

IN THE OHIO COURT OF APPEALS
FOR THE SEVENTH DISTRICT
MAHONING COUNTY

Case No. 2015MA00150

RICHARD ROWE

Appellant

-VS-

DIRECTOR, OHIO DEPARTMENT
OF JOB AND FAMILY SERVICES,
ET AL

Appellees

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. W. Scott Gwin, J.

Hon. Craig R. Baldwin, J.

OPINION

CHARACTER OF PROCEEDING:

Civil appeal from the Mahoning County
Court of Common Pleas, Case No. 2014
CV 03332

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

May 3, 2016

APPEARANCES:

For Appellant

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For Appellees

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Gwin, J.

{¶1} Appellant appeals the August 7, 2015 judgment entry of the Mahoning County Court of Common Pleas affirming the decision of the Ohio Unemployment Compensation Review Commission.

Facts & Procedural History

{¶2} Appellant Richard Rowe (“Rowe”) worked as a deputy sheriff for the Mahoning County Sheriff’s Office from May 1997 to May 16, 2014 when he was discharged for violating various department rules. After he was terminated, Rowe filed an application for unemployment benefits.

{¶3} On June 9, 2014, appellee Director of Ohio Department of Job and Family Services (“Director”) made an initial determination that Rowe was entitled to unemployment benefits as he was discharged without just cause under R.C. 4141.29(D)(2)(a). Appellee Mahoning County Auditor (“Auditor”) filed a timely appeal on June 20, 2014. On July 7, 2014, the Director’s determination was affirmed. The Auditor filed an appeal on July 18, 2014. On July 25, 2014, the Director transferred the matter to the Ohio Unemployment Compensation Review Commission (“Review Commission”). A notice of hearing was issued on July 28, 2014, setting a telephonic evidentiary hearing for August 6, 2014. The notice, mailed to Rowe and the Auditor, provided the parties had a right to attend the hearing, subpoena witnesses, and present documentary evidence.

{¶4} On July 31, 2014, a postponement notice was issued to Rowe and the Auditor, postponing the telephonic evidentiary hearing. On August 1, 2014, a notice of

hearing was issued to Rowe and the Auditor setting the telephonic evidentiary hearing for August 12, 2014.

{¶5} On August 12, 2014, a hearing officer, Tonya Brady (“Brady”) held the telephonic evidentiary hearing. Rowe did not appear to present evidence or to cross-examine the Auditor’s witness. Officer John Antonucci (“Antonucci”) testified on behalf of the Auditor.

{¶6} The hearing officer issued a decision on August 18, 2014, finding there was insufficient evidence presented to show fault or wrongdoing. Brady found Antonucci’s hearsay testimony as to the incidents leading to Rowe’s discharge admissible, but stated the hearsay testimony was not as reliable as first-hand testimony would have been. Brady found Rowe was discharged without just cause, allowed the application for unemployment benefits, and affirmed the determination of the Director.

{¶7} The Auditor filed a timely request for review from the hearing officer’s decision on September 8, 2014. On October 8, 2014, the Review Commission allowed the request for review from the decision of the hearing officer and provided notice to Rowe of his right to respond. Rowe did not file a response. The October 8, 2014 order stated the Review Commission could dispose of the allowed request for review by examining the record and the decision on appeal, and, without further hearing, affirm, modify, or reverse the decision. The order additionally stated the Review Commission may hold further proceedings, or have a hearing officer hear the case on behalf of the Review Commission. Finally, the order stated notice of the Review Commissions’ order to hold further proceedings or issue a decision based upon the existing record would be

sent to each interested party and the parties may respond, but were not required to do so.

{¶8} The Review Commission issued a rewrite order on October 30, 2014. The Review Commission notified the parties a decision would be issued based solely on a review of the record without further hearing.

{¶9} The record before the Review Commission established the following: From February 13, 2013 to July 2, 2013, Rowe violated the rules of the Sheriff's Office and received adverse behavior reports on six occasions due to the failure to report off properly and unsatisfactory performance. Rowe was notified he would be subject to a pre-disciplinary hearing. As a result of this notice, Rowe and the sheriff came to a settlement agreement and Rowe served a five (5) day suspension.

{¶10} Rowe received an adverse behavior report for an incident on March 28, 2014 while he was working at the Juvenile Justice Center. Rowe was upset when his personal property was damaged, so he removed all the food from the refrigerator and freezer and threw it in the trash. The juvenile court judge requested Rowe not be permitted to return. Rowe was notified he would be subject to a pre-disciplinary hearing. The pre-disciplinary hearing was waived due to a settlement agreement where Rowe was suspended for fifteen (15) days, was ordered to undergo anger management classes, and removed from the Juvenile Justice Center at the request of the judge. The settlement agreement Rowe signed provided that additional offenses may subject him to more severe disciplinary action, including a recommendation for termination.

