[Cite as *Pennessi v. Hanger Prosthetics & Orthotics, Inc.*, 2018-Ohio-4631.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

MICHAEL PENNESSI	:	
	:	
Plaintiff-Appellant	:	Appellate Case No. 28022
	:	
v.	:	Trial Court Case No. 2017-CV-5073
	:	
HANGER PROSTHETICS AND ORTHOTICS, INC., et al.	:	(Civil Appeal from Common Pleas Court)
	:	
Defendant-Appellee	:	

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O P I N I O N

Rendered on the 16th day of November, 2018.

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WELBAUM, P.J.

{¶ 1} Michael Pennessi appeals from the trial court's judgment affirming a decision of the Ohio Unemployment Compensation Review Commission ("UCRC"), which denied benefits to Pennessi. Specifically, the UCRC held that Pennessi's employer, Hanger Prosthetics and Orthotics, Inc. ("Hanger"), had just cause to terminate his employment.

{¶ 2} In support of his appeal, Pennessi contends that the UCRC and trial court erred as a matter of law by holding that he was fired for just cause. Pennessi further argues that the trial court and UCRC erred as a matter of law by disallowing evidence that he proffered. Finally, Pennessi maintains that the UCRC violated his due process rights by allowing UCRC employees, rather than judicial officers, to hear his appeal.

{¶ 3} We conclude that no error existed during the UCRC proceedings and that Pennessi's benefits were properly denied because he was terminated for just cause. Furthermore, Pennessi waived his due process argument by failing to raise it prior to this appeal. Even if this argument were considered under the plain error doctrine, this case does not present exceptional circumstances that would warrant reversal based on plain error. Accordingly, the judgment of the trial court will be affirmed.

I. Facts and Course of Proceedings

{¶ 4} The evidence in the record, including the transcripts of the administrative hearings, reveals the following chronology of events. Where appropriate, we will indicate where the parties' factual accounts differ.

{¶ 5} Hanger is an orthotic and prosthetic company that provides services to patients. On July 13, 2015, Hanger hired Michael Pennessi as a full-time business

manager to provide oversight in its Dayton market, which encompassed six locations and 27 employees. Pennessi's duties included overall management of business for the Dayton location, reporting to the Hanger chain of management, providing direction and guidance to management, reviewing and signing off on employees' time cards, and submitting employees' time records to payroll.

{¶ 6} Before Pennessi began employment, he and Hanger signed an agreement, under which Pennessi would be paid an initial base salary of $90,000 per year, along with a $5,000 signing bonus. The agreement specified that Pennessi's employment was at will and that either party could terminate employment at any time. In addition, the signed agreement provided that Pennessi's work assignments and conditions of employment could be modified at any time.

{¶ 7} In July 2015, Pennessi also signed an acknowledgment concerning Hanger's policies. The acknowledgment included statements to the effect that Pennessi was responsible for reading Hanger's company handbook and was responsible for consulting with Human Resources if he were unsure of a proper course of action. The acknowledgment also indicated that the most current information on company policies could be found on Hanger's intranet website. Director's file, TALX UCM Services May 11, 2017 appeal letter, p. 3. Pennessi also signed an acknowledgment that he had access to various company manuals and was required to comply with them. These manuals included: Hanger's Standard Operating Procedures (SOP) Manual; Hanger's Compliance Manual; and job-related manuals that currently or in the future were required for Pennessi's job. *Id*. at p. 12.

{¶ 8} Hanger did not have a written disciplinary policy, but followed a general

procedure of: (1) a verbal warning; (2) an initial written warning; (3) a final written warning; and (4) discharge. However, for very serious matters, Hanger could provide either a final written warning or immediately terminate the employee. Hanger's policy on involuntary termination included various grounds that could result in immediate dismissal without prior warning. Among these grounds were “falsifying” and “falsifying documents.”

