In the
# Supreme Court of Ohio

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| JOHN GERETZ, et al., | : | Case No. 2006-0405 |
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| Appellees, | : | |
| | : | On Appeal from the |
| v. | : | Erie County |
| | : | Court of Appeals, |
| DIRECTOR, OHIO DEPARTMENT OF JOB AND FAMILY SERVICES, et al., | : | Sixth Appellate District |
| | : | |
| | : | Court of Appeals Case |
| Appellants. | : | No. E-05-042 |
| | : | |

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**REPLY BRIEF OF APPELLANT DIRECTOR,**
**OHIO DEPARTMENT OF JOB AND FAMILY SERVICES**

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## TABLE OF CONTENTS

**Page**

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

ARGUMENT ..... 2

A. The evidence presented to the Commission demonstrates that the one-time payment was remuneration made to compensate employees for wages they would have otherwise received during the Independence Week had the strikes not occurred ..... 2

1. The Memorandum of Understanding specifically states that the one-time payment was made to employees for *wages* they were entitled to receive during the Independence Week ..... 3

2. The Claimants' unnecessary focus on the date they *received* the one-time payment is a red herring that ignores common sense and fails to overcome the extensive evidence showing that the payment was for the week ending July 4, 1998 ..... 4

B. The Claimants misconstrue and ignore pertinent facts and sections of the Revised and Administrative Codes in an attempt to reach their desired results ..... 7

1. The Claimants incorrectly apply R.C. 4141.01(H)(1) and 4141.35(A)(5) to the facts of this case and fail to show how the one-time payment did not constitute remuneration ..... 7

2. The Claimants omit and distort the facts in a failed attempt to overcome the directive of 4141-9-05(A), which mandates a finding that the one-time payment was for the week ending July 4 ..... 8

CONCLUSION ..... 10

CERTIFICATE OF SERVICE ..... unnumbered

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

*Irvine v. Unemployment Comp. Bd. of Review* (1985),
19 Ohio St. 3d 15 ..... 6

*Tzangas, Plakas & Mannos v. Ohio Bureau of Employment Servs.* (1995),
73 Ohio St. 3d 694 ..... 6

**Statutes**

R.C. 4141.01(H)(1) ..... 4, 7

R.C. 4141.282(H) ..... 7

R.C. 4141.31(A)(5) ..... 4, 7, 8

O.A.C. 4141-9-05 ..... 4, 8, 9

## INTRODUCTION

In our opening brief, the Director explained that because the employees who received a one-time special payment from General Motors ("GM") were not totally unemployed for the week ending July 4, 1998, because they were paid the wages that they would have otherwise received had the strikes and layoffs not occurred. Thus, they are ineligible for unemployment benefits during that period. This argument readily flows from the application of the pertinent Revised Code sections and administrative regulations, as well as a common sense analysis of the facts at issue—wages paid to compensate employees for a week of pay they were entitled to, but missed due to the strike, constitute remuneration for that week, even if the actual receipt of the money was at a later date.

The well-established principles of unemployment law are clear—an individual cannot receive benefits for a week in which he received remuneration. In this case, the claimants received remuneration for the week ending July 4, 1998, in the form of the one-time special payment. The language of the Memorandum of Understanding (MOU), the union flyer, and the newsletter all demonstrate that this payment was indeed for the Independence Week and not a "bonus" week in August.

In their merits brief, the claimants provide no persuasive basis to conclude that the Review Commission's findings were against the manifest weight of the evidence. The claimants' discussion of the facts fails to demonstrate any error by the Commission in its factual determinations. As such, the court of appeals erred by failing to give the proper deference to the Commission's findings. The claimants have not provided any grounds for a finding otherwise.

The claimants attempt to avoid the true issue—whether the payment constituted remuneration for the Independence Shutdown Week—by focusing on the date the money was actually paid to them. This argument is a red herring that ignores the specific language, purpose,

and intent of the MOU, as well as the extrinsic evidence that directly linked the payment to the week ending July 4, 1998. As we noted in our merits brief, if this payment is not for the Independence Shutdown Week, than what *is* this payment for? The claimants failed to provide any tenable answer in their brief, but rather repeatedly return to the non-issue of the date the payments were received. The fact remains that even though the payment was not actually paid to the claimants until August, the only time period it can plausibly be connected to is the Independence Shutdown Week.