{¶11} On Rowe's first day back from his fifteen day suspension, April 21, 2014, he was assigned to municipal court and was in charge of the individuals in court for

video arraignments. A municipal court bailiff reported Rowe had difficulty staying awake while supervising the inmates during the video arraignment. Rowe was warned about his actions.

{¶12} On April 29, 2014, Rowe was several minutes late for roll call. Rowe was upset when he was not allowed to pick his assignment based on seniority due to his tardiness. Rowe became argumentative with his supervisors and, after he did not get the assignment he wanted, left work after telling his supervisors he was ill.

{¶13} A pre-disciplinary hearing was held on May 9, 2014. Rowe filed a written rebuttal and denied falling asleep. Rowe was discharged on May 16, 2014. Antonucci stated Rowe was discharged for an accumulation of nine offenses and rules violations of the sheriff's department.

{¶14} On December 4, 2014, the Review Commission issued its decision, reversing the hearing officer's decision and finding that Rowe was discharged for just cause in connection with work. The Review Commission stated Rowe acted inappropriately, moved through progressive steps of the employer's discipline, and served two suspensions prior to termination. The Review Commission found during the last two incidents in April of 2014, Rowe acted inappropriately and was not performing his duties as a deputy sheriff. The Review Commission concluded that, when the totality of the evidence was reviewed, there was sufficient fault on Rowe's part to create just cause in connection with work for his discharge and Rowe was discharged for just cause in connection with work. The Review Commission thus reversed the hearing officer's decision and denied Rowe's application for unemployment benefits.

{¶15} Rowe appealed the determination of the Review Commission to the Mahoning County Court of Common Pleas. In an August 7, 2015 judgment entry, the trial court found the record before the Review Commission demonstrated Rowe had been disciplined for numerous work violations and established Rowe was aware of these work rules. As to Rowe's argument that it was improper for the Review Commission to reverse the hearing officer's decision because there was some evidence to support the hearing officer's decision and/or that if the Review Commission does not hold another hearing, the Review Commission had to affirm the hearing officer unless the decision was unreasonable and against the manifest weight of the evidence, the trial court found these arguments misplaced and found the Review Commission is authorized to rewrite a hearing officer's decision pursuant to R.C. 4141.281. Further, that the rewritten decision by the Review Commission becomes the final administrative decision for the trial court to review.

{¶16} The trial court found the Review Commission's factual determinations were supported by competent and credible evidence. Further, the Review Commission's decision was not unlawful, unreasonable, or against the manifest weight of the evidence. The trial court thus affirmed the decision of the Ohio Unemployment Compensation Board of Review.

{¶17} Rowe appeals the August 7, 2015 judgment entry of the Mahoning County Court of Common Pleas and assigns the following as error:

{¶18} "I. THE TRIAL COURT ERRED IN AFFIRMING THE DECISION OF THE UNEMPLOYMENT COMPENSATION REVIEW COMMISSION ("COMMISSION") THAT RICHARD ROWE ("ROWE") WAS NOT ENTITLED TO UNEMPLOYMENT

COMPENSATION BENEFITS BECAUSE THE DECISIONS OF BOTH THE COMMISSION AND THE TRIAL COURT WERE “UNREASONABLE.”

Standard of Review of Appellate Court

{¶19} A claimant bears the burden of proving his entitlement to unemployment compensation benefits. *Kosky v. Am. Gen. Corp.*, 7th Dist. Belmont No. 03-BE-31, 2004-Ohio-1541. An unsatisfied claimant may appeal the review commission’s decision to the trial court. R.C. 4141.282(A). The trial court shall reverse, vacate, modify, or remand the commission’s decision if it finds the decision was unlawful, unreasonable, or against the manifest weight of the evidence. R.C. 4141.282(H). If the court does not find the decision was unlawful, unreasonable, or against the manifest weight of the evidence, then the court shall affirm the decision.