{¶ 9} One of Hanger’s employee policies stated, in pertinent part, that:

> We must maintain adequate records of all hours worked, including overtime worked by Non-exempt employees. You and your manager are accountable for the accuracy and completeness of time records. The time record must reflect actual, not approximate, hours worked by Non-exempt employees. Submitting a false time record; knowingly submitting, completing, or altering another employee’s time records; or permitting another employee to submit, complete or alter your time records are offenses that can result in corrective action up to and including termination.

Director’s file, TALX UCM Services May 11, 2017 appeal letter at p. 5.

{¶ 10} When Pennessi was hired in July 2015, he did not handle payroll. However, in October 2015, he was asked to take over payroll. Pennessi testified that he had no prior experience with payroll. At that particular time, the payroll process was that employees entered their hours on timesheets. Pennessi then verified the information and submitted the timesheets to payroll.

{¶ 11} In March 2016, Donna White, Hanger’s human resources business leader, trained Pennessi and other employees on the Fair Labor Standards Act (“FLSA”). White’s seminar included a Powerpoint presentation. Among other things, Pennessi was

instructed that employees should request and obtain manager approval to work overtime. However, if that did not happen, employees must still be paid for all hours that they worked.

{¶ 12} White also discussed employee discipline, and one of the slides in the presentation stated that "[r]epeated instances of working overtime without authorization is subject to corrective action, but must be paid." August 9, 2017 Hearing Tr. ("Tr."), p. 28. Pennessi admitted that he had attended this seminar. However, he testified that he was not familiar with Hanger's requirement that employees be paid overtime whether or not they had approval.

{¶ 13} In December 2016, Hanger automated its timecard process by switching to ADP, which was a payroll service. Pennessi and other Hanger managers then received separate training on payroll. Managers also attended employee training, because they had to submit their own employee timecards. According to Pennessi's direct supervisor, Lisa Adams, the request for Pennessi to approve payroll was not outside the scope of his position; it was mandatory once Hanger switched to ADP. Only managers could enter any type of time in the ADP system and do all approvals for their staff.

{¶ 14} In the last six months of 2016, labor overage started to become an issue at the company. Hanger did not identify overtime as part of the problem until it received an overtime report in early February 2017. This report revealed the overtime statistics for January 2017. At that time, Adams had a conversation with Pennessi and sent him a spreadsheet. The concern was that even though Pennessi managed only six out of approximately 60 offices in the company, Pennessi's offices accounted for a very disproportionate share of total overtime. Pennessi was also concerned, and he and

Adams had extensive conversations about the situation.

{¶ 15} Some of the overtime problem related to Pennessi's requirement that employees be at their desks and be prepared for work ten to fifteen minutes before the workday began. This policy resulted in what was essentially biweekly mandatory overtime of two to two-and-a-half hours per employee. Pennessi had instituted this policy to address the habitual tardiness of several employees. Adams and Pennessi discussed using discipline for tardiness and also discussed other issues that were causing excessive overtime.

{¶ 16} On February 27, 2017, Pennessi sent his employees an email stating that their particular offices had exceeded reasonable overtime utilization and had the "dubious distinction" of having the highest overtime in the region. Pennessi indicated that effective immediately, employees must punch in a maximum of five minutes early, punch out for their allotted lunch time (one hour), and clock out precisely at their scheduled quitting time. He also stated that he needed to approve all overtime. Pennessi did not copy his supervisor, Lisa Adams, on this email.

{¶ 17} Pennessi sent his employees another email on March 14, 2017, indicating that he would adjust their time records to their specific eight-hour schedule if they submitted time in excess of their normal schedule. The payroll period at issue in connection with this email was the period from March 11 through March 24, 2017. Pennessi did not send a copy of this email to his supervisor.

{¶ 18} For this particular payroll period, Pennessi amended the time records and removed time that 13 of his employees had actually worked. According to Pennessi, he called Adams before doing this and left a voicemail indicating that he intended to adjust

the payroll to the actual schedule and do a "true up." Pennessi testified that as he understood the term, "true up" meant adjusting employees' time to what they had been assigned, rather than what they had actually worked. Pennessi stated that after he left this voicemail, Adams never responded. Adams denied ever receiving such a voicemail.

