[Cite as *Zanesville Metro. Hous. Auth. v. Tichenor,* 2018-Ohio-4734.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ZANESVILLE METROPOLITAN HOUSING AUTHORITY aka ZMHA

Plaintiff-Appellee

-vs-

ROBERT B. TICHENOR, et al.

Defendants-Appellants

JUDGES:
Hon. John W. Wise, P. J.
Hon. W. Scott Gwin, J.
Hon. Patricia A. Delaney, J.

Case No. CT2018-0038

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. CF2017-0316
JUDGMENT:	Reversed
DATE OF JUDGMENT ENTRY:	November 16, 2018

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellants
GRANT J. STUBBINS STUBBINS, WATSON, BRYAN & WITUCKY 59 North Fourth Street P. O. Box 488 Zanesville, Ohio 43702-0488	MICHAEL DEWINE OHIO ATTORNEY GENERAL ALAN SCHWEPE SENIOR ASSISTANT AG 30 East Broad Street, 26th Floor Columbus, Ohio 43216

Wise, P. J.

{¶1} Appellant Director, Ohio Department of Job and Family Services, appeals the May 10, 2018, decision of the Muskingum County Court of Common Pleas reversing the decision of the Unemployment Review Commission.

{¶2} Appellee is the Zanesville Metropolitan Housing Authority.

STATEMENT OF THE FACTS AND CASE

{¶3} The relevant facts and procedural history are as follows:

{¶4} On July 22, 2015, Robert Tichenor was hired by the Zanesville Metropolitan Housing Authority (ZMHA) to perform maintenance and repair work on its rental properties. ZMHA has a policy manual which Mr. Tichenor received at the time he was hired. (Hrg. T. at 6). The policy manual states

> All employees are required to record the time that the employee started and ended the workday on their weekly time record. Employees shall also record any time taken for sick leave, vacation, holidays and other paid or unpaid leave.

{¶5} The policy manual further provides that an employee's failure to follow the rules set forth in the manual can result in discipline, including a cautioning, written warning, unpaid suspension, or discharge. Discharge can be with or without cause or prior notice. (ZMHA Policy Manual, 13.01).

{¶6} The record shows Tichenor signed an acknowledgement indicating he received the Policy Manual, and he testified he understood the time clock policies.

{¶7} Tichenor was also a member of the International Union of Operating Engineers, Local 18-5, so his employment was governed by a Union Agreement. The Union Agreement provided, in pertinent part:

> **(Article II)**
>
> **TIME CLOCKS: Each employee will be issued a prenumbered card to swipe the timekeeper at the start and end of each shift. It is the employee's responsibility to keep this card in a secure place.**
>
> **(Article IX).**
>
> **Employees will be dismissed at any time by ZMHA for unsatisfactory work, failure to comply with working regulations, gross misconduct, and abolition of position.**

{¶8} Mr. Tichenor's supervisor, Shane McGrew, testified that three writes ups were required for discharge. (Hrg T. at 31-32). All discipline, including dismissal, is subject to the grievance procedure set forth in Article XII of the union contract. Binding arbitration is the last step in the grievance procedure.

{¶9} On September 15, 2016, Mr. Tichenor received a first written warning for failing to clock in appropriately. The employee discipline report indicated the date of the incident was 9/9/16, but the description of the incident stated "missed clock in 2 times 2 weeks prior over looked it. Filled in time per Steve Randal this pay period". Under the corrective instructions given to the employee the report states "missed clock in on Friday's time card". Mr. Tichenor acknowledged receipt in writing.

{¶10} On January 17, 2017, Mr. Tichenor was written up with a second written warning for the same issue. However, Mr. Tichenor was not issued this second written

warning as he was hospitalized at that time and it was not issued to him upon return to work. (Hrg. T. at 8). Supervisor McGrew testified he told Tichenor about the January 17th Report and explained that a copy of it was placed in his personnel file. In addition, the Union Steward/Rep signed off on the Report.

{¶11} At the top of each Employee Discipline Report, it states, in pertinent part:

{¶12} "If this conduct is repeated, or if you engage in any other misconduct, you may be subject to further disciplinary action, up to and including dismissal."