The claimants' other arguments do not support their case, either. They ignore specific provisions of the Revised Code and Administrative Code that tend to disprove their position, and they simply omit pertinent facts when discussing the pertinent legal provisions.

For these reasons and other reasons below, the Court should reverse the judgment below.

## ARGUMENT

### A. The evidence presented to the Commission demonstrates that the one-time payment was remuneration made to compensate employees for wages they would have otherwise received during the Independence Shutdown Week had the strikes not occurred.

In our merits brief, the Director explained that in any "normal," non-strike year, the claimants would have received payment for the Independence Shutdown Week. In 1998, however, due to the strike and resulting lay-offs, the employees initially missed the chance to receive their Independence Shutdown Week wages. The resulting settlements and MOU remedied this missed payment, though, by providing the claimants with the full wages that they otherwise would have been paid for that week had the strikes not occurred. In addition to the language contained in the MOU itself, every aspect of the one-time payment demonstrates that it can *only* be attributed to the week ending July 4, 1998.

The claimants attempt to distract the Court from the sole issue in dispute—whether the one-time payment was remuneration—by unnecessarily focusing on the date the one-time payment was received. Rather than providing any authority or justification for their position that the one-time payment was not remuneration, the claimants skim over the substantial evidence that supports the Commission's finding that the payment was, in fact, remuneration for the Independence Shutdown Week.

**1. The Memorandum of Understanding specifically states that the one-time payment was made to employees for *wages* they were entitled to receive during the Independence Week.**

The purpose of this one-time payment—to replace the lost Independence Shutdown Week wages—is obvious by looking solely to the language of the MOU. The MOU states that "employees who were on strike or layoff status at General Motors locations due to the labor dispute . . . and who did not receive Independence Week Shutdown and Holiday Pay as a result of being on said layoff and strike and were otherwise entitled to these pay provisions . . . shall receive a *one time special payment in the amount they would have been entitled to had they not been on strike or layoff.*" (emphasis added, Supp. 25). The MOU further stresses that this one-time payment is remuneration by stating in the last paragraph, "the parties recognize that these payments may result in employees being ineligible for unemployment compensation." *Id.* Indeed, this language emphasizing that the one-time payment was *for* the week ending July 4, 1998, makes it difficult to hypothesize what more GM could have done to clarify that the payment was a replacement for the Independence Week wages the employees did not receive due to the strike and layoffs.

The MOU language directly reflects the statutory guidelines for receipt of unemployment benefits. Under R.C. 4141.31(A)(5), unemployment benefits otherwise payable to a claimant for any week shall be reduced by the amount of remuneration the claimant received with respect to

such week, including vacation pay or allowance payable under the terms of a labor-management contract or agreement.

The MOU is such a contract, yet the claimants repeatedly claim that the language of the MOU did not include the words "holiday" or "vacation pay." Geretz Br. 13, 15, 16. This is simply inaccurate. The second paragraph of the MOU specifically states that the payment will be applicable for all "employees...who did not receive Independence Week Shutdown and *Holiday* pay." (emphasis added, Supp. 25). Thus, not only did the MOU explicitly reference the Independence Holiday, but common sense dictates that because there is no other major national holiday between July 4 and the date when the money was received in mid-August 1998—a fact that even the claimants must admit—the one-time payment can *only* be attributed to the July 4 holiday. Geretz Br. 15, 16.

The MOU specifically identifies the individuals who would receive the payment as those employees who would have been entitled to the Independence Shutdown Week *pay* had they not been on strike or laid off. This language in the MOU, as well as the amount of the payment, confirms that the payment was to reimburse the claimants for wages that they should have received during that week. As a result, pursuant to the definition of remuneration in R.C. 4141.01(H)(1) and Administrative Code section 4141-9-05(B), the claimants received remuneration *for* the week ending July 4, 1998, and are therefore ineligible to also receive unemployment benefits for that same period.

**2. The Claimants' unnecessary focus on the date they *received* the one-time payment is a red herring that ignores common sense and fails to overcome the extensive evidence showing that the payment was for the week ending July 4, 1998.**

The claimants spend much of their brief discussing the date when they actually received the one-time payment—August 13 or 14, 1998—a fact that was stipulated to and is not disputed.