{¶ 19} Later in his testimony, Pennessi said that he left this voicemail for Adams close to the end of February, before he sent either the February 27 or March 14 emails. August 9, 2017 Tr. at pp. 11 and 19.

{¶ 20} Pennessi further testified that his edits resulted in minutes, rather than hours, being deleted from the affected employees' time cards. He also said that he did not believe he had done anything inappropriate or wrong.

{¶ 21} Adams testified that she first learned about the altered time cards on March 27, 2017, during a previously scheduled meeting with Pennessi and Adams' own manager, Tony Caliguire, who was a regional vice president. On that day, Adams and Caliguire met with Pennessi to deliver a written warning on an unrelated matter. Specifically, Pennessi was being disciplined for failing to coordinate employee education or training on cranial helmets for patients. The helmet issue arose after Hanger's legal team called the company in July 2016 about a cranial case that had complications. Although Pennessi had been assigned this task in July 2016, he had not completed it as of March 27, 2017.

{¶ 22} As part of the meeting that day, Adams and Caliguire also conducted a business review. Their intention was to discuss information in the most recent financial statement, and Adams told Pennessi ahead of time about this so he could prepare. The subject of overtime came up during the discussion. At that point, Pennessi said that he

had removed overtime on the most recent payroll for people who worked overtime without approval. Pennessi also stated that he was not sure if this was okay. During the conversation, he additionally said he had sent an email to employees about this issue.

{¶ 23} Adams and Caliguire immediately told Pennessi that what he had done was not legal and that his actions violated both Hanger policy and federal law. They instructed Pennessi to immediately contact the payroll department to see if the situation could be remediated. They then contacted White and the human resources office to seek advice and let human resources investigate. After investigating, the payroll team determined the amount of employee time that had been altered. However, the issue could not be corrected until the next pay period because payroll had already been closed.

{¶ 24} Pennessi testified that he called White on March 27, 2017, and told her that he did not realize he had done anything wrong. He also called the person who managed Hanger's national payroll. According to Pennessi, this person said that while Pennessi was not supposed to delete time, payroll could be adjusted.

{¶ 25} Previously, on February 13, 2017, Pennessi had received an initial written warning about his lack of preparation for Hanger's quarterly inventory. This was a job performance issue. According to Pennessi, this was a "bogus" write-up, because an outside auditor and Pennessi's supervisor were present for the inventory. In addition, another person was there to help with inventory and to interact with the auditor. August 9, 2017 Tr. at p. 16. The effect of this prior written warning, however, was that when Adams and Caliguire learned of the time-card deductions on March 27, 2017, Pennessi already had been given two written warnings relating to his job performance.

{¶ 26} On March 30, 2017, Hanger terminated Pennessi. Adams, Caliguire, and

White were present either in person or by phone during the termination meeting. The termination letter that Pennessi received did not state a specific reason for the termination; it simply stated that he had been terminated for cause. However, Pennessi was told during the meeting that he was being discharged for falsification of records.

{¶ 27} After being discharged, Pennessi filed an application for unemployment benefits with the Ohio Department of Job and Family Services ("ODJFS"). On April 20, 2017, ODJFS made an initial decision to allow benefits. ODJFS concluded that Hanger had failed to establish Pennessi's negligence or willful disregard of a company rule. Pennessi received a $443 weekly benefit, with a total maximum amount payable of $11,518.

{¶ 28} Hanger appealed from the decision, contending that Pennessi had been discharged for falsification of records. According to Hanger, Pennessi had violated the Fair Labor Standards Act (FLSA) by amending employee time records so that employees were not paid for all time worked.[1] After Pennessi responded, the ODJFS director issued a decision finding that a change in outcome was not supported, based on a review of the original facts plus the facts submitted in the appeal. The prior decision in Pennessi's favor, therefore, was affirmed.