{¶20} Our standard of review is the same. *Tzangas, Plakas & Mannos v. Administrator, Ohio Bureau of Employment Services*, 73 Ohio St.3d 694, 653 N.E.2d 1207 (1995). That is, the court of appeals must also determine whether the commission’s decision was unlawful, unreasonable, or against the manifest weight of the evidence. “This standard of review is inherently limited. Neither the common pleas court nor the court of appeals is permitted to make factual findings or determine the credibility of witnesses.” *Wilson v. Matlack, Inc.*, 141 Ohio App.3d 95, 750 N.E.2d 170 (4th Dist. 2000). This leaves the board’s role as the factfinder intact. *Tzangas, Plakas & Mannos v. Administrator, Ohio Bureau of Employment Services*, 73 Ohio St.3d 694, 653 N.E.2d 1207 (1995). A reviewing court may not reverse the commission’s decision simply because reasonable minds might reach different conclusions. *Williams v. Ohio Dept. of Job & Family Services*, 129 Ohio St.3d 332, 2011-Ohio-2987, 951 N.E.2d 1031.

Discretion of the Review Commission

{¶21} Rowe first asserts that when the Review Commission elects to proceed without holding a hearing, its discretion to reverse or modify the hearing officer's decision should not be unlimited. Specifically, Rowe argues that if the Review Commission does not develop its own record and hearing and reverses the decision of the hearing officer, the Review Commission should be required to act like a common pleas court and should only be able to reverse the hearing officer's decision if it is unlawful, unreasonable, or against the manifest weight of the evidence. Rowe urges this limitation as consistent with the mandate that the Unemployment Compensation Act be liberally construed to persons seeking benefits.

{¶22} We disagree with Rowe. The Ohio General Assembly has set forth detailed procedures for administrative filing and appeals of unemployment compensation benefits. R.C. 4141.281 sets forth the procedure for appealing determinations of benefit rights or claims for benefit determinations. It establishes two levels of hearing before the commission: the hearing officer level and the Review Commission level. R.C. 4141.281(C)(2). When the director transfers an appeal to the commission, the hearing before the hearing officer is de novo. R.C. 4141.281(C)(3). After the hearing officer affirms, modifies, or reverses the determination of the director, an interested party may request the Review Commission review the matter. At the review level, the Review Commission may affirm, modify, or reverse the determination of the hearing officer. R.C. 4141.281(C)(6). Further, R.C. 4141.281(C)(2) provides that

when the term “hearing officer” is “used in reference to hearings conducted at the review level, the term includes members of the commission.”

{¶23} Despite Rowe's contention that when the Review Commission does not hold a further hearing the Review Commission should only be able to reverse the hearing officer's decision if it is unlawful, unreasonable, or against the manifest weight of the evidence, the plain language of the Ohio Revised Code and Ohio Administrative code provides otherwise. In order to determine and give effect to the legislative intent, the court first looks to the plain language of the statute. If the language is clear and unambiguous, it must be applied as written. *Michels Corp. v. Rockies Express Pipeline, LLC*, 7th Dist. Monroe No. 14 MO 14, 2015-Ohio-2218. The court has the obligation to give effect to the words used and not to delete words or to insert words not used. *Id.* Further, an Ohio Administrative Code section “is a further arm, extension, or explanation of statutory intent implementing a statute passed by the General Assembly. It has the force and effect of a statute itself.” *State v. Bish*, 7th Dist. Mahoning No. 09 MA 145, 2010-Ohio-6604.

{¶24} R.C. 4141.281(C)(6), in describing the review procedure for the Review Commission, states that if the commission allows a request for review, the commission, based on the record before it, may do one of the following: “affirm the decision of the hearing officer; provide for the appeal to be heard or reheard at the hearing officer or review level; provide for the appeal to be heard at the review level as a potential precedential decision; or provide for the decision to be rewritten without further hearing at the review level.” Ohio Administrative Code 4146-25-03(D) describes the disposition of a request for review and provides:

The review commission may dispose of an allowed request for review by taking one of the following actions: (1) Without further hearing, rewrite the hearing officer's decision affirming, modifying, or reversing such decision; (2) Affirm the hearing officer's decision without further hearing or issuing a decision; or (3) Hold further proceedings at review level or assign such to a hearing officer to conduct a hearing for the review commission.

{¶25} Pursuant to R.C. 4141.281(C)(6) and Ohio Adm.Code 4146-25-03(D), the Review Commission has the discretion to conduct an additional hearing, but it is not required to do so. Further, pursuant to the plain language of these sections, even if no further hearing is conducted, the Review Commission retains the ability to “rewrite” the hearing officer's decision by modifying or reversing the decision. Finally, the Ohio General Assembly has not placed any restrictions or a limited standard of review on the Review Commission in either R.C. 4141.281(C)(6) or Ohio Adm.Code 4146-25-03(D). There is no language in either of these sections providing that, if the Review Commission does not hold its own hearing, it is limited to reversing the hearing officer's decision only if it is unlawful, unreasonable, or against the manifest weight of the evidence. As noted above, this Court must give effect to the words used in a statute and will not insert words not used into a statute. *Michels Corp. v. Rockies Express Pipeline, LLC*, 7th Dist. Monroe No. 14 MO 14, 2015-Ohio-2218

