.3d 282, 289 (2001), quoting *Swallow v. Indus. Comm.*, 36 Ohio St.3d 55 (1988).

{¶ 27} The enabling statute in this case is R.C. 124.385, and it provides in relevant part:

> (B) The director of administrative services, by rule adopted in accordance with Chapter 119. of the Revised Code, shall establish a disability leave program. The rule shall include, but shall not be limited to, the following:
>
> (1) Procedures to be followed for determining disability.

{¶ 28} The court finds that the statute is silent as to the particular disability determination at issue in this case. The statute neither expressly authorizes a rule such as Ohio Adm.Code 123:1-33-11(A)(2) nor does it expressly prohibit the rule.

{¶ 29} In *Melick v. Ohio Dept. of Adm. Servs.*, 10th Dist. No. 04AP-821, 2005-Ohio- 1850, we deferred to the interpretation of the director in a case involving disability benefits under the same disability program at issue herein. In *Melick*, the question for this court was whether DAS should be estopped to deny disability benefits to an employee who returned to work within the prohibited 14-day waiting period,[1] on the advice of the department of health. *Id.* at ¶ 22. In concluding that the director adopted a reasonable interpretation of the 14-day waiting period, we stated:

> Appellee administers the disability benefits program. R.C. 124.385(E); Ohio Adm.Code 123:1-33-12(C). Accordingly, we defer to appellee's interpretation of its own disability benefits

[1] The waiting period now appears in Ohio Adm.Code 123:1-33-05(A) as follows: "Waiting period. Disability leave benefits shall commence with the employee's first scheduled workday following a waiting period of fourteen consecutive calendar days. The waiting period shall commence the day the disabling illness, injury, or condition prevents the employee from performing the duties of the employee's position."

> rules "if such an interpretation is consistent with statutory law and the plain language" of the rules. *State ex rel. DeMuth v. State Bd. of Edn.*, 113 Ohio App.3d 430, 433 (10th Dist.1996).

Id. at ¶ 13.[2]

{¶ 30} In *Melick*, we found that the equitable principle of estoppel did not create an exception to the 14-day waiting period and that the director's interpretation of the rule was reasonable. Although appellant claims that the director has not adopted any particular interpretation of the administrative rule at issue, it is clear from the position taken by the director in this case, that a literal interpretation of Ohio Adm.Code 123:1-33-11(A)(2), has been applied to appellant's disability claim. Appellant claims that a literal interpretation of the rule, which leaves no room for exceptions, violates the statutory disability scheme.

{¶ 31} When ascertaining the meaning of administrative rules and regulations having the effect of legislative enactment, we apply rules of statutory construction. *State v. Castle*, 10th Dist. No. 12AP-369, 2012-Ohio-6028, ¶ 9. "An administrative rule, '* * * issued pursuant to statutory authority, has the force and effect of law unless it is unreasonable or is in clear conflict with statutory enactment.' " *Id.*, quoting *Kroger Grocery & Baking Co. v. Glander*, 149 Ohio St. 120, 125 (1948). Our paramount concern in ascertaining the meaning of a statute is legislative intent. *State Farm Mut. Auto. Ins. Co. v. Grace*, 123 Ohio St.3d 471, 2009-Ohio-5934, ¶ 25.

{¶ 32} R.C. 1.47(C) requires a reviewing court to construe statutes so as to avoid unreasonable or absurd results. *State ex rel. Moss v. Ohio State Hwy. Patrol Retirement Sys.*, 97 Ohio St.3d 198, 2002-Ohio-5806, ¶ 22. " 'Words * * * that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.' " *Hoffman v. State Med. Bd. of Ohio*, 113 Ohio St.3d 376, 2007-Ohio-2201, ¶ 26, quoting R.C. 1.42.