{¶13} Mr. Tichenor testified that he knew nothing about this alleged infraction until after he was terminated:

> I was, I was never told that. Um, in fact, they are stating that on that discipline that they could have even made up who knows when. They are stating that I missed a punch on 1/1/17? What is 1/1/17? It is New Year's Day, Sunday. I don't work either day. I did go in on a clock ... a call out, and the record shows that I clocked in and out. I was never given this, never told about this, never nothing until after I was terminated. (Hrg. T. at 18).

{¶14} On February 4, 2017, and February 23, 2017, the time keeping system registered a no clock-in by Mr. Tichenor, but no discipline was issued for either.

{¶15} On March 7, 2017, Mr. Tichenor was issued a third written warning for not clocking-in on February 28, 2017, and two other times.

{¶16} At that time, Mr. Tichenor advised the employer he would grieve the matter:

> Well, I told them I was going to grievance it because two hours prior to that I told Shane McGrew that I was, uh, the injury that I had told him about was a hernia and that I needed to get a worker's

> compensation claim going. It was two hours later that I received this write up. I didn't sign it. (Hrg. T. at 19).

{¶17} No further clock violations occurred. (Hrg. T. at 32).

{¶18} On March 9, 2017, after being made aware of Tichenor's repeated time clock violations, Executive Director Steven Randles made the decision to terminate Tichenor's employment.

{¶19} During the Telephone Hearing, Mr. Randles testified Tichenor was terminated because he failed to comply with both the Union Agreement and ZMHA's Policy Manual. Mr. Randles further testified that at the time of termination, he was not aware of any workers' compensation claim filed by Tichenor. *(*Hrg. T. at 10-11).

Administrative Proceedings

{¶20} Mr. Tichenor applied for unemployment compensation benefits, and on June 19, 2017, the Ohio Department of Job and Family Services, Office of Unemployment Compensation, issued an Initial Determination that Mr. Tichenor had been discharged without just cause and awarded Tichenor unemployment compensation benefits in the amount of $8,112.00 for the benefit year beginning May 28, 2017.

{¶21} On July 6, 2017, ZMHA appealed the Initial Determination. On July 18, 2017, The Director, Ohio Department of Job and Family Services, filed it Redetermination allowing the claimant’s application for unemployment compensation benefits.

{¶22} On August 7, 2017, ZMHA appealed the Redetermination. Jurisdiction was transferred to the Unemployment Compensation Review Commission.

{¶23} A telephone hearing was held on August 23, 2017. Mr. Tichenor testified at this hearing that he disagreed with the employer's characterization of the alleged time

clock violations; that he did not receive any verbal warnings of the alleged violations; that he received two written warnings for alleged violations in the course of his eighteen month employ but he was unaware that he would be discharged for missing a time punch. (Hrg. T. at p. 20). Mr. Tichenor further testified that he believed the true reason for his discharge was the fact that he notified his immediate supervisor of a workers' compensation injury just two hours prior to his discharge. (Hrg. T. at 19).

{¶24} Steve Randles, Executive Director, and Shane McGrew, Supervisor, testified on behalf of ZMHA. Mr. Randles testified at the hearing that ZMHA subscribed to a progressive discipline policy; that multiple time clock punch issues resulted in "several" undocumented verbal warnings and two official written warnings; and Mr. Tichenor never was warned further infractions could lead to discharge. (Hrg. T. at 10-11).

{¶25} Shane McGrew testified that ZMHA had a progressive discipline policy; that three write ups would lead to termination; and while he verbally warned Mr. Tichenor that further infractions could lead to discharge, he could not recall the dates of the warnings nor did he include those warnings on the actual write ups. (Hrg. T. at 31-33).

{¶26} On August 24, 2017, a decision was issued affirming the Redetermination that Mr. Tichenor was discharged without just cause.

{¶27} On August 31, 2017, a request for the review by the Review Commission was made by ZMHA, which was then denied on September 13, 2017.

{¶28} ZMHA next appealed the matter to the Muskingum County Common Pleas Court. The appeal was briefed by both parties, and oral argument was held before the court. Counsel for ZMHA and ODJFS were in attendance, along with Tichenor, who appeared *pro se.* The trial court acknowledged he had thoroughly reviewed the briefs and

then engaged in significant question and answer with Counsel and Tichenor. At the conclusion of the hearing, the court took the matter under advisement and asked that the parties file short post-argument briefs, which they did.

{¶29} On May 10, 2018, the trial court issued its Decision reversing the Commission's Decision, finding that it was "unreasonable and against the manifest weight of the evidence."