{¶26} Further, case law supports the position of the Review Commission. In *Belle Tire Distributors, Inc. v. Ohio Dept. of Job & Family Services*, 8th Dist. Cuyahoga No. 97102, 2012-Ohio-277, the Eighth District reversed the decision of a trial court. The Court stated, “the trial court's conclusion that doubt is cast upon the appeal process

when the Review Commission reverses the decision of the hearing officer without offering any explanation or reasoning as to the decision is equally wrong.” *Id.* The Court further noted that the Ohio Revised Code expressly provides for the Review Commission to rewrite the decision of a hearing officer. The Court concluded the Review Commission acted within the bounds of the law in modifying the decision of the hearing officer and thus the Review Commission’s decision was supported by competent and credible evidence. *Id.*

{¶27} In *McNeil Chevrolet, Inc. v. Unemployment Compensation Review Board*, 6th Dist. Fulton No. F-09-015, 2010-Ohio-2376, the Sixth District found the Review Commission was not required to give deference to the hearing officer’s findings and, even if the full commission did not conduct an additional hearing, it retained the latitude to determine the credibility of the witnesses. Thus, the Court concluded the review by the full Review Commission is a de novo review and the Review Commission is permitted to weigh the credibility of the witnesses in making its determination. *Id.*

{¶28} The Tenth District, in *Watkins v. Director, Ohio Dept. of Job & Family Services*, 10th Dist. Franklin No. 06AP-479, 2006-Ohio-6651, found the Review Commission was not required to conduct an additional hearing and retained the latitude to determine the credibility of the witnesses.

{¶29} Rowe points to no cases which suggest the Review Commission is required to defer to the factual findings of its hearing officer or that when the Review Commission is reviewing a hearing officer’s decision, it is held to the same standard of review as reviewing courts.

Just Cause

{¶30} R.C. 4141.29(D)(2)(a) provides that an individual is ineligible for unemployment benefits if he was “discharged for just cause in connection with the individual’s work.” Although it is not defined by statute, the Ohio Supreme Court has stated “just cause” is “that which, to an ordinary intelligent person, is a justifiable reason for doing or not doing a particular act.” *Irvine v. Unemployment Compensation Board of Review*, 19 Ohio St.3d 15, 482 N.E.2d 587 (1985). The determination of whether there is just cause for discharge depends upon the factual circumstances of each case. *Guy v. City of Steubenville*, 147 Ohio App.3d 142, 768 N.E.2d 1243 (7th Dist. 2000). Determination of purely factual question is primarily one within the province of the Board of Review. *Id.*

{¶31} An appellate court may reverse the Review Commission’s “just cause” determination only if it is unlawful, unreasonable, or against the manifest weight of the evidence. *Tzangas, Plakas & Mannos v. Administrator, Ohio Bureau of Employment Services*, 73 Ohio St.3d 694, 653 N.E.2d 1207 (1995). “None of the reviewing courts can reverse a commission decision as being against the manifest weight of the evidence if there is evidence in the record to support the commission’s decision.” Where the board of review might reasonably decide either way, the courts have no authority to upset that decision. *Guy v. City of Steubenville*, 147 Ohio App.3d 142, 768 N.E.2d 1243 (7th Dist. 2000).

{¶32} Upon review, we find competent and credible evidence supports the Review Commission’s conclusion. Antonucci testified Rowe attended training sessions where the rules at issue were discussed and the record contains documents which Rowe signed during attendance at the training sessions. Rowe was previously

disciplined for several work rule violations due to the failure to report off properly and unsatisfactory performance from February 2013 to July of 2013. As a result of a notice of pre-disciplinary hearing, Rowe and his employer came to a settlement agreement and Rowe served a five (5) day suspension.

{¶33} After an incident in the Juvenile Justice Center in March of 2014, Rowe signed a settlement agreement with his employer wherein Rowe was suspended for fifteen (15) days, ordered to undergo anger management classes, and removed from the Juvenile Justice Center at the request of the judge. The settlement agreement further provided that additional offenses may subject him to more severe disciplinary action, including a recommendation of termination.

{¶34} On April, 21, 2014, Rowe's first day back from his suspension, a bailiff reported Rowe had difficulty staying awake while supervising inmates during a video arraignment at municipal court. Rowe was warned about his actions. On April 29, 2014, Rowe was several minutes late for roll call and was upset when he was not allowed to pick his assignment based on seniority due to his tardiness. Rowe became argumentative with his supervisors and, after he did not get the assignment he wanted, left work after telling his supervisors he was ill.