(Supp. 2, 17, 20, 154, 155). This is a non-issue. Claimants' constant focus on the *receipt* date simply serves to shift focus from the key facts that demonstrate the payment, despite its date of receipt, was actually *for* the Independence Shutdown week.

As a result of the time necessary to complete the settlement and MOU, and then coordinate with payroll to have the funds dispersed to the employees, the claimants did not actually receive the money until August. Yet, this understandable time delay did not alter the purpose or amount of the payment; the one-time payment was made to the claimants to replace their pay that they unintentionally missed during the Independence Shutdown Week. (Supp. 145, 154, 192).

The time between the actual dates the payment covered and the date the money was received is irrelevant. As with almost all wages, payments are on a delayed cycle and the wages for a certain period will not actually be received by the employee until almost a month after the actual dates of work. In this situation, the fact that the claimants received the payment in a paycheck different than the one for the actual July 4 week is a normal business practice and irrelevant to the dispute in this case. In fact, the claimants did not even receive the unemployment benefits for which the Commission found them to be eligible (i.e., to cover the periods of the strike and layoffs excluding the week ending July 4) until the *end* of August. Geretz Br. 7.

The claimants argue that the payment was not for the Independence Shutdown week because GM did not allocate the payment "back" to the week ending July 4, but the claimants fail to provide any other explanation as to what the basis for this one-time payment could have been. Geretz Br. 14. If GM had not intended the one-time payment to be attributed to the Independence Shutdown Week, the MOU easily could have been drafted simply to provide *all* employees with 32 or 40 hours pay and there would be no need to reference the Independence

Week Shutdown and Holiday Pay provisions. However, such provisions were not written because the one-payment was *not* a bonus for all employees; it was to compensate only those employees who were not able to receive wages for the Independence Shutdown Week as a result of the strike and layoffs.

After a full evidentiary hearing, the Commission found the "weight of the evidence . . . is that the purpose of this payment was to replace the lost Independence Week Shutdown Period pay and Independence Holiday pay." (Exh. C, D). This determination was proper in light of the significant evidence presented to the Commission. In addition to the language of the MOU, there is a substantial amount of other evidence in the record that the claimants simply ignore in their brief: the testimony of a GM representative that the payment was intended to make up for the lost Independence Week pay (Supp. 145, 154, 192), the union flyers calling the payment "Independence Week Holiday Pay," (Supp. 195, 196), and the local union newsletter dated August 3, 1998 referencing the payment as pay for the week ending July 4, 1998. (Supp. 198).

Claimants do not even try to refute these facts, nor could they. The Court's settled law establishes that factual determinations of the Commission must be given deference by any later appellate court. See *Tzangas, Plakas & Mannos v. Ohio Bureau of Employment Servs.* (1995), 73 Ohio St. 3d 694, 696-97, citing *Irvine v. Unemployment Comp. Bd. of Review* (1985), 19 Ohio St. 3d 15, 17-18. Since the dispute here is solely a factual one, the only question for the court of appeals to address was whether the Commission's decision was reasonable based on the facts. The evidence confirms that the date the money was received is irrelevant and the one-time payment was simply a delayed payment of the normal wages the claimants would have received for the Independence Shutdown Week had the strike not occurred.

**B. The Claimants misconstrue and ignore pertinent facts and sections of the Revised and Administrative Codes in an attempt to reach their desired results.**

**1. The Claimants incorrectly apply R.C. 4141.01(H)(1) and 4141.31(A)(5) to the facts of this case and fail to show how the one-time payment did not constitute remuneration.**

The settled law of unemployment compensation is clear: an employee cannot receive unemployment benefits for a week in which he or she also received remuneration. In this case, the record evidence demonstrates that the one-time payment was remuneration for the Independence Shutdown Week. Thus, if the claimants also receive unemployment benefits for that same week, they would be "double-dipping." This is certainly not the desired result or purpose of the unemployment compensation system.

While the claimants provide the correct definition of remuneration from R.C. 4141.01(H)(1), they fail to provide any facts or legal authority to support their assertion that the one-time payment was not remuneration. Geretz Br. 15. In fact, rather than addressing the substantial record evidence demonstrating that the payment was for the week ending July 4, the claimants simply make blanket statements without any factual support. Geretz Br. 20. Revised Code section 4141.01(H)(1) defines remuneration as "all compensation, including commissions and bonuses." Therefore, even if, as the claimants argue, this payment was a bonus, it would still constitute remuneration under this provision and make the claimants ineligible for unemployment benefits during the same period. Geretz Br. 21.