{¶ 29} Hanger again appealed, and the matter was transferred to the UCRC in

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[1] "The FLSA provides that employees may not be required to work more than forty hours per seven-day week without overtime compensation at a rate not less than one and one-half times their regular pay." Employers who violate overtime requirements are subject to various sanctions, including paying liquidated damages to aggrieved employees. *Elwell v. Univ. Hosps. Home Care Services*, 276 F.3d 832, 837 and 840 (6th Cir.2002), citing 29 U.S.C. 207(a) and 216(b). *See also* 29 U.S.C. 216(a) (imposing fines and potential imprisonment for willful violations of 29 U.S.C. 215, which includes violations of overtime requirements).

June 2017. Subsequently, two telephone hearings were held, during which Hanger presented testimony from White, Hanger's human resources business leader, and Adams, Pennessi's supervisor at Hanger. Pennessi also testified.

{¶ 30} White testified that the discharge decision was based on Pennessi's violation of the FLSA and Hanger policy, as well as the fact that he had two written warnings in his personnel file. In response to questions asked by the hearing examiner, Adams denied that Pennessi had been terminated due to his age or because of an overall company-wide strategy to reduce costs. August 9, 2017 Tr. at p. 61.

{¶ 31} On August 30, 2017, the hearing officer mailed a decision to the parties, reversing the ODJFS's determination and finding that Pennessi had been terminated for cause due to falsification and/or dishonesty. In the decision, the hearing officer noted that Pennessi had admitted the underlying conduct (unilaterally changing time cards), that had resulted in his termination. The hearing officer also concluded that Hanger had submitted reliable, probative, and substantial evidence to support its allegation of dishonesty and/or falsification.

{¶ 32} Pennessi timely appealed to the UCRC for a review of the hearing officer's decision. However, his request for review was disallowed in early October 2017. Pennessi then filed a notice of administrative appeal with the trial court on October 30, 2017. After the certified transcript was filed, all parties filed briefs. ODJFS also filed a motion to strike exhibits that Pennessi had attached to his brief.

{¶ 33} In May 2018, the trial court granted the motion to strike and affirmed the decision of the UCRC. Pennessi appeals from the trial court's judgment.

II. Firing for Just Cause

{¶ 34} Pennessi's First Assignment of Error states that:

> The Trial Court and the Unemployment Compensation Review Commission Erred as a Matter of Law in Holding that the Appellant Was Fired for Just Cause.

{¶ 35} Under this assignment of error, Pennessi contends that the agency and trial court erred in holding that he was fired for just cause. According to Pennessi, the facts presented in connection with the original decision, which approved benefits, did not differ from those submitted in connection with the later decision that denied benefits.

{¶ 36} Pennessi further contends that Hanger's disciplinary policy did not address the disciplinary avenue that should be followed in connection with unauthorized overtime. Instead, according to Pennessi, Hanger relied on an obscure federal regulation to terminate his employment. Pennessi's ultimate argument is that Hanger fired him because the company was experiencing financial hardship and wanted to cut costs, not because he committed acts warranting termination.

{¶ 37} Under R.C. 4141.282(A), aggrieved parties may appeal decisions of the UCRC to the court of common pleas. The standard of review for common pleas courts is contained in R.C. 4141.282(H), which provides that "[i]f the court finds that the decision of the commission was unlawful, unreasonable, or against the manifest weight of the evidence, it shall reverse, vacate, or modify the decision, or remand the matter to the commission. Otherwise, the court shall affirm the decision of the commission."