{¶35} Based on the foregoing, we find there was competent and credible evidence for the Review Commission to find Rowe acted inappropriately, moved through progressive steps of the employer's discipline, and was not performing his duties as a deputy sheriff. Further, there was competent and credible evidence to support the Review Commission's decision that, based on the totality of the evidence,

there is sufficient fault on Rowe's part to create just cause in connection with work for his discharge and Rowe was discharged for just cause in connection with work.

Due Process

{¶36} In his third argument, Rowe contends that conferring unlimited discretion on the Review Commission deprived Rowe of his due process. We disagree.

{¶37} As the Ohio Supreme Court emphasized, the aim of the procedural provision of R.C. 4141.281 "is to avoid the rigid formality imposed by technical rules of evidence, while construing an efficient method for ascertaining a claimant's entitlement to unemployment compensation benefits." *Simon v. Lake Geauga Printing Co.*, 69 Ohio St.2d 41, 430 N.E.2d 468 (1982). Since each unemployment determination is fact-driven, the fact-finder is charged by statute to "give full and fair consideration to the information in the record." *Maldonado v. Ohio Dept. of Job & Family Services*, 7th Dist. Mahoning No. 10 MA 190, 2012-Ohio-4555.

{¶38} The Ohio Supreme Court has held that the statutes and rules governing the procedure employed in reviewing an unemployment compensation claim are constitutional because they give an opportunity for a fair hearing before an impartial tribunal. *Henize v. Giles*, 22 Ohio St.3d 213, 490 N.E.2d 585 (1986); *Bulatko v. Ohio Dept. of Job & Family Services*, 7th Dist. Mahoning No. 07 MA 124, 2008-Ohio-1061. "The key factor in deciding whether the hearing satisfied procedural due process is whether the claimant had the opportunity to present the facts which demonstrate that he was entitled to unemployment benefits." *Bulatko v. Ohio Dept. of Job & Family Services*, 7th Dist. Mahoning No. 07 MA 124, 2008-Ohio-1061.

{¶39} In this case, Rowe had the opportunity to present the facts which he contends demonstrated that he was entitled to unemployment benefits. The Review Commission issued a notice of hearing to Rowe and informed him he had a right to attend the hearing, subpoena witnesses, and present documentary evidence. Rowe did not appear at the hearing to testify, he did not subpoena witnesses, and did not cross-examine the Auditor's witness. The Review Commission's notice also stated that, if Rowe failed to attend the hearing, pursuant to R.C. 4141.281(D), the hearing would go forward and the decision would be based on the evidence of record. Further, when the Review Commission issued the notice allowing the request for review they provided Rowe with notice of his right to respond. Rowe did not respond. The Review Commission complied with the statutory requirements of R.C. 4141.281. Accordingly, the Review Commission's reversal of the hearing officer's decision did not obviate Rowe's due process rights.

{¶40} While Rowe argues due process can only be afforded if the Review Commission holds its own hearing, there is nothing in the Ohio Revised Code or Ohio Administrative Code requiring the Review Commission to conduct a separate hearing in order to comport with due process. In fact, R.C. 4141.281(C)(6) and Ohio Adm.Code 4146-25-03(D) specifically give the Review Commission discretion as to whether to hold a further hearing or review and rewrite the decision without further hearing and upon the record.

Address Issues Related to this Appeal

{¶41} In his final argument, Rowe contends the trial court did not properly address or decide the issues governing the appeal. Specifically, appellant argues the

trial court did not address his argument regarding the Review Commission's standard of review and/or the impact on factual determinations when the Review Commission does not hold an additional hearing.

{¶42} We disagree and find the trial court did properly address Rowe's arguments. The trial court specifically addressed these arguments in its judgment entry when it provided as follows:

Rowe argues that it was improper for the Review Commission to reverse the Hearing Officer's Decision and order that it be rewritten without further hearing. This argument is misplaced. The Review Commission is authorized to rewrite a hearing officer's decision pursuant to R.C. 4141.281(C)(4-6). The rewritten decision becomes the final administrative decision which is the case here.

{¶43} Based on the foregoing, we find the Review Commission's decision was not unlawful, unreasonable, or against the manifest weight of the evidence. Rowe's assignment of error is overruled. The August 7, 2015 judgment entry of the Mahoning County Court of Common Pleas is affirmed.

By Gwin, J.,
Farmer, P.J., and
Baldwin, J., concur