{¶ 33} Appellant argues that the term "disability" has acquired a technical and particular meaning in the law. In making this argument, appellant has called the court's attention to the definition of "disability" found in Ohio case law, case law from other

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[2] R.C. 124.385(A)(4) requires "[t]he establishment of a minimum level of benefit *and of a waiting period before benefits begin*." (Emphasis added.)

jurisdictions, and in insurance law treatises. Appellant maintains that he submitted medical evidence clearly establishing that he is disabled, and that DAS abandoned the recognized meaning of "disability" when it terminated his benefits.

{¶ 34} While we agree that an employee may be "disabled" as a matter of law, even though the employee is capable of performing work in another occupation, appellant's argument is inapposite. In this case, DAS found that the medical evidence supported appellant's claim for disability benefits. DAS subsequently terminated appellant's disability benefits, ab initio, because he engaged in conduct during the waiting period that disqualified him from receiving any such benefits. Thus, contrary to appellant's assertions, DAS did not terminate appellant's benefits due to a failure of proof of disability.

{¶ 35} Appellant next contends that the trial court erred in concluding that an employee who works a part-time intermittent job, is engaged in an "occupation," for purposes of Ohio Adm.Code 123:1-33-11(A)(2). The usual and customary usage of the term occupation "relates ' "to the habitual or regular occupation that the party was engaged in with a view to winning a livelihood or some gain." ' " *Zurcher v. Jones*, 9th Dist. No. 99CA0055 (Nov. 29, 2000), quoting *Dewey v. Niagara Fire Ins. Co.*, 16 Ohio Misc. 297 (C.P.1968), quoting *Marsh v. Groner*, 258 Pa. 473 (1917). The common dictionary definition of "occupation" is "ones usual or principal work or business, esp. as a means of earning a living." *See, e.g., Webster's Encyclopedic Dictionary of the English Language* (Rev.Ed.1996); *Random House Dictionary of the English Language* (2d Ed.1983). In the rule at issue, the adjective "any" amplifies the noun "occupation." Therefore, it is reasonable to interpret "occupation" as broadly as the terms "work" or "employment."

{¶ 36} In this context, there can be little doubt that paid employment as a college level instructor is an occupation. *See Settlemire v. Ohio Dept. of Adm. Servs.*, 10th Dist. No. 00AP-440 (Oct. 31, 2000). (Employment as a waitress is an "occupation" for purposes of former Ohio Adm.Code 123:1-33-15, provided that such employment was not part of an approved rehabilitation work training program.) The language of the rule places no quantitative limitations on the phrase "engages in any occupation for wage or

profit." Consequently, the director's position that the rule prohibits engaging in part-time and/or intermittent employment is reasonable.

{¶ 37} Appellant next contends that a literal construction of the Ohio Adm.Code 123:1-33-11(A)(2) will inevitably lead to unreasonable and absurd results. He posits that DAS could deny benefits to a disabled employee, pursuant to Ohio Adm.Code 123:1-33-11(A)(2), where the employee works just one hour at a minimum wage job after the onset of disability. Appellant concedes, however, that he worked at the Career Center for at least ten hours at $25 per hour before learning of the prohibition. And, as discussed in connection with appellant's fourth and fifth assignments of error, appellant worked additional hours and earned additional wages at Columbus State during the 14-day waiting period. Thus, the facts of this case are not similar to appellant's hypothetical.

{¶ 38} Moreover, the clear purpose of the short-term disability program is to provide temporary financial support to a disabled employee until such time as the employee can fully recover from the disabling condition and return to the employee's full-time position. Permitting a disabled employee to engage in an occupation during the period of disability could frustrate the purpose of the program by delaying or inhibiting the employee's recovery from the disabling condition. This purpose is evident when one considers Ohio Adm.Code 123:1-33-07, which creates an exception to Ohio Adm.Code 123:1-33-11(A)(2), for an approved rehabilitation work training program. *See Settlemire*.