{¶ 38} Like common pleas courts, we have a very restricted standard of review in unemployment compensation appeals. We cannot make factual findings, or decide

witness credibility. We may only decide if the review commission's "just cause" decision was "unlawful, unreasonable, or against the manifest weight of the evidence." *Tzangeos, Plakas, & Mannos v. Ohio Bur. of Emp. Servs.*, 73 Ohio St.3d 694, 653 N.E.2d 1207 (1995), paragraph one of the syllabus. *Accord Sammons v. Cherryhill Mgt., Inc*., 2d Dist. Montgomery No. 27760, 2018-Ohio-3403, ¶ 23.

{¶ 39} All reviewing courts share the same duty of deciding if some competent, credible evidence in the record supports the commission's decision. *Tzangeos* at 696; *Williams v. Ohio Dept. of Job & Family Servs*., 129 Ohio St.3d 332, 2011-Ohio-2897, 951 N.E.2d 1031, ¶ 20.

{¶ 40} Under R.C. 4141.29(D)(2)(a), individuals may not receive benefits for the duration of their unemployment if the director finds that "[t]he individual quit work without just cause or has been discharged for just cause in connection with the individual's work * * *." "Just cause" has been defined as " 'that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act.' " *Irvine v. State 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). The facts of each case determine if just cause for discharge exists. *Williams* at ¶ 22. In addition, discharged employees have the burden of persuasion in proving that they are entitled to employment compensation. *Silkert v. Ohio Dept. of Job & Family Servs*., 184 Ohio App.3d 78, 2009-Ohio-4399, 919 N.E.2d 783, ¶ 36 (2d Dist.).

{¶ 41} In considering this matter, we initially reject Pennessi's contention that there was no difference in the evidence presented during the various administrative stages. After Hanger appealed to the UCRC, the hearing officer heard live testimony from

witnesses over the course of two hearings and additional evidence was presented beyond what had been presented during the prior proceedings.

{¶ 42} We also conclude that the UCRC's decision was supported by some competent, credible evidence. As the statement of facts indicates, there were some factual disputes. However, the hearing officer clearly credited the testimony of Hanger's witnesses, who stated that Pennessi's actions violated both company policy and the FLSA, and that Pennessi had been made aware of the relevant requirements. As was noted, we cannot make credibility determinations.

{¶ 43} We also note that Pennessi admitted being present at the FLSA seminar, although he said he was not aware of the fact that employees must be paid for all hours worked even if they do not obtain approval to work overtime. This information was clearly reflected on a Powerpoint slide presented at the meeting. In addition, Hanger's work policy clearly stated that employees could be terminated for altering another employee's time record. When Pennessi was hired, he acknowledged this and other company policies.

{¶ 44} The UCRC concluded that Pennessi had engaged in falsification and/or dishonesty, and there is some competent, credible evidence in the record to support that finding. Accordingly, the First Assignment of Error is overruled.

III. Disallowance of Proffered Evidence

{¶ 45} Pennessi's Second Assignment of Error states as follows:

> The Trial Court and the Unemployment Review Commission Erred as a Matter of Law by Disallowing Proffered Evidence. Rubberstamping

by the Commission and Common Pleas Court Likewise Constitutes Error.

{¶ 46} Under this assignment of error, Pennessi contends that the trial court and UCRC improperly refused evidence that he proffered, which would have demonstrated that he was terminated due to his age and salary. According to Pennessi, this evidence showed that Hanger manufactured a case against him for financial reasons.

{¶ 47} Regarding administrative hearings, R.C. 4141.281(C)(2) provides that:

> The principles of due process in administrative hearings shall be applied to all hearings conducted under the authority of the commission. In conducting hearings, all hearing officers shall control the conduct of the hearing, exclude irrelevant or cumulative evidence, and give weight to the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of serious affairs. Hearing officers have an affirmative duty to question parties and witnesses in order to ascertain the relevant facts and to fully and fairly develop the record. Hearing officers are not bound by common law or statutory rules of evidence or by technical or formal rules of procedure.