{¶30} Appellant ODJFS now appeals, raising the following assignments of error on appeal:

ASSIGNMENTS OF ERROR

{¶31} "I. IN ITS DECISION OF MAY 10, 2018, THE LOWER COURT ERRED WHEN IT HELD THAT THE SEPTEMBER 13, 2017 DECISION OF THE UNEMPLOYMENT COMPENSATION REVIEW COMMISSION WAS UNLAWFUL, UNREASONABLE, OR AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶32} "II. THE LOWER COURT ERRED IN ITS DECISION OF MAY 10, 2018 WHEN IT SUBSTITUTED ITS JUDGMENT, AND FAILED TO DEFER, TO THE UNEMPLOYMENT COMPENSATION REVIEW COMMISSION ON THE RESOLUTION OF FACTUAL ISSUES INCLUDING, BUT NOT LIMITED TO, JUST CAUSE IN THE DISCHARGE OF MR. TICHENOR."

I., II.

{¶33} Appellant argues the trial court erred in finding that the decision of the Unemployment Compensation Review Commission was unlawful, unreasonable, or against the manifest weight of the evidence and instead substituted its judgment in this matter. We agree.

{¶34} "An applicant seeking unemployment compensation benefits submits to ODJFS an application for such benefits along with information in support of his or her claim." *Henderson v. Ohio Dept. of Job & Family Servs.*, 10th Dist. Franklin No. 12AP-154, 2012-Ohio-5382, 2012 WL 5868888, ¶ 5, citing *McGee v. Ohio Dept. of Job & Family Servs.,* 10th Dist. Franklin No. 09AP-680, 2010-Ohio-673, 2010 WL 661047, ¶ 9. "Initially, ODJFS makes findings of fact and conclusions of law as to whether the applicant is entitled to unemployment compensation benefits." *Id.*, citing *McGee* at ¶ 9, citing R.C. §4141.28(B). "Such decision is subject to an appeal to the commission for a de novo hearing." *Id.*, citing *McGee* at ¶ 9, citing R.C. §4141.281(C)(1) and (3).

{¶35} "A party dissatisfied with the commission's final determination may appeal to the appropriate court of common pleas, which shall hear the appeal on the record certified by the commission." *Id.* at ¶ 6, citing *McGee* at ¶ 10, citing R.C. §4141.282(H).

{¶36} Pursuant to R.C. §4141.282(H), "[i]f the court [of common pleas] 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." *Id.*, quoting *McGee* at ¶ 10.

{¶37} "This standard of review applies to all levels of appellate review in unemployment compensation cases." *Id.* at ¶ 7, citing *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Servs.*, 73 Ohio St.3d 694, 696–97, 653 N.E.2d 1207 (1995). "Applying the same standard of review at both the common pleas and appellate court levels does not result in a de novo review standard." *Id.*, citing *Tzangas* at 697, 653 N.E.2d 1207. "In reviewing commission decisions, a court may not make factual findings or determine

witness credibility." *Id.*, citing *Tzangas* at 696, 653 N.E.2d 1207, citing *Irvine v. State Unemp. Comp. Bd. of Rev.,* 19 Ohio St.3d 15, 18, 482 N.E.2d 587 (1985). "Factual questions remain solely within the province of the commission." *Id.*, citing *Tzangas* at 697, 653 N.E.2d 1207. "Similarly, a court may not substitute its judgment for that of the commission." *Id.*, citing *McCarthy v. Connectronics Corp.*, 183 Ohio App.3d 248, 2009-Ohio-3392, 916 N.E.2d 871, ¶ 16 (6th Dist.), citing *Irvine* at 18, 482 N.E.2d 587. "The fact that reasonable minds might reach different conclusions is not a basis for reversing the commission's decision." *Id.*, citing *McGee* at ¶ 11, citing *Tzangas* at 696, 653 N.E.2d 1207. "Instead, a court must 'determine whether [the Commission's] decision is supported by the evidence in the record.' " *Id.*, quoting *Tzangas* at 696, 653 N.E.2d 1207, citing *Irvine* at 18, 482 N.E.2d 587. "Judgments supported by some competent, credible evidence on the essential elements of the controversy may not be reversed as being against the manifest weight of the evidence." *Id.*, citing *Houser v. Ohio Dept. of Job & Family Servs.,* 10th Dist. Franklin No. 10AP-116, 2011-Ohio-1593, 2011 WL 1217586, ¶ 7, citing *Carter v. Univ. of Toledo,* 6th Dist. Lucas No. L-07-1260, 2008-Ohio-1958, 2008 WL 1837254, ¶ 12, citing *C.E. Morris Co. v. Foley Constr. Co.,* 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