{¶ 39} Another clear purpose for such a rule is to avoid the appearance of impropriety or fraud that naturally arises when an employee receives disability benefits from one employer and, at the same time, earns a wage from a second employer in another occupation. This is no doubt a reason for asking applicants to disclose recent outside employment during the application process.

{¶ 40} In short, we find that the interpretation of the rule adopted by DAS is true to the plain language of the rule. In our view, appellant advocates an interpretation of Ohio Adm.Code 123:1-33-11(A)(2) that imposes quantitative and qualitative limitations on the phrase "engages in any occupation for wage or profit," where no such limitations appear in the plain language of the rule. Moreover, as a practical matter, such an interpretation will likely increase the administrative burden on DAS.

{¶ 41} Accordingly, we hold that the interpretation of Ohio Adm.Code 123:1-33-11(A)(2) adopted by DAS is both reasonable in light of the plain language of the rule and consistent with the rules of statutory construction. Consequently, the trial court did not err in deferring to the director's interpretation of the rule and affirming the denial of disability benefits. Appellant's first and second assignments of error are overruled.

{¶ 42} In his third assignment of error, appellant focuses on the phrase "will be terminated," as it appears in Ohio Adm.Code 123:1-33-11(A). Appellant makes the argument that disability benefits cannot be "terminated" for the prohibited conduct set forth in subdivision (A)(2) if the employee engages in such conduct before the employee receives the first benefit payment.

{¶ 43} DAS concedes that there is no evidence that appellant engaged in an occupation for wages at any time subsequent to the approval of his disability application. Appellee also concedes that appellant received no disability payments until after such approval. DAS maintains, however, that the plain language of Ohio Adm.Code 123:1-33-11(B) disqualified appellant from receiving disability benefits ab initio. The court agrees.

{¶ 44} In *Settlemire*, we determined that, under former Ohio Adm.Code 123:1-33-15, disability benefits terminate on the first date the employee engages in any occupation for wages. *Id.* at ¶ 2. Indeed, Ohio Adm.Code 123:1-33-11(B) specifically states:

> If any employee engages in any of the acts listed in paragraph (A) of this rule, the director will notify the employee of the intention to *disqualify the employee from receiving disability leave benefits as of the date the employee first engaged in any of the prohibited acts*.

(Emphasis added.)

{¶ 45} The evidence in this case supports a finding that appellant taught classes at Columbus State in the two-week period beginning May 29, 2010, and in the two-week period beginning June 16, 2010. It is undisputed that appellant received disability benefits for the period beginning June 25 and ending November 14, 2010. Although appellant did not receive any payment until shortly thereafter, the fact of the matter is that the payments made to appellant date back to the period of disability beginning June 11, 2010. Thus, the facts of this case establish that appellant engaged in the prohibited conduct both during the 14-day waiting period and during the period in which

benefits were paid. Such facts disqualify appellant from receiving disability benefits, ab initio. *See Settlemire*. Accordingly, appellant's third assignment of error is overruled.

{¶ 46} In appellant's sixth assignment of error, he argues that the trial court erred as a matter of law in concluding that appellee may recoup all sums paid to him. The director is required to recover improperly paid disability benefits as follows:

> The director shall initiate all necessary steps to recover disability leave benefits * * * *paid in error* * * *, or to make any needed adjustments to ensure that proper payment of benefits and insurance premiums has been made.

(Emphasis added.) Ohio Adm.Code 123:1-33-05(I).

{¶ 47} Appellant maintains that the director's authority to recoup benefits does not extend to the payments he received because those benefits were not "paid in error." However, as noted above, the hearing officer found that DAS paid benefits to appellant in violation of DAS rules and the trial court agreed with the hearing officer. Because we have determined that reliable, probative and substantial evidence supports the trial court decision, and that the decision is in accordance with law, we must overrule appellant's sixth assignment of error.

V. Disposition

{¶ 48} Having overruled each of appellant's six assignments of error, we hereby affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and SADLER, JJ., concur.

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