{¶ 48} Hearing officers have broad discretion in deciding whether to accept or reject evidence. *Reid v. MetroHealth Sys., Inc.*, 2017-Ohio-1154, 87 N.E.3d 879, ¶ 28 (8th Dist.). *See also Folck v. Patton*, 2d Dist. Clark No. 12-CV-1120, 2014-Ohio-2304, ¶ 30. Furthermore, hearing officers have "exclusive authority to exclude irrelevant or cumulative evidence, and have broad discretion with respect to the admission of evidence and the number of witnesses that may be needed to testify at the Commission's hearings under R.C. 4141.281." *Reid* at ¶ 28. "The hearing officer's discretion is tempered only

to the extent that he must afford each party an opportunity to present evidence that provides insight into the very subject of the dispute." *Bulatko v. Ohio Dept. of Job & Family Servs*., 7th Dist. Mahoning No. 07 MA 124, 2008-Ohio-1061, ¶ 11, citing *Owens v. Ohio Bur. of Emp. Serv*., 135 Ohio App.3d 217, 220-221, 733 N.E.2d 628 (1st Dist.1999).

{¶ 49} Having reviewed both transcripts, we conclude that the hearing officer did not abuse his discretion in rejecting evidence. During the hearings, Pennessi raised the issue of whether his termination was due to Hanger's financial difficulties and was an attempt to avoid paying his high salary. The hearing officer did let Pennessi present a good deal of evidence on this point.

{¶ 50} Pennessi first mentioned this issue during the July 7, 2017 hearing, and the hearing officer allowed him to testify about Hanger's business difficulties and layoffs that occurred at the end of 2016. This was over Hanger's objection. *See* July 7, 2017 Transcript ("Tr."), pp. 33-34.

{¶ 51} At the August 9, 2017 hearing, Pennessi discussed (again over Hanger's objection) the fact that Hanger had been delisted from the New York Stock Exchange and that Hanger was having financial difficulties. He also was able to question Hanger's witnesses about this subject. August 9, 2017 Tr. at pp. 14-15, 34-35, and 59. In overruling Hanger's objections, the hearing officer stated that "I will allow the testimony. The relevance of it, quite honestly, is that * * * the claimant can certainly offer an alternative reason why he believes he was discharged or fired." *Id*. at p. 16. The hearing officer previously made the same observation when Hanger objected at the July hearing. July 7, 2017 Tr. at p.33.

{¶ 52} On his own initiative, the hearing officer asked Donna White, Hanger's human resources leader, if Hanger had any reduction of force between January and March 2017. August 9, 2017 Tr. at p. 32. After indicating that no reduction of force occurred during that time frame, White stated that some reductions occurred in December 2016 as part of an overall reduction in force company-wide. She also said that no further reductions were planned after that time. *Id*.

{¶ 53} The hearing officer did not let Pennessi introduce evidence about Hanger's failure to pay sales tax assessments from 2013 to present, but did allow a proffer of the information. *Id*. at pp. 59-60. The hearing officer found this information irrelevant, and we agree. Pennessi was hired in 2015, two years after Hanger allegedly began failing to pay sales tax assessments. If this were a relevant factor in employment decisions, it is unlikely that Hanger would have hired Pennessi at his rather substantial salary in 2015.

{¶ 54} Finally, the hearing officer, again, on his own initiative, asked Hanger's supervisor, Lisa Adams, if Pennessi had been terminated due to his age or an overall company-wide strategy to reduce costs. August 9, 2017 Tr. at p. 61. She said no. *Id*. Again, we cannot make credibility determinations.

{¶ 55} In any event, the hearing officer had sufficient evidence to consider whether Hanger's financial state was a factor in the termination. Accordingly, we conclude that the hearing officer did not abuse his discretion by declining to accept the evidence that Pennessi proffered.

{¶ 56} Pennessi also argues that the trial court erred in striking various exhibits that he attempted to submit at the trial court level. These exhibits included items like Wikipedia pages about TALX UCM Services, which was Hanger's agent during the

administrative hearings. According to Pennessi, TALX "has a history of a 'war of attrition' on employees that have been dismissed by companies without cause.' " Appellant's Brief, p. 14. The documents in question were not part of the record that the UCRC certified to the trial court.