The claimants' attempts to prevent the application of R.C. 4141.31(A)(5) to their case also fail. This section authorizes benefits otherwise payable for any week to be reduced by the amount of remuneration a claimant receives in the form of "an allowance under the terms of a labor-management contract or agreement . . . *which payments are allocated to designated weeks*." (emphasis added). Here, the one-time payment resulted from a labor-management

settlement intended to replace the wages employees lost during the Independence Shutdown Week because of the strikes and layoffs. A straightforward application of R.C. 4141.31(A)(5) mandates that the unemployment benefits received by the employees for the week ending July 4, 1998 must be reduced by the amount of the one-time payment, because that was the result of a labor-management agreement.

In sum, the MOU's language, along with all the record evidence, led the Commission to properly find that the payment was for the Independence Shutdown Week. As such, the claimants are not eligible to double-dip and receive unemployment benefits for a week that they also received remuneration.

**2. The Claimants omit and distort the facts in a failed attempt to overcome the directive of 4141-9-05(A), which mandates a finding that the one-time payment was for the week ending July 4.**

Under Ohio law, remuneration in the form of holiday pay is subject to reduction from benefits otherwise payable and such holiday pay will be applied to the week during which the holiday occurs, *regardless of when such remuneration is actually received.* (emphasis added) O.A.C. 4141-9-05(A). The claimants do not provide any factual or legal authority to overcome this decisive regulation. Rather, they misstate the facts, claiming the payment was not denominated "holiday pay." Geretz Br. 15. This is, once again, a misreporting of the facts below. The payments were classified in GM's records as "MISCIWSP" (miscellaneous independence week special) and "MISCHOSP" (miscellaneous holiday special). (Supp. 2, 27-20, 81-83). These descriptions, especially when read in the context with the MOU, flyers, and newsletters, supports the Commission's findings that the one-time payment was indeed for Independence Shutdown Week.

The claimants continued attempt to focus on the date the payment was received does nothing to help their case. The one-time payment was described in the MOU as compensation for

the wages the employees would have received during the Independence Shutdown Week had the strike and layoffs not occurred. (Supp. 25). The actual paychecks and payroll records went on to identify the payment as corresponding to that week. (Supp. 81-83). It is irrelevant that the actual payment was not received immediately after the time-period it covered, but in a paycheck the next month, as is the case with almost all wages. The claimants' focus on the date the money was received is merely a distraction from the ultimate fact—the payment constituted remuneration for the week ending July 4, 1998.

The claimants have attempted to prevail by omitting decisive facts and information from their argument. As highlighted above, none of their arguments negate the strong record evidence that the purpose of the one-time payment was to compensate qualified employees for wages that they would have otherwise received during the Independence Shutdown Week. Thus, pursuant to Administrative Code section 4141-9-05(A), the claimants' unemployment benefits for that week must be reduced by the amount of the one-time payment.

## CONCLUSION

For the above reasons, this Court should reverse the judgment of the court of appeals, and find that the employees are ineligible for unemployment benefits during the week in question.

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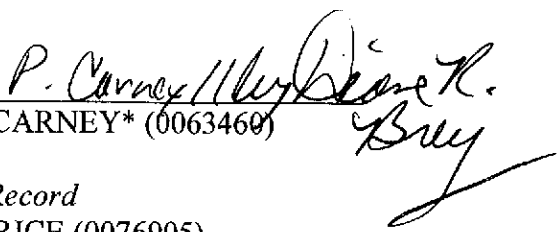

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I certify that a copy of the foregoing Reply Brief of the Director, Ohio Department of Job and Family Services was served by U.S. mail this 30th day of October, 2006, upon the following counsel:

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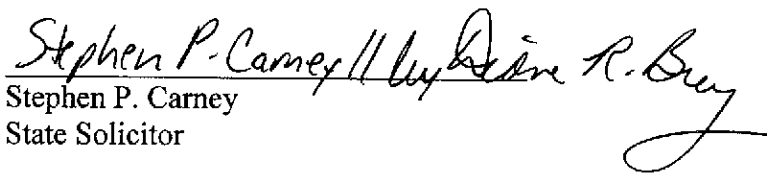

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