{¶38} "This court's focus is on the commission's decision, rather than on that of the common pleas court." *Id.* at ¶ 8, citing *Howard v. Electronic Classroom of Tomorrow*, 10th Dist. Franklin No. 11AP-159, 2011-Ohio-6059, 2011 WL 5878334, ¶ 12, citing *Moore v. Comparison Mkt., Inc.*, 9th Dist. Summit No. 23255, 2006-Ohio-6382, 2006 WL 3498598, ¶ 8. "Thus, our task is to review the commission's decision and determine

whether it is supported by evidence in the certified record and is unlawful, unreasonable or against the manifest weight of the evidence." *Id.*, citing *McGee* at ¶ 12.

{¶39} Accordingly, the issue before us is whether the Commission's determination that just cause for discharge did not exist for termination was supported by the record and was lawful, reasonable and not against the manifest weight of the evidence.

{¶40} Again, a claimant is not eligible for unemployment compensation benefits if the director of ODJFS finds the claimant "… has been discharged for just cause in connection with the individual's work[.]" R.C. 4141.29(D)(2)(a). The "claimant has the burden of proving his or her entitlement to unemployment compensation benefits, including the issue of just cause." *Holzer v. State Unemp. Comp. Rev. Comm.,* 11th Dist. Portage No. 2011–P–0011, 201-Ohio-6523, 2011 WL 6364575, ¶ 15.

{¶41} The Ohio Supreme Court has defined "just cause" as "'that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act.'" *Irvine, supra,* at 17, 482 N.E.2d 587, quoting *Peyton v. Sun T.V. & Appliances,* 44 Ohio App.2d 10, 12, 335 N.E.2d 751 (10th Dist.1975).

{¶42} [Further, the Review Commission, not the court, is to resolve conflicts in witness testimony as it is in the best position to assess witness credibility. *See Marietta Coal Co. v. Kirkbride,* 7th Dist., 2014-Ohio-5677, 26 N.E.3d 852, ¶ 22–23. "The fact that reasonable minds might reach different conclusions is not a basis for the reversal of the board's decision. * * * Where the board might reasonably decide either way, the courts have no authority to upset the board's decision.' " *Irvine, supra,* at 18, 482 N.E.2d 587; *see also Holzer, supra,* at ¶ 11.

{¶43} Upon review of the record, we find that in his August 24, 2017, decision, which was based on testimony provided during the August 23, 2017, telephone hearing as well as information provided by the employer, the Hearing Officer found:

> The employer failed to establish that claimant intentionally disregarded company policy or was aware that his conduct would result in discharge. The employer argued that claimant failed to clock in and out on thirty occasions during his employment; however claimant only received written warnings for five incidents. If the employer was concerned about his conduct the employer should have disciplined claimant each time it occurred so claimant would be aware that it could not occur again. Further, claimant was given an additional warning labeled as a second warning on March 7, 2017. No incidents occurred after this and claimant did not have sufficient time to grieve this issue or improve his behavior after this date before discharge. The employer cannot choose to discharge claimant at a later date for an incident he was already disciplined for.
>
> Since the employer failed to establish that missing clock ins or outs on seven occasions over an eight month period materially and substantially [a]ffected the employer's best interests and warranted discharge at the time claimant was discharged or that claimant was sufficiently warned that his job was in jeopardy, the Hearing Officer finds that claimant was discharged without just cause in connection with work.

{¶44} Based on the above, the Hearing Officer found just cause for discharge did not exist. Our review of the record supports the Hearing Officer's findings.

{¶45} In its May 13, 2018, decision, the trial court sets forth no basis for reversing the decision of the Review Decision. As set forth above, a reviewing court may not substitute its judgment for that of the commission.

{¶46} Based on the foregoing, we do not find that the Review Commission's September 13, 2017, decision is therefore unlawful, unreasonable or against the manifest weight of the evidence.

{¶47} Appellant's assignments of error are sustained.

{¶48} Accordingly, the judgment of the Court of Common Pleas, Muskingum County, Ohio, is reversed.

By: Wise, P. J.

Gwin, J., and

Delaney, J., concur.

JWW/d 1029