{¶ 57} Trial court decisions on motions to strike are reviewed for abuse of discretion. *Univ. of Toledo Chapter of Am. Assn. of Univ. Professors v. Erard*, 6th Dist. Lucas No. L-14-1185, 2015-Ohio-2675, ¶ 20. "The term 'abuse of discretion' means an unreasonable, arbitrary, or unconscionable decision." *State ex rel. Pipoly v. State Teachers Retirement Sys.*, 95 Ohio St.3d 327, 2002-Ohio-2219, 767 N.E.2d 719, ¶ 14.

{¶ 58} Trial courts are statutorily restricted to the record that the UCRC certifies. *Erard* at ¶ 22, citing R.C. 4141.282(H). In *Erhard*, the appellant argued that the trial court could consider a decision in a "civil companion case" because it was a "mere 'legal source,' much like a citing authority." *Id*. The court of appeals rejected that argument, noting that the decision was not in the commission's record. Additionally, the court observed that since "the civil companion case involves the same parties and same allegations, it is clear that appellant was attempting to surreptitiously supplement the certified record." *Id*.

{¶ 59} We have also stressed that trial courts are confined to the record certified by the UCRC and do not have "authority to accept additional evidence." *Puterbaugh v. Goodwill Industries of the Miami Valley, Inc*., 2d Dist. Miami No. 2013 CA 39, 2014-Ohio-2208, ¶ 31, citing R.C. 4141.282(H). Accordingly, the trial court did not abuse its discretion by striking the additional documents that Pennessi attached to his trial court brief.

{¶ 60} Based on the preceding discussion, the Second Assignment of Error is overruled.

IV. Due Process Rights

{¶ 61} Pennessi's Third Assignment of Error states that:

> [The] Decision by the Administrative Hearing Officer is a Violation of Plaintiff's Due Process Rights. Rubberstamping by the Commission and the Common Pleas Court Likewise Constitutes Error.

{¶ 62} Under this assignment of error, Pennessi contends that his due process rights were violated due to the appointive process for UCRC hearing officers. According to Pennessi, this process improperly relegates hearing officers to "employees" rather than "officer" or "judge" status, which violates Ohio law regarding appointment of judges. Pennessi's argument is based on the recent decision of the United States Supreme Court in *Lucia v. S.E.C.*, 138 S.Ct. 2044, 201 L.Ed.2d 464 (2018). In *Lucia*, the court held that the Securities and Exchange Commission's appointment of administrative law judges failed to comply with U.S. Constitution, Article II, Section 2, cl. 2 (the Appointments Clause), because these judges were not "employees," but were constitutional officers who were improperly appointed by SEC staff members instead of by the head of the SEC, the President or a court of law. *Id*. at 2049.

{¶ 63} Pennessi did not raise this issue at the administrative level, nor did he designate it as an issue on his notice of appeal from the UCRC decision. He also did not raise the matter during briefing in the trial court. As a result, Pennessi waived consideration of this assignment of error. The fact that *Lucia* was decided in June 2018,

after both the administrative and trial proceedings ended, is irrelevant to the question of waiver; the United States Supreme Court specifically stated that its decision was "in keeping" with a 1991 decision. *Lucia* at 2049, citing *Freytag v. C.I.R.*, 501 U.S. 868, 869, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991). Consequently, *Lucia* did not announce a novel legal principle.

{¶ 64} " 'The rule compelling a party to present all legitimate issues before the administrative tribunal is required in order to preserve the integrity of the proceedings before that body and to endow them with a dignity beyond that of a mere shadow-play.' " *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 82, 679 N.E.2d 706 (1997), quoting *Bohn v. Watson*, 130 Cal.App.2d 24, 37, 278 P.2d 454 (1954). *See also Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442, 879 N.E.2d 174, ¶ 30 (failure to raise arguments before agency or trial court typically precludes party from raising objections on appeal).

{¶ 65} In some situations, as where a party is challenging the facial constitutionality of a statute, the failure to raise the issue before an administrative agency is not required, because agencies lack authority to pass on the constitutionality of statutes. *See Am. Legion Post 0046 Bellevue v. Ohio Liquor Control Comm*., 111 Ohio App.3d 795, 798, 677 N.E.2d 384 (6th Dist.1996); *S & P Lebos, Inc. v. Ohio Liquor Control Comm*.,163 Ohio App.3d 827, 2005-Ohio-5424, 840 N.E.2d 1108, ¶ 10 (10th Dist.) (by logical extension, the prohibition against an agency considering the constitutionality of statues includes regulations the agency adopts pursuant to statute).

{¶ 66} A few other exceptions to waiver exist. *See Temesi* at ¶ 30 (allowing employer to raise objections not preserved at agency (Ohio Civil Rights Commission)

level because R.C. 4112.06(C) permits such objections to be considered under extraordinary circumstances; employer also raised objections at first opportunity after he learned of employee's deception in concealing bankruptcy*); Weiss v. State Med. Bd. of Ohio*, 10th Dist. No. 13AP-281, 2013-Ohio-4215, 997 N.E.2d 570, ¶ 18 (appellate courts may consider issues of law not argued below where they are implicit in other issues that were argued).

{¶ 67} Although Pennessi's argument seemingly relates to the constitutionality of the process the UCRC uses to employ hearing officers, Pennessi also failed to raise it at the first opportunity, i.e., at the trial court level. In such situations, we may only review for plain error, which is used in civil cases "only with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *LeFort v. Century 21-Maitland Realty Co*., 32 Ohio St.3d 121, 124, 512 N.E.2d 640 (1987); *S & P Lebos, Inc*. at ¶ 12. The case before us does not involve any such exceptional circumstances.

{¶ 68} As a preliminary point, using referees or hearing officers to decide factual issues has long been approved in the context of unemployment compensation cases. *See, e.g., Brown-Brockmeyer Co. v. Roach*, 148 Ohio St. 511, 518, 76 N.E.2d 79 (1947) ("decision of purely factual questions is primarily within the province of the referee and the board of review"); *Irvine*, 19 Ohio St.3d at 17, 482 N.E.2d 587; *Brown v. Ohio Bur. of Emp. Servs.*, 70 Ohio St.3d 1, 3, 635 N.E.2d 1230 (1994) ("administrative agency should accord due deference to the findings and recommendation of its referee, especially where there exists evidentiary conflicts"); *Coles v. Ohio Bur. of Emp. Servs.*, 2d Dist. Montgomery No. 16716, 1998 WL 151142, *4 (Apr. 3, 1998) (referee and board of review decide factual questions).

{¶ 69} Pennessi also failed to cite any Ohio cases that have invalidated the use of hearing officers based on either *Lucia*, 138 S.Ct. 2044, 201 L.Ed.2d 464, or *Freytag*, 501 U.S. 868, 111 S.Ct. 2631, 115 L.Ed.2d 764. Additionally, Pennessi failed to cite any particular Ohio statute or regulation concerning hearing officers. Instead, he simply attached an apparent posting for a hearing officer's job. This document was not part of the record in the trial court. The law is well settled that reviewing courts cannot add matters to the record and decide appeals based on the new matter. *Miller v. Ohio Dept. of Edn.*, 2017-Ohio-7197, 95 N.E.3d 1124, ¶ 69 (2d Dist.); *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus.

{¶ 70} Accordingly, the Third Assignment of Error is without merit and is overruled.

IV. Conclusion

{¶ 71} All of Pennessi's assignments of error having been overruled, the judgment of the trial court is affirmed.

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DONOVAN, J. and TUCKER, J., concur.

Copies sent